THE REVIVAL OF SPECTRE: VOLUNTARY IMPORT EXPANSIONS AND THE WTO COMPATIBILITY

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ABSTRACT

The Economic and Trade Agreement Between the Government of the United States of America and the Government of the People's Republic of China sets an objective for China's trade purchases from the United States (hereinafter "US") within a certain period, bringing back the Voluntary Import Expansions (hereinafter "VIEs"). During the GATT period, the Panel in Japan — Trade in Semi-conductors did not directly address the issue of whether the VIE in the US–Japan Semiconductor Agreement of 1986, was consistent with international trade obligations. There is also a lack of explicit rules in the WTO agreements to regulate VIEs. Some concerns have been raised that VIEs may breach WTO law. This article begins by providing a background to VIEs and discusses the nature, causes, features, and possible impacts of VIEs. Then, it examines which specific WTO rules and principles VIEs may be inconsistent with. It argues that VIEs may violate Article 1.1, Article 11.1 of the General Agreement on Tariffs and Trade (hereinafter "GATT"), Article 11.1(b) of the Agreement on Safeguards, and other WTO members whose trade benefits are impaired can bring non-violation complaints under Article 23.1(b) of GATT. Besides, VIEs are incompatible with the principle of good faith. This article

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concludes that VIEs may destroy the WTO multilateral trading system and should be prohibited.

KEYWORDS: *voluntary import expansion, most-favoured-nation, quantitative restrictions, safeguards, non-violation, good faith*

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Table of Content

I. Introduction 234
II. VIEs: Nature, Causes, Features and Possible Impacts 237
A. Nature of VIEs 237
1. Similarities 238
2. Differences 238
B. Causes of VIEs 240
C. Features of VIEs 243
1. Quantitative 243
2. Temporary 244
3. Non-Reciprocity 244
4. Discriminatory 245
D. Possible Impacts of VIEs 245
III. The Compatibility of VIEs Under WTO Rules 247
A. Most-Favoured Nation 248
B. General Elimination of Quantitative Restrictions 251
C. Agreement on Safeguards 253
1. Context 254
2. Object and Purpose 255
D. Non-Violation 256
1. Whether VIEs Constitute Measures Capable of Giving Rise to Non-Violation Complaints 257
2. Whether the Third Party Has a Benefit Under the Relevant WTO Agreements Should Be a Legitimate Expectation 258
3. Whether There Is Nullification or Impairment of the Benefit as the Result of the Application of the Measure 258
E. Other Rules That May Be Violated 260
IV. The Compatibility of VIEs Under WTO Principles 261
V. Conclusion 265

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I. INTRODUCTION

On 25 January 2022, the United States (hereinafter "US") Service released a report entitled "Managed Trade and Quantitative Restrictions: Issues for Congress", which observed that the US has been pursuing—in certain areas—a "managed trade" policy that seeks specific or numerical outcomes of trade by using, among other things, the size of the US economy as leverage, since the Trump administration, and was inherited by the Biden administration.[1] Noted that the "managed trade" policy was not officially and explicitly confirmed by the US government, but it was reflected in the revised the Free Trade Agreement Between the US and the Republic of Korea, in which Korea had agreed to reduce its exports of steel to the US to 70% of the average of the previous three years (Voluntary Export Restraints, hereinafter "VERs"); the quota arrangements on steel and aluminum with Brazil, Argentina, and the European Union (hereinafter "EU"); and more prominently, the Economic and Trade Agreement Between the Government of the United States of America and the Government of the People's Republic of China (hereinafter "the China–US ETA") (Voluntary Import Expansions, hereinafter "VIEs"). Under the WTO law, the VERs and Quotas have been banned in clear terms,[2] but the WTO compatibility of VIEs remains uncertain and to which we have to pay more attention at a time when US trade policy continues to shift.

Back in 2020, China and the US reached the China–US ETA (Phase 1) against the background of the trade war, providing more trade opportunities for the two countries to ease the tense bilateral trade relations. In particular, Chapter 6 of the China–US ETA achieves the goal of trade expansion by outlining quantitative import commitments for China, which is result-oriented and different from the rule-oriented multilateral trading system. In Chapter 6, the preamble of Article 6.2.1 provides:

> During the two-year period from January 1, 2020, through December 31, 2021, China shall ensure that purchases and imports into China from the US of the manufactured goods, agricultural goods, energy products, and services identified in Annex 6.1 exceed the corresponding 2017 baseline amount by no less than $200 billion.

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[1] *See* Andres B. Schwarzenberg, *Managed Trade and Quantitative Restrictions: Issues for Congress* CONG. RSCH. SERV., https://crsreports.congress.gov/product/pdf/IF/IF11035 (Jan. 25, 2022).

[2] *See* General Agreement on Tariffs and Trade [hereinafter GATT] art.11.1, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194; Agreement on Safeguards art. 11.1(b), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 154.

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Despite China–US ETA being set to end on 31 December 2021, the Biden team's vow to enforce China's phase 1 commitments[3] and the 2022 *National Trade Estimate Report* on *Foreign Trade Barriers* released by the United States Trade Representative criticized that China fell far short of implementing its commitments to purchase the US goods and services under this agreement[4], which suggests that this agreement might not come to an end immediately.

One can notice that import targets, the defining element of Chapter 6 of the China–US ETA aim at expanding the import of a specified set of products over a certain period.[5] Generally, this agreement can be called "Voluntary Import Expansions", which was first used in the context of US-Japan trade tensions of the 1980s.[6] In the US–Japan Semiconductor Agreement of 1986 (hereinafter "US–Japan Agreement"), Article I, "Market Access" declares that both countries anticipate improved opportunities for foreign semiconductor sales in Japan, which requires that Japan double the existing foreign market share to meet a target of 20% in the secret side letter.[7] The 20% share is the "target" in the US–Japan Agreement to expand sales of US semiconductor products in Japan, similar to the China–US ETA. The US–Japan Agreement and the China–US ETA, both reflect the pragmatic orientation in dealing with trade frictions or wars between contracting parties. However, WTO does not define or specify trade outcomes and does not seek to manage trade flows.[8] VIEs as trade tools focus on "outcomes" or "quantities" rather than "rule", departing from the "rule-oriented"[9] system of WTO institutions. Besides, they do not consider the potential impacts on other WTO members and the multilateral trading system.

WTO agreements have not put bans on VIEs, as they did on VERs, the counterparts of VIEs.[10] Although the trade management approach of VIEs is infrequent in the current multilateral trading system, both the US–Japan Agreement and the China–US ETA have raised concerns about their WTO

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[3] *See* Anna Ashton, *Reflections on the Phase One Agreement*, CHINA BUS. REV. (Jan. 20, 2022), https://chinabusinessreview.com/reflections-on-the-phase-one-agreement/.

[4] *See* U.S. TRADE REPRESENTATIVE, 2022 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 89 (2022), https://ustr.gov/sites/default/files/2022%20National%20Trade%20Estimate%20Report%20on%20Foreign%20Trade%20Barriers.pdf.

[5] *See* WORLD BANK GROUP [hereinafter WBG], EAST ASIA AND PACIFIC ECONOMIC UPDATE (APRIL): EAST ASIA AND PACIFIC IN THE TIME OF COVID-19 141 (2020), https://openknowledge.worldbank.org/bitstream/handle/10986/33477/211565ov.pdf?sequence=26&isAllowed=y.

[6] *See* Jagdish N. Bhagwati, *VERs, Quid Pro Quo DFI and VIEs: Political-Economy-Theoretic Analyses*, 1(1) INT'L ECON. J. 1, 11-12 (1987).

[7] *See* Charles S. Kaufman, *The U.S.–Japan Semiconductor Agreement: Chipping Away at Free Trade*, 12 UCLA PAC. BASIN L.J. 329, 347-49 (1994).

[8] *See* BERNARD M. HOEKMAN & PETEOS C. MAVROIDIS, THE WORLD TRADE ORGANIZATION: LAW, ECONOMICS, AND POLITICS 15 (2007).

[9] *See* JOHN H. JACKSON, SOVEREIGNTY, THE WTO AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW 87 (2006).

[10] *See* Bhagwati, *supra* note 6, at 11.

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compatibility among WTO members. In 1987, The European Community (hereinafter "EC") brought a case against the US and Japan under GATT, arguing that improved market access in the US–Japan Agreement was exclusively foreseen for the US companies, and there was discriminatory intent in it.[11] The Panel found that the information submitted to it did not demonstrate that the Japanese measures to improve access to its market for semiconductors favoured the US products.[12] Consequently, the Panel did not respond directly to the WTO compatibility of VIEs in this case. As for the China–US ETA, some opinions from the EU and Canada had also expressed suspicions about its WTO compatibility.[13] As the US moves towards "managed trade",[14] these or similar forms of trade acts are likely to proliferate in international trade. The VIE in the China–US ETA would also not be the last one before it was prohibited explicitly. Thus, examining the issue of WTO compatibility of VIEs is vital because they may have restrictive spillover effects on other WTO members. To avoid VIEs jeopardizing the multilateral trading system, this article argues that VIEs should be interpreted as violating WTO agreements, preventing them from continuing to be resorted to in the future.

There is not much in the existing literature that directly discusses the relationship between VIEs and WTO law, and the question of their WTO compatibility is not answered. Most of them was published in the 1990s focusing on the US–Japan Arrangement.[15] This article proceeds in five parts. Part II gives an overlook to VIEs and analyses their nature, causes, features and possible impacts. Part III discusses that VIEs may violate WTO specific rules. Part IV argues that the principle of good faith could be applied

[11] *See* Report of the Panel, *Japan — Trade in Semi-conductiors*, ¶ 63, L/6309 (May 4, 1988), GATT B.I.S.D. (35th Supp.), at 116, 133 (1989) [hereinafter *Japan — Semi-conductors* Panel Report].
[12] *Id.* at 149.
[13] For example, "EU Trade Commissioner Phil Hogan said his team will scrutinize whether China's pledge to increase purchases of U.S. goods and services by at least US$200 billion over the next two years is WTO-compatible." Jonathan Stearns, *Europe Threatens Legal Challenge to U.S.–China Trade Deal at WTO*, BLOOMBERG NEWS (Jan. 16, 2020), https://www.bnnbloomberg.ca/europe-threatens-legal-challenge-to-u-s-china-trade-pact-at-wto-1.1375099.amp.html. See also, as John Weeks, a former top Canadian trade negotiator and WTO ambassador, said: "It really undermines the WTO." Barrie Mckenna, *The U.S.-China Trade Deal Is Bad for Canada — and We Can't Do a Thing About It*, GLOB. & MAIL (Jan. 12, 2020), https://www.google.com.hk/amp/s/www.theglobeandmail.com/amp/business/commentary/article-the-us-china-trade-deal-is-bad-for-canada-and-we-cant-do-a-thing/.
[14] *See* Schwarzenberg, *supra* note 1; Heng Wang, *How May China Respond to the U.S. Trade Approach: Retaliatory, Inclusive and Regulatory Responses*, 31(2) COLUM. J. ASIAN L. 151, 157 (2018).
[15] *See, e.g.*, James W. Prendergast, *The European Economic Community's Challenge to the U.S.–Japan Semiconductor Arrangement*, 19(3) L. & POL'Y INT'L BUS. 579, 579 (1987); William J. Long, *The U.S. Japan Semiconductor Dispute: Implications for U.S. Trade Policy*, 13(1) MD. J. INT'L L. & TRADE 1, 1 (1988); John C. Kingery, *The U.S.–Japan Semiconductor Arrangement and the GATT: Operating in a Legal Vacuum*, 25(2) STAN. J. INT'L L. 467, 467 (1989); Kaufman, *supra* note 7, at 329.

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to regulate VIEs. Part V concludes that VIEs are difficult to obtain WTO compatibility and need to be prohibited under WTO law.

II. VIES: NATURE, CAUSES, FEATURES AND POSSIBLE IMPACTS

A. Nature of VIEs

The core of a VIE is usually the setting of a quantitative target, indicating that one party promises to provide the other party with a certain market share for a particular product or to increase the quantity of particular products purchased by the other party. There are two possible hypothetical interpretations of this target legally, the difference being whether it creates a treaty obligation between the parties. One interpretation is that this objective is a "commitment" from one party to the other and can be regarded as a treaty obligation, capable of creating legally binding obligations on the parties, which must be fulfilled by the party that has undertaken the obligation, failing which will result in a breach of the treaty and even in international responsibility. Another interpretation is that this objective is merely an "expectation" by the parties of the development of economic relations and markets between them over a period of time in the future, and does not create binding obligations between them.

The question of whether a quantitative target in a VIEs is "commitment" or "expectation" has not yet been answered. Although it was touched upon in the case *Japan — Trade in Semi-conductors*. Unfortunately, it was not directly addressed in the Panel's analysis. In this case, the EC said that the conditions surrounding the improvement of market access in Japan showed that Japan had been granting preferential market access to US producers and exporters of semi-conductors, which could not but have discriminatory effects contrary to Article 1 of GATT.[16] The US reckoned that the arrangement uniformly spoke of enhanced access for "foreign-based semi-conductors" and denied secret understandings on preferential access for US companies.[17] Ultimately, the Panel found that the "foreign capital affiliation" in the agreement did not decisively lead to an intention to favour imports from the US and that the EC had not submitted sufficient information to support its claim and rejected the EC's opinions.[18] Yet, in rebuttal to the EC's argument, the US pointed out that regarding so-called market shares, statements of expectations, be they written or otherwise, simply reflected the expectations of those making the statements and certainly were not a commitment by governments.[19] According to the US, not only did it not

[16] *Japan — Semi-conductors* Panel Report, *supra* note 11, at 132.
[17] *Id.* at 136.
[18] *Id.* at 149.
[19] *Id.* at 136.

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accept the existence of market share agreements between the parties, but it even regarded the market share targets proposed by the EC as merely an expectation of industry in an effort to avoid being bound by treaty obligations. It is factually true that the EC's stated target of Japan providing 20% of the US market share did not appear in the US–Japan Agreement, but only in the deliberately vague and envisioned words "steady increase" in it,[20] which also prevented the Panel from having the opportunity to assess the nature of the quantitative targets in the VIE in a general way.

On a comparative basis, some textual similarities and differences between Chapter 6 of the China-US ETA and Section I of the US–Japan Agreement may be summarized as follows.

1. Similarities — (1) Both agreements establish unilateral market opening obligations for one party to the agreement whilst the other party does not make any market access commitments; (2) Both agreements show respect for the market;[21](3) Both agreements emphasize the necessity for the government to play a role to facilitate implementation.[22]

2. Differences — (1) The amount of import expansion is specified in the China–US ETA; the US–Japan Agreement uses vague expressions about realizing the expected improvement in access;[23] (2) The China–US ETA specifies that the origin of China's expanded imports is the US; the US–Japan Agreement specifies that Japan's expanded purchases are to be from "foreign-produced" semiconductors,[24] which is a neutral concept and does not specifically require that they originate in the US; (3) The China–US ETA covers industries such as manufactured goods, agricultural goods, energy products, and services; [25] the US–Japan Agreement covers only the semiconductor industry; (4) When setting expanded import targets, the China–US ETA uses the binding word "shall";[26] the US–Japan Agreement uses both the words "will" and "should",[27] which are less legally binding than the word "shall".

In contrast, the language used in the China–US ETA is much clearer, not only specifying the quantitative targets for China's purchases of US products

[20] *See* Long, *supra* note 15, at 22.
[21] *See* Economic and Trade Agreement Between the Government of the United States of America and the Government of the People's Republic of China, China-U.S., art. 6.2.5, Jan. 15, 2020, https://ustr.gov/countries-regions/china-mongolia-taiwan/peoples-republic-china/phase-one-trade-agreement/text [hereinafter China–US ETA]; Arrangement Between the Government of Japan and the Government of the United States of America Concerning Trade in Semiconductor Products, Sept. 2, 1986, GATT B.I.S.D. (31st Supp.), at 3 [hereinafter US–Japan Agreement].
[22] *See* China–US ETA, *supra* note 21, arts. 6.1.4, 6.2.4; US–Japan Agreement, *supra* note 21, at 4.
[23] *See* US–Japan Agreement, *supra* note 21, at 3.
[24] *See id.* at 4.
[25] *See* China–US ETA, *supra* note 21, art. 6.2.1.
[26] *Id.*
[27] *Id.* art. 1.1-.4.

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but also explicitly using the word "shall", suggesting that it is set as a treaty obligation. As far as binding legal norms are concerned, the provisions of the China–US ETA on the purchase of US products have been greatly improved in the aspects of normativity, enforceability and precision.[28] The purchase target in the China–US ETA thus constitutes an obligatory commitment that can have normative significance under the law of treaties. Besides, the word "shall" used in the China–US ETA implies that the agreement is "enforced" or "enforceable" and underlines the "voluntary" nature of the agreement under the *Vienna Convention on the Law of Treaties* (hereinafter "VCLT"). On the one hand, this suggests that the parties have expressed consent to be bound by the agreement, which can be deemed as a "voluntary" acceptance of the agreement legally. The only two circumstances in which a treaty is non-voluntary under the VCLT are coercion of a representative of a state and coercion of a state by the threat or use of force.[29] So-called "unequal" treaties are those which are generally said to have been forced upon a weaker state by a stronger one, and which may be in some way invalid and have never been accepted in international law.[30] In a nutshell, political or economic pressure does not affect the "voluntary" nature of the agreement under the VCLT. On the other hand, under the VCLT, the word "shall" create positive obligations, which makes the implementation of VIEs not entirely dependent on the voluntariness of the parties. Treaty obligations and the legal consequences of violations are also factors that promote the implementation of VIEs by parties.

A question also arises, however, whether such trade expansion targets can be concealed from scrutiny by the relevant WTO norms as long as the members adopt vague and relatively neutral wording in the agreement? If such a situation is tolerated, it will likely encourage subsequent countries to enter into such agreements with a tendency to adopt an extremely broad approach in the text of the agreement and a discretionary, non-transparent approach to granting *de facto* preferences to specific countries in practice. The real danger posed by such agreements in practice is that the parties to the agreement circumvent their WTO obligations in an implicit manner, and it is difficult for the panel to rule against them, given its customary practice of sticking to textualism.[31] In other words, if it is true that the parties have not set out in their agreements the exact quantitative targets applicable to

[28] *See* Jaye Ellis, *Shades of Grey: Soft Law and the Validity of Public International Law*, 25(2) LEIDEN J. INT'L L. 313, 315 (2012).
[29] *See* Vienna Conventions on the Law of Treaties arts. 51, 52, May 23, 1969, 1155 U.N.T.S. 331.
[30] *See* ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 320 (3d ed. 2013).
[31] *See* Henrik Horn & Joseph H. H. Weiler, *European Communities—Trade Description of Sardines: Textualism and Its Discontent*, 4 WORLD TRADE REV. (SPECIAL ISSUE) 248, 252 (2005); Dongsheng Zang, *Textualism in GATT/WTO Jurisprudence: Lessons from the Constitutionalization Debate*, 33(2) SYRACUSE J. INT'L L. & COM. 393, 394 (2006).

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each other, it is difficult to prove that they had a discriminatory intent unless clear evidence exists.

Whether a quantitative target in an agreement is a "commitment" or an "expectation" remains to be interpreted in accordance with the VCLT to find out the true intentions of the parties, which is also tough and uncertain in practice. However, the textual interpretation suggests that the language of the agreement enables a relatively objective initial distinction to be made between the two. When a quantitative target constitutes a commitment, the parties often use clear and binding terms, such as "shall", to indicate that it exists as an obligation. However, when members see it as an expectation, it is possible to reflect its initiative by using words such as "best endeavor" or "encourage", which constitute a "soft obligation"[32] and does not impose binding obligations on parties.[33] Such soft obligations, although lacking legal enforceability, may nevertheless have an influence on the parties in the implementation of the agreement, albeit indirectly and in a hidden way, and may be deemed in practice to have the status of "quasi-obligation" when interpreted via the purpose of the treaty. For ease of discussion, this article focuses on "commitment"—explicit quantitative target obligations introduced in VIEs.

B. Causes of VIEs

Several reasons may be given to explain the emergence of VIEs in the multilateral trading system. On the one hand, multilateralism may yet yield to the pressures of globalization and changes in global economic power, interests and concerns. Countries faced with increasing unemployment, loss of industry, reduced wages and living standards, would seek new ways to engage with trade for their domestic benefit.[34] These all contributed to the need for these countries to take specific protection measures, including VIEs, to change this imbalanced trade situation. On the other hand, VIEs are concluded politically due to asymmetries in power. VIEs allow more powerful members to legitimize trade measures with the consent of another member. There are often political and economic power differences between the parties to VIEs, and the relatively weaker members often have no choice but to accept them. For example, both the US–Japan Agreement and the China–US ETA were responses to the threat of trade retaliation from the US.

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[32] *See* Heng Wang, *An Assessment of the CHAFTA and Its Implications: A Work-in-Progress Type FTA with Selective Innovations?*, *in* THE CHINA AUSTRALIA FREE TRADE AGREEMENT: A 21ST CENTURY MODEL 1, 16 (Colin Picker et al. eds., 2018), http://www5.austlii.edu.au/au/journals/UNSWLRS/2019/24.pdf.

[33] *See* Susannah Hodson, *Applying WTO and FTA Disciplines to Data Localization Measures*, 18(4) WORLD TRADE REV. 579, 597 (2019).

[34] *See* Elimma Ezeani, *WTO Post Doha: Trade Deadlocks and Protectionism*, 12(3) J. INT'L TRADE L. & POL'Y 272, 283 (2013).

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In short, the degree of "voluntariness", hence, depends on the relative bargaining power of the countries involved.[35] The formation of VIEs can be considered to some extent as the result of unilateral coercion.

However, when it comes to the China–US ETA, it may be argued that China is not economically "weaker" than the US; why did China agree to VIEs? It is a fact that China is in an international economic system that is dominated by the US, and in many ways still subject to it. With regard to economic aggregate, although China is currently the second-largest economy in the world, its GDP accounts for two-thirds of American one and its GDP per capita is much lower. Meanwhile, China's economy is more dependent on the US than American dependence on China. What is in China's interest is to work with the US and other trading nations to maintain the current free trade order.[36] The US remains one of China's most important trading partners and China still relies on the US market and technology for many aspects of its economic growth. In some key high-tech areas, further trade restrictions imposed by the US would be extremely severe for some Chinese industries. Noting that the trade war has hurt both countries, but China has suffered more politically and economically than the US.[37] Sustained and stable political and economic development is a priority for China, and a harmonious international environment is crucial. China wishes to end the trade war as soon as possible by reaching the China–US ETA to stabilize China–US relations and avoid continuing to drive up conflict. Therefore, acceptance of the US requirements would also be profitable for China.

Apart from the non-legal reasons above, the deficiencies and decline in the binding of WTO law are vital reasons for the formation of VIEs, which allows members to deviate more easily from the multilateral trading system, such as resorting to unilateral tariffs.[38] The multilevel trade governance in

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[35] *See* Stefan Lutz, *Import Quotas and Voluntary Export Restraints*, *in* HANDBOOK ON INTERNATIONAL TRADE POLICY 248, 248 (William A. Kerr & James D. Gaisford eds., 2007).
[36] *See* Zhang Xiaotong & Colin Flint, *Why and Whither the US–China Trade War?: Not Realist 'Traps' But Political Geography 'Capture' as Explanation*, 55(2) J. WORLD TRADE 335, 352 (2021).
[37] For example:

> [T]he massive scale of Section 301 tariffs has affected countless Chinese exporters . . . the departure of global supply chains will not only cause massive unemployment but also hinder the technological advancement of Chinese industries . . . the geopolitical tension between the two countries . . . [has threatened] to derail bilateral cooperation and exchanges in every field . . . [even bringing] the world . . . [close] to the brink of a new Cold War.

See Julia Ya Qin, *WTO Reform: Multilateral Control over Unilateral Retaliation — Lessons from the US–China Trade War*, 12(2) TRADE L. & DEV. 456, 469-70 (2020).
[38] *See* Thomas J. Schoenbaum & Daniel C.K. Chow, *The Peril of Economic Nationalism and a Proposed Pathway to Trade Harmony*, 30(1) STAN. L. & POL'Y REV. 115, 167 (2019).

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the context of WTO law has so far failed to limit numerous "market failures" and "governance failures".[39]

In the initial stage of the WTO, a drastic increase in discipline and law significantly thickened the trade system's legal-normative structure. Dispute Settlement Body (hereinafter "DSB") has opted for a rigorous, impartial, and strictly legal approach to analyzing trade complaints, and also placed WTO rules squarely within the broader field of public international law, thereby confirming their legally binding nature.[40] Taking the case *US — Sections 301* for example, although the Panel declared that the core aspects of Section 301 of the US Trade Act were not inconsistent with Dispute Settlement Understanding (hereinafter "DSU") requirements in a compromised manner, it restricted the US from implementing Section 301. Its' finding was that the:

"All these conclusions are based in full or in part on the US Administration's undertakings. It thus follows that should they be repudiated or in any other way removed by the US Administration or another branch of the US Government, the findings of conformity contained in these conclusions would no longer be warranted."[41]

In this case, while the Panel did not directly rule that Section 301 of the US Trade Act was unlawful, it did attach a prerequisite to its legality—the exercise of Section 301 must be consistent with its commitments in the US Statement of Administrative Action (hereinafter "SAA").[42] In addressing the question of the legality of Section 301, the Panel has put forward a hypothetical view that the US can ensure that Section 301 does not undermine the multilateral free trade system through commitments in the SAA, a line of reasoning that points to the future implementation of Section 301, thus avoiding a direct challenge to Section 301 itself. From the Panel's perspective, notwithstanding the problems with Section 301, a complete denial of its WTO legality would inevitably lead to a huge protectionist backlash within the US and would lead to instability in the WTO legal system. Albeit the ruling itself does not require the US to abolish Section 301, it essentially requires the US to refrain from imposing trade retaliatory measures under it, which would otherwise constitute a breach of its WTO obligations. Indeed, there have been no further WTO cases involving the US under Section 301, and the US has also not substantively used Section 301 to engage in substantive unilateral retaliation against other members since then. During this past period, the US was willing to abide by the Panel's award, even if the award of *US — Sections 301* was not entirely thorough.

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[39] *See* Ernst-Ulrich Petersmann, *20 Years WTO Law and Governance: Some Legal Methodology Problems*, 13(2) MANCHESTER J. INT'L ECON. L. 106, 118 (2016).
[40] *See* Joost Pauwelyn, *The Transformation of World Trade*, 104(1) MICH. L. REV. 1, 26 (2005).
[41] *See* Panel Report, *United States — Sections 301-310 of the Trade Act of 1974*, ¶ 8.1, WTO Doc. WT/DS152/R (adopted Jan. 27, 2000) [hereinafter *US — 301 Section* Panel Report].
[42] *Id.* ¶ 7.115.

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However, more than twenty years later, the US has once again used Section 301 against other members, choosing to go against the spirit of the Panel award in *US — Sections 301*, which reflects the declining binding effect of WTO law.

While the previous US administrations viewed international trade as a rules-based multilateral trading system, in which all members are subject to the jurisdiction of the WTO. Under the current US view, the WTO is a mere instrumentality to be used by the US whenever appropriate, law itself is always subordinate to political and economic goals.[43] In fact, WTO law has only partially succeeded in disciplining the intergovernmental power politics,[44] leaving institutional loopholes for the powers to violate WTO law. This is a long-term and intrinsic problem as the result of "member-driven political governance" of international trade and "sovereignty" of international law. Despite the existence of a compulsory dispute settlement mechanism and authorized retaliatory measures, the willingness of members to implement remains a key factor in the effective enforcement of WTO law, especially when WTO members prioritize their national interests and question the WTO's ability to address their concerns.[45] In other words, WTO rules and procedures may reduce power imbalances; they have certainly not erased them.[46] Thus, hardly dealing well with or balancing the interaction between law and politics may give this decline in the binding effect of WTO law the reasons.

C. Features of VIEs

1. Quantitative — VIEs would set various quantitative growth targets for the domestic market in the importing country, aiming at directly affecting quantities traded internationally and implying a floor on a country's imports.[47] According to the past practices between the US and Japan, there are three types of VIE—content VIE, market-share VIE and total value VIE. Taking the auto-parts as the sample, the content VIE requires that autos produced in Japan achieve at least some specified US content per auto; market-share VIE forces Japan to meet a market-share target for imported parts; total-value VIE requires that Japan import a given total value of US

[43] *See* Daniel C.K. Chow, *United States Unilateralism and the World Trade Organization*, 37(1) B.U. INT'L L.J. 1, 30 (2019).
[44] *See* Petersmann, *supra* note 39, at 116.
[45] *See* Schoenbaum & Chow, *supra* note 38, at 123-28; Aseema Sinha, *Understanding the 'Crisis of the Institution' in the Liberal Trade Order at the WTO*, 97(5) INT'L AFF. 1523, 1532-34 (2021).
[46] *See* Joost Pauwelyn, *Rule-Based Trade 2.0 — The Rise of Informal Rules and International Standards and How They May Outcompete WTO Treaties*, 17(4) J. INT'L ECON. L. 739, 748 (2014).
[47] *See* WBG, supra *note* 5, at 142.

臺灣大學學術期刊資料庫

parts.[48] We can find that the targets among different VIEs can perform various forms but all of them concentrate on the trade figures.

2. *Temporary* — VIEs are temporary and non-sustainable and are introduced for a period generally. Such agreements are invariably for quite short periods and usually the original intent is not to renew them many times,[49] like the US–Japan Agreement and the China–US ETA, which established a period of five and two years respectively. On the basis of this feature, they could differentiate from those typical trade agreements. From the viewpoint of distinction between law-making treaties and contractual treaties,[50] the former was defined as "concluded for the purpose of confirming, defining or abolishing existing customary rules, and of establishing new rules for the law of nations,"[51] while the latter is based on a transaction and does not purport to set up rules applicable for an indefinite time.[52] VIEs belong to contractual treaties to solve particular problems and provide for exchanges of certain goods or acts,[53] instead of formulating common rules of conduct for the future. VIEs would no longer be binding when the agreed period has passed and the obligations agreed upon by both parties have been fulfilled.

3. Non-Reciprocity — VIEs are non-reciprocity and create the asymmetrical opening of the markets. Judging from the content of VIEs, only one party undertakes the obligation to open up its market to the other party. As a result, the trade flow under VIEs is unidirectional, which may contribute to protecting exporters' industries or easing trade deficits. WTO rules do not unequivocally provide for a reciprocity principle,[54] nevertheless, reciprocity has been a basic principle that applies to negotiations.[55] Reciprocity implies the exchange of a reduction in the level of protection in one country in return for an equivalent reduction in the level of protection of another country.[56] Even though, each WTO member is sovereign to determine for herself if a

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[48] *See* Larry D. Qiu & Barbara J. Spencer, *Keiretsu and Relationship-Specific Investment: Implications for Market-Opening Trade Policy*, 58 J. INT'L ECON. 49, 51 (2002).
[49] *See* Wilfred J. Ethier, *The Economics and Political Economy of Managed Trade, in* MARKETS AND POLITICIANS: POLITICIZED ECONOMIC CHOICE 283, 285 (Arye L. Hillman ed., 1991).
[50] *See* Arnold D. McNair, *The Functions and Differing Legal Character of Treaties*, 11 BRIT. Y.B. INT'L L. 100, 106 (1930).
[51] *See* Quincy Wright, *The Interpretation of Multilateral Treaties*, 23(1) AM. J. INT'L L. 94, 99 (1929).
[52] *See* ROBERT KOLB, THE LAW OF TREATIES: AN INTRODUCTION 30 (2016).
[53] *See* Christopher J. Borgen, *Resolving Treaty Conflicts*, 37 GEO. WASH. INT'L L. REV. 573, 581 (2005).
[54] *See* Jong Bum Kim, *A Legal Review of RTA Tariff Negotiations*, 35(2) LEGAL ISSUES ECON. INTEGRATION 157, 164 (2008).
[55] *See* HOEKMAN & MAVROIDIS, *supra* note 8, at 15.
[56] *See* BERNARD M. HOEKMAN & MICHEL M. KOSTECKI, THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: THE WTO AND BEYOND 162 (3d ed. 2009).

臺灣大學學術期刊資料庫

proposed agreement is advantageous to her in the negotiation[57] and strict reciprocity in trade might be desirable,[58] unilateral trade expansions produced by VIEs are not based on exchange.

4. Discriminatory — VIEs may be discriminatory to the third country. Generally, the preferential trade treatments which are the outcome of the market-opening commitments by the importing country only occur between the parties to VIEs, and third countries would be excluded. In most cases, the importing country, will not be entitled to the same treatments unconditionally to the third country because some import targets look extraordinarily ambitious. For instance, it is unrealistic for China to make the $200 billion purchase pledge to every third country as it did in the China–US ETA. Turn to the form of discrimination. There can be both de jure and *de facto* discrimination caused by VIEs. The China–US ETA is a typical form of de jure discrimination, in which China accords preferential trade treatments to the US on the face of the words of this agreement clearly. But, sometimes VIEs might not use explicit words to point out the exporting country, which would create the illusion that they are ostensibly origin-neutral. Like the US–Japan Agreement, it declares that both countries anticipate improved opportunities for foreign semiconductors sales in Japan,[59] the word "foreign" does not refer to any specific country. However, these terms and clauses could be tailor-made so as to accord preferential treatment to a US company,[60] resulting in *de facto* discrimination among other counties.

D. Possible Impacts of VIEs

On the one hand, there is the potential for government intervention in VIEs as a manifestation of managed trade. VIEs reflect the alternative "managed trade" approach to expanding trade[61] rather than tackling specific tariff or non-tariff barriers. As the opposite notion to free trade, managed trade policy is usually seen as a combination of government programs to help domestic producers and to create obstacles for foreign competitors, like the more active interventions of governments to promote employment and exports.[62] However, GATT is viewed as a free trade constitution and favours

[57] *See* J. Michael Finger, *A Diplomat's Economics: Reciprocity in the Uruguay Round Negotiations*, 4(1) WORLD TRADE REV. 27, 30 (2005).
[58] *See* Schoenbaum & Chow, *supra* note 38, at 163.
[59] *See* Kaufman, *supra* note 7, at 347.
[60] *See Japan — Semi-conductors* Panel Report, *supra* note 11, at 132.
[61] *See* Andres B. Schwarzenberg, *supra* note 1.
[62] *See* James M. Lutz, *The United States and Managed Trade: A Minnow Swimming with Piranhas*, 21(3) WORLD COMPETITION: L. & ECON. REV. 45, 46 (1998).

臺灣大學學術期刊資料庫

liberal trade by mandating the use of transparent, non-discriminatory, and proportionate trade policy instruments.[63]

In a post-Uruguay Round world, managed trade initiatives seem to pose a larger threat to the multilateral trade system, and will continue to add strain to the frail multilateral trading system fostering a power-based system of international economic relations.[64] The bilateral pressure created by managed trade would deviate from liberal principles.[65] In the liberal trade order embodied in the WTO,[66] one of the most widely accepted theories views the function of the WTO as being to restrain Members from manipulating terms-of-trade[67] where government intervention in the free flow of trade is strictly restrained. But in implementing VIEs, the importing government might play a facilitating role to a greater or lesser extent, where it can choose between a reward or a punishment to accomplish import promotion.[68] When the market does not function effectively, the government has to be involved in some way, such as through import allocations or subsidies either explicitly or implicitly, to meet the agreed quantitative import targets, which cannot provide fair and equal business opportunities to every participant in the market.[69] In other words, quantitative targets leave substantial discretion to a government to pick winners arbitrarily, increasing the risk of rent-seeking activities.[70]

On the other hand, VIEs could lead to trade diversion/restriction. A deal that sets import targets to seek trade creation could result in trade diversion. Under VIEs, the importing country's commitments to the exporting country could result in reduced imports from other countries if the domestic market demands in the importing country do not increase by the same amount or the total imports do not change. In this case, the exports from third countries to the importing country could be potentially substitutable by the exporting country's exports. Then, this could impose significant losses on affected countries if accompanied by some type of market segmentation.[71] To maintain the existing total imports and reduce imports from third countries,

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[63] *See* Willem Thorbecke, *Free Trade Versus Managed Trade: A Constitutional Political Economy Perspective*, 151(2) J. INSTITUTIONAL & THEORETICAL ECON. 373, 382 (1995).
[64] *See* C.A. Primo Braga & Alexander J. Yeats, *Minilateral and Managed Trade in the Post-Uruguay Round World*, 3 MINN. J. GLOB. TRADE 231, 257 (1994).
[65] *See* Lutz, *supra* note 62, at 58.
[66] *See* Sinha, *supra* note 45, at 1521.
[67] *See* Weihuan Zhou, *In Defence of the WTO: Why Do We Need a Multilateral Trading System?,* 47(1) LEGAL ISSUES ECON. INTEGRATION 9, 13 (2020).
[68] *See* Theresa M. Greaney, *Import Now! An Analysis of Market-Share Voluntary Import Expansions(VIES)*, 40 J. INT'L. ECON. 149, 152 (1996).
[69] *See* Mitsuo Matsushita, *Basic Principles of the WTO and the Role of Competition Policy*, 3(4) J. WORLD INV. 567, 568 (2002).
[70] *See* WBG, s*upra* note 5, at 144.
[71] *See generally* Eugenio Cerutti et al., *Managed Trade: What Could Be Possible Spillover Effects of a Potential Trade Agreement Between the U.S. and China?* 1 (IMF, Working Paper Doc. WP/19/251, 2019).

臺灣大學學術期刊資料庫

the importing country will likely adopt implicit restriction measures. Hence, even though VIEs may have positive promotional effects and could expand the trade volume between the parties, they could also impose adverse welfare effects on third parties outside the agreements.

Trade, a mutually beneficial enterprise, brings prosperity to each nation involved.[72] Suppose trade benefits only some members, even to the detriment of other members' established interests or trade rights. In that case, they could not help to "raise standards of living, ensure full employment and a large and steadily growing volume of real income and effective demand, and expand the production of and trade in goods and services"—the ultimate objectives of the WTO[73] that aim to promote balanced and overall trade and enhance global welfare. Nevertheless, it should be acknowledged that the trade-restrictive effects of VIEs against third parties are indirect, in which the existence of purposes to impose trade restrictions by the parties to the agreement cannot be detected prima facie. Identifying the trade restriction effects of VIEs remains to be observed in conjunction with how the parties to the agreement perform the agreements.

III. THE COMPATIBILITY OF VIES UNDER WTO RULES

Through specific forms of voluntary arrangements, VIEs can seek to escape the restrictions of multilateral trade rules by diluting the role of governments in trade regulation. However, the current WTO rules lack direct restrictive provisions on VIEs, and the interpretative application of the relevant specific rules needs to be considered in light of maintaining the effectiveness of the multilateral trade legal system. According to the analysis mentioned above of the features and impacts of VIEs, in specific circumstances, VIE may constitute breaches of Article 1.1 of GATT, Article 11 of GATT, Article 11.1(b) of Agreement on Safeguards (hereinafter "AoS") and Article 23.1 of GATT, which need to be examined in the light of its provisions and implementation.

[72] *See generally* Sungjoon Cho, *Reinventing the Development Wheel of the World Trading System (Reviewing Sonia E. Rolland, Development the World Trade Organization (2012))*, 16(2) J. INT'L ECON. L. 481 (2013).

[73] *See* MARY E. FOOTER, AN INSTITUTIONAL AND NORMATIVE ANALYSIS OF THE WORLD TRADE ORGANIZATION 23 (2006).

臺灣大學學術期刊資料庫

A. Most-Favoured-Nation

The discriminatory nature of the VIE makes it difficult to comply with the Most-Favoured-Nation (hereinafter "MFN") rules in GATT/GATS, which have been regarded as "absolutely fundamental" since the draft GATT stage.[74] The MFN rules in WTO Agreements share common ground and have a similar meaning, requiring that a member accord goods and services of another member treatment no less favourable than that it accords to goods and services of all other members.[75] Indeed, the Appellate Bodies and Panels have also rightly used the case law relating to GATT Article 1 with regard to GATS Article 2, as the two provisions have similar functions and render the same principle operational.[76] This article will mainly focus on trade in goods in VIEs and Article 1.1 of GATT, when discussing whether VIEs are consistent with the MFN rules.

Confirming whether a measure violates Article 1.1 of GATT must consider some elements. In *EC — Seal Products* the Appellate Body explained that:

> Based on the text of Article 1.1, the following elements must be demonstrated to establish an inconsistency with that provision: (i) that the measure at issue falls within the scope of application of Article 1.1; (ii) that the imported products at issue are 'like' products within the meaning of Article 1.1; (iii) that the measure at issue confers an 'advantage, favour, privilege, or immunity' on a product originating in the territory of any country; and (iv) that the advantage so accorded is not extended 'immediately' and 'unconditionally' to 'like' products originating in the territory of all Members.[77]

First of all, identify whether VIEs fall into the application scope of Article 1.1 of GATT. According to Article 1.1 of GATT, it is designed for four matters, including "customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports", "the method of levying such duties and charges", "all rules and formalities in connection

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[74] *See* Donald McRae, *MFN in the GATT and the WTO*, 7(1) ASIAN J. WTO & INT'L HEALTH L. & POL'Y 1, 3 (2012).

[75] *See* Mitsuo Matsushita, *Basic Principles of the WTO and the Role of Competition Policy*, 3(2) WASH. UNIV. GLOB. STUD. L. REV. 363, 367 (2004).

[76] *See* MITSUO MATSUSHITA ET AL., THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY 173 (3d ed. 2015).

[77] *See* Appellate Body Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 5.86, WTO Doc. WT/DS400/AB/R, WT/DS401/AB/R (adopted June 18, 2014).

臺灣大學學術期刊資料庫

with importation and exportation" and "with respect to all matters referred to in paragraphs 2 and 4 of Article 3". VIEs do not stipulate the tariff measures and therefore do not cover the above matters relating to "customs duties and charges," but may involve "all rules and formalities in connection with importation and exportation."

The Panel in *EC — Banana III* reiterated that the phrase "all rules and formalities" has been interpreted broadly in past GATT practice,[78] making embracing VIEs possible. Furthermore, The Panel in *EC — Banana III* found that "import licensing procedures, including the operator category rules" are "rules and formalities in connection with importation" in the meaning of Article 1.1.[79] Import targets are the primary methods to regulate the bilateral trade between VIEs' parties. They were incorporated into the treaties as government commitments and will create binding to the importing country. To realize them, the importing country should adopt some methods to make commitments operational and to ensure imports from the exporting country, regardless of the forms of regulations. Thus, those methods of regulations can be deemed as the equivalent of import licensing for products from one particular exporting country. The operator in the exporting country can gain the desired market share of exports to the importing country for a certain period, which will result in *de facto* differential management of imports from the third countries.

In fact, VIEs do not directly allow the importing country to restrict imports from third countries but expand imports from the exporting country and thus indirectly restrict the third countries. This involved the range of "in connection with importation". In *US — Poultry*, the Panel concluded that "in connection with importation", as used in Article 1, not only encompasses measures which directly relate to the process of importation but could also include those measures which relate to other aspects of the importation of a product or have an impact on actual importation.[80] Accordingly, the measures in connection with importation could be both direct and indirect, including measures that merely impact importations. Under VIEs, the importing country restricting imports from other WTO members is the result of expanding imports from the exporting country, which can constitute an "impact" on importations from the third countries. Therefore, VIEs could fall into the application scope of Article 1.1 of GATT.

Secondly, identify whether "like" products from other WTO members exist. In contrast, the element "like products" is easy to identify under VIEs because it has a wide range of uncertain affected WTO members. Hence, the

[78] *See* Panel Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, ¶ 7.107, WTO Doc. WT/DS27/R/ECU (adopted Sept. 25, 1997) [hereinafter *EC — Banana III* Panel Report].
[79] *Id.* ¶ 7.189.
[80] *See* Panel Report, *United States — Certain Measures Affecting Imports of Poultry from China*, ¶ 7.410, WTO Doc. WT/DS392/R (adopted Oct. 25, 2010) [hereinafter *US — Poultry* Panel Report].

臺灣大學學術期刊資料庫

likelihood of like products existing between the exporting country and third countries is remarkably high, unless the products stipulated with import targets under VIEs are irreplaceable. How to examine the "like products", the DSB has developed four criteria aiding analysis in practices: physical property and nature, end use, consumer tastes and habits, and tariff classification; still, there are no mandated and fixed criteria to obey.[81] And in the Report by the Working Party on Border Tax Adjustments, the Working Party concluded that problems arising from the interpretation of the term "like or similar products" should be examined on a case-by-case basis.[82] It seems that there must be "the imported products at issue" as mentioned by the *EC — Seal* Products Appellate Body before. In the analysis in this article, VIEs as a managed trade paradigm are abstract, causing the basis for a case-by-case analysis to be lost. However, hypothetical like product analysis has been established and adopted in past practices,[83] meaning that when the origin is the sole criterion for a regulatory distinction between products, the likeness of the products that are distinguished in this way can be presumed.[84]

Panels are of the opinion that state measures that differentiate on the basis of origin are so inherently against the spirit of the non-discrimination principle that they ought to be sanctioned by facilitating complaints against them.[85] Specifically, in *China — Publications and Audiovisual Products*, the Panel explained that "where a difference in treatment between domestic and imported products is based exclusively on the products' origin, the complaining party need not necessarily identify specific domestic and imported products and establish their likeness in terms of the traditional criteria in order to make a prima facie case of 'likeness'."[86] As the general clause introduced in VIEs, the clearly defined origin is the sole criterion to ensure the completion of import targets. Appropriate hypotheticals are

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[81] *See* Hsien Wu, *The Effect of Technology Development on the Decision of Physical Property/Nature and End Use for Determining Like Product Under the GATT*, 6(2) ASIAN J. WTO & INT'L HEALTH L. & POL'Y 455, 460 (2011).

[82] *See* Rep. by the Working Party on Border Tax Adjustment, ¶ 18, GATT Doc. L/3464, at 5 (Dec. 2, 1970).

[83] *See generally* Panel Report, *Indonesia — Certain Measures Affecting the Automobile Industry*, ¶ 14.113, WTO Doc. WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64R (adopted July 23, 1998) [hereinafter *Indonesia — Autos* Panel Report]; Panel Report, *Colombia — Indicative Prices and Restrictions on Ports of Entry*, ¶ 7.356, WTO Doc. WT/DS366/R (adopted May 20, 2009); Panel Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Products*, ¶ 7.1446, WTO Doc. WT/DS363/R (adopted Jan. 19, 2010) [hereinafter *China — Publications and Audiovisual Products* Panel Report]; *US — Poultry* Panel Report, *supra* note 80, ¶ 7.432; Appellate Body Report, *Argentina — Measures Relating to Trade in Goods and Services*, ¶ 6.38, WTO Doc. WT/DS453/AB/R (adopted May 9, 2016); Panel Report, *Russia — Measures Affecting the Importation of Railway Equipment and Parts Thereof*, ¶ 7.919, WTO Doc. WT/DS499/R (adopted Mar. 5, 2020) [hereinafter *Russia — Railway* Panel Report].

[84] *See Russia — Railway* Panel Report, *supra* note 83, ¶ 7.919.

[85] *See* MATSUSHITA ET AL., *supra* note 76, at 172.

[86] *See China — Publications and Audiovisual Products* Panel Report, *supra* note 83, ¶ 7.1446.

臺灣大學學術期刊資料庫

therefore easily constructed if certain imported products would not obtain import commitments under VIEs simply because of their origin; it is no need to demonstrate the existence of actually traded like products.[87] In short terms, hypothetical like product analysis can also help confirm that there can or will be imported products from the third countries that are "like" products from the exporting country in VIEs.

Thirdly, identify whether the import targets of VIEs are equal to "advantage, favour, privilege, or immunity". In *EC — Bananas III*, the Panel considered that "advantages" are those that create "more favourable import opportunities" or affect the commercial relationship between products of different origins.[88] The import targets of VIEs show the determination of the importing country to purchase specific quantities of goods from the exporter, in this condition, which will improve the regularity and stability of commercial transactions between the parties to VIEs over a particular period and guarantee commercial opportunities for the exporter rather than third countries. Obviously, there are no doubts that the import targets can be considered as "advantages".

Lastly, identify whether VIEs extend advantages "immediately" and "unconditionally" to other members. In general, as a bilateral agreement, VIEs will not touch on the adjustment of trade relations between the parties and the third countries. Thus, the terms of VIEs do not reveal that the importing country extends the advantages to third parties other than the exporting country either. Most importantly, as mentioned before, due to the inherently discriminatory of VIEs, for the importing country, it is hard to accord advantages to other members. Overall, discriminatory VIEs are difficult to comply with Article 1 of the GATT.

B. General Elimination of Quantitative Restrictions

Article 11.1 of GATT General Elimination of Quantitative Restrictions provides that: "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party." According to it, quotas and import or export licenses are explicitly prohibited, and other possible forms of quantitative restrictions are pre-empted through "other measures". "Other measures", however, are not further defined in the WTO Agreement. In the Decision on Notification Procedures for Quantitative Restrictions, which requires members to notify quantitative restrictions

[87] *See Indonesia — Autos* Panel Report, *supra* note 83, ¶ 14.113.
[88] *See EC — Banana III* Panel Report, *supra* note 78, ¶ 7.239.

臺灣大學學術期刊資料庫

adopted, ten forms of quantitative restrictions that should be notified are further listed in Annex 2,[89] again excluding VIEs. Therefore, it is not feasible to assess whether a measure constitutes a quantitative restriction measure only by matching the type of measure already in place, but on the contrary, current developments in dispute settlement do not constrain the determination of quantitative restriction measures to a particular form. Two conditions need to be satisfied for a measure at issue to constitute a quantitative restriction measure: (i) the measure falls within the scope of the phrase "quotas, import or export licenses or other measures"; and (ii) the measure constitutes a "prohibition" or "restriction".[90]

The first condition is an external formal element and VIEs do not fall under the quotas or import/export licenses explicitly listed in Article 11.1 of the GATT and therefore need to be considered whether they fall under the category of "other measures". It is now generally accepted that "other measures" are relatively open in meanings, the *India — Quantitative Restrictions* Panel noted that the text of Article 11.1 is very broad in scope, providing for a general ban on import or export restrictions or prohibitions.[91] "Other measures" are also formally subject to only a few restrictions in the WTO legal system, in practice, only the measures with the fiscal nature were excluded from the scope of application of Article 11.1 in *Argentina — Financial Service*.[92] Clearly, VIEs have no the fiscal nature. Then, Article 11.1 of the GATT seeks regulatory "restrictions" or "prohibitions" broadly, without more additional requirements as to the form of the measures, and there is little obstacle to VIEs being considered as "other measures".

The second condition is a substantive one and requires the measure at issue to have a limiting effect. In *China — Raw Materials*, the Appellate Body examined the meaning of "restrictions", which is defined as a thing which restricts someone or something, a limitation on action, a limiting condition or regulation, and thus refers generally to something that has a limiting effect on the quantity or amount of a product being imported or

[89] The ten forms of quantitative restrictions include prohibition, prohibition except under defined condition, global quota, global quota allocated by country, bilateral quota, non-automatic licensing, quantitative restriction made effective through state-trading operations, mixing regulation, minimum price, triggering a quantitative restriction, and voluntary export restrictions. *See* Council for Trade in Goods, *Decision on Notification Procedures for Quantitative Restrictions*, WTO Doc. G/L/59/Rev.1 (June 22, 2012), at 9.

[90] *See* Panel Report, *European Union and Its Measure States — Certain Measures Relating to the Energy Sector*, ¶ 7.243, WTO Doc. WT/DS476/R (circulated Aug. 10, 2018).

[91] *See* Panel Report, *India — Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, ¶ 5.128, WTO Doc. WT/DS90/R (adopted Sept. 22, 1999).

[92] *See* Panel Report, *Argentina — Measures Relating to Trade in Goods and Services*, ¶ 7.1067, WTO Doc. WT/DS453/R (adopted May 9, 2016).

臺灣大學學術期刊資料庫

exported.[93] For the parties to a VIE, the volume of trade between the parties is usually stable under normal trade and rarely changes dramatically under market-based adjustment situations. When a VIE comes into effect and the volume of trade between the parties increases dramatically, this can limit the volume of purchases from third countries by importing countries, which not only affects trade flows but also changes the competitive opportunities for imported products and can have a limiting effect against third countries. Besides, in *Argentina — Import Measures*, the Appellate Body summarized that it is not necessary to establish actual, quantifiable, negative effects on the overall level of imports to find that a measure is inconsistent with Article 11.1.[94] Thus, only a qualitative analysis of the restrictive effect is required, not a quantitative one, and there is no need to find out the specific trade figures of third countries that are restricted.

However, noting that the trade-restrictive effects of VIEs are not directly on the number of products exported from third countries, but are indirectly caused by an increase in purchases between the parties to the agreement, the issue at stake is whether such indirect restrictions can be recognized. There is no direct response to this issue in existing WTO cases, but the interpretation of the DSB in other disputes may provide ways to discuss it. On the other hand, in *India — Automotive Sector*, the Panel believed that in the context of Article 11, the limiting effect must be on importation itself,[95] rather than the challenged measure must be on the importation itself. On the other hand, the Panel in *Argentina — Leather* admitted that the disciplines of Article 11.1 extend to restrictions of a *de facto* nature,[96] despite nothing on the face of the challenged measure to restrict the trade. These findings can help explain the indirect restrictions of VIEs against third countries. There is no provision to restrict imports from third countries, but the limiting effects arising from VIEs do impose on them, which could constitute a *de facto* restriction. For those reasons, VIEs can be regulated by Article 11.1 of GATT.

C. Agreement on Safeguards

In WTO legal system, safeguard provisions permit governments under specified circumstances to withdraw or cease to apply their normal

[93] *See* Appellate Body Report, *China — Measures Related to the Exportation of Various Raw Materials*, ¶¶ 319-20, WTO Doc. WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (adopted Feb. 22, 2012).
[94] *See* Appellate Body Report, *Argentina — Measures Affecting the Importation of Goods*, ¶ 5.212, WTO Doc. WT/DS438/AB/R, WT/DS444/AB/R, WT/DS445AB/R (adopted Jan. 26, 2015).
[95] *See* Panel Report, *India — Measures Affecting the Automotive Sector*, ¶ 7.270, WTO Doc. WT/DS175/R (adopted Apr. 5, 2002).
[96] *See* Panel Report, *Argentina — Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, ¶ 11.17, WTO Doc. WT/DS155/R (adopted Feb. 16, 2001).

臺灣大學學術期刊資料庫

obligations in order to protect certain overriding interests.[97] However, as the improper use of safeguard measures may lead to trade protection, members further concluded the AoS based on Article 19 of GATT to provide more specific guidelines and restrictions on the actions of members in taking safeguard measures. Article 11.1(b) stipulates that a Member shall not seek, take or maintain any VERs, orderly marketing arrangements (hereinafter "OMAs") or any other similar measures on the export or the import side. In terms of textual provisions, Article 11.1(b) of the Safeguards Agreement also describes the prohibitions in a non-exhaustive list. The key to determining whether a VIE is in breach of Article 11.1(b) of AoS is to identify whether it falls within the scope of "any other similar measures". There is no precedent concerning setting criteria for "any other similar measures", and the analysis still needs to be based on the rules of treaty interpretation established by the VCLT. The wording of "any other similar measures" is abstract, which needs to be considered in the context of the treaty and in the light of its object and purpose,[98] which are the methods stipulated in Article 31 of the VCLT.

1. Context — According to Article 11.1(b) of AoS, "any other similar measures" need to share some similar elements with VERs or OMAs. Article 11.1(b) of AoS used the term "similar" rather than "same" which means that lenient interpretation is inherent in the application of this article. Thus, it is sufficient that the challenged measures are similar to VERs or OMAs in several, but not all, respects. In addition, footnote 4 to the AoS offers some examples of "any similar measures", like "export moderation, export-price or import-price monitoring systems, export or import surveillance, compulsory import cartels and discretionary export or import licensing schemes, any of which afford protection." It may be noted that "any other similar measures" can take a variety of forms. Therefore, the term "any other similar measures" might be taken to encompass virtually any non-tariff import- or export- related measures that operate to afford protection.[99] The primary factor that should be considered in determining whether a measure falls into this residual category is its effects.

As mentioned, VIEs have been understood as counterparts of VERs which refer to the "voluntary" limits placed by an exporting country or industry on the quantities of products to be exported to certain countries without the imposition of complementary import quotas.[100] VIEs could be deemed as a kind of reverse restriction on third countries due to the purchase expansions between the parties. VIEs are not only a formally quantitative and discriminatory arrangement with VERs but also have the effect of

[97] *See* HOEKMAN & KOSTECKI, *supra* note 56, at 413.
[98] *See* AUST, *supra* note 30, at 235.
[99] *See* ALAN O. SYKES, THE WTO AGREEMENT ON SAFEGUARDS: A COMMENTARY 250 (2006).
[100] *See* Misao Tatsuta, *Voluntary Export Restraints — Implementation and Implications*, 49 RABEL J. COMPAR. & INT'L PRIV. L. 328, 328 (1985).

臺灣大學學術期刊資料庫

protecting the domestic industry of one party to the agreement. Therefore, there are similarities in form and effect between VIEs and VERs.

2. Object and Purpose — One of the objectives of Members in the Uruguay Round was to curtail the resort to so-called "grey area" measures, i.e., legal arrangements used to circumvent GATT prohibitions on discriminatory and trade-restrictive measures.[101] The measures mentioned in Article 11 can therefore be seen as a reflection of the "grey area" measures, and "any other similar measures" should also have the features of "grey area" measures. In other words, providing VIEs belong to the "grey area" measures, they could easily be identified as "any other similar measures". The nature of "grey area" measures was defined by the GATT Secretariat in a 1987 Note, as follows:

> Concerning the nature of such measures it would appear, in general, that:
> (a) Many of the so-called 'grey-area' measures are bilateral restraint arrangements of a VER or OMA type (usually in the form of quantitative restrictions, surveillance systems or price undertakings) concluded between importing and exporting countries; they may take the form of export forecasts by the exporting country. (Nature I)
> (b) The extent of government participation varies considerably, some of the cases being industry-to-industry arrangements where the specific role of government is not always clear. In one case the action taken changed from an industry-to-industry arrangement to an Article XIX action and then to a VER. (Nature II)
> (c) Importing countries have also taken unilateral actions affecting imports, involving tariff increases, quota restrictions or price monitoring in relation to imports from particular sources without notification or reference to GATT provisions. (Nature III)
> (d) The actions are usually introduced for a period ranging from one to five years. The arrangements sometimes, but not always, involved an element of degressivity providing more liberal conditions of market access. (Nature IV)[102]

On the face of it, VIEs may differ from or even take the opposite form of these features, but when examined from the perspective of the third

[101] *See* Geraldo Vidigal, *The Return of Voluntary Export Restraints? How WTO Law Regulates (and Doesn't Regulate) Bilateral Trade-Restrictive Agreements*, 53(2) J. WORLD TRADE 187, 196 (2019).
[102] GATT Secretariat, *"Grey-Area" Measures*, GATT Doc. MTN.GNG/NG9/W/6, at 2 (Sept. 16, 1987).

臺灣大學學術期刊資料庫

countries using these features, they are still essentially "grey area" measures in disguise. Firstly, although VIEs manifest themselves as bilateral expansion arrangements between the parties to them, the presence of VIEs, for third countries outside these agreements, will restrict trade between them as exporting countries and the importing countries to these agreements, constituting a restrictive arrangement. Secondly, Nature II emphasizes the role of the government, more or less, in the implementation of "grey area" measures. As discussed earlier, VIEs have the potential for government intervention. VIEs are not merely exclusively inter-industry arrangements from conclusion to implementation, and government involvement cannot be completely ruled out to achieve their objectives of them when the import market is relatively stable. Thirdly, VIEs impose additional volume requirements on the importing countries, which is a choice with no choice for the importing countries. VIEs are usually to solve protocol export surges or trade imbalances. The exporters of VIEs usually have economic and political advantages and will take unilateral measures to promote the acceptance of VIEs by importers, which may violate existing trade rules. For example, before the conclusion of the China–US ETA, the US had unilaterally raised tariffs on Chinese products and conducted several rounds of trade investigations. Finally, VIEs are temporary, and the quantitative target requirements of VIEs do not involve the inevitable improvement of market access conditions. Accordingly, VIEs can be viewed as belonging to the "grey area" measures and "any other similar measures" intended to be prohibited in the Uruguay Round.

D. Non-Violation

Under the WTO legal system, even if the measures at issue do not explicitly violate specific WTO rules, a member may bring a non-violation complaint before the WTO dispute settlement mechanism (DSM) when the measures cause damage to its legitimate interests. Under the GATT, the non-violation complaint arose from Article 23.1(b), which permits a claim of nullification or impairment of a benefit accruing under GATT to be brought, "whether or not" there is a conflict or inconsistency with its provisions, and this concept has been extended into GATS albeit with some differences in application.[103] As mentioned above, VIEs are "grey area" measures that do not directly and explicitly violate the provisions of WTO agreements. And other WTO members as the third parties to VIEs could attempt to be regulated through a non-violation complaint. In *Japan — Film*, the Panel held that the text of Article 23.1(b) establishes three elements that a

[103] *See* Locknie Hsu, *Non-Violation Complaints: World Trade Organization Issues and Recent Free Trade Agreements*, 39(2) J. WORLD TRADE 205, 206 (2005).

臺灣大學學術期刊資料庫

complaining party must demonstrate to make out a cognizable claim under Article 23.1(b): (1) application of a measure by a WTO Member; (2) a benefit accruing under the relevant agreement; and (3) nullification or impairment of the benefit as the result of the application of the measure.[104] This part will proceed with analysis by considering in turn each of these three elements and conclude that VIEs may lead to non-violation complaints from other WTO members.

1. Whether VIEs Constitute Measures Capable of Giving Rise to Non-Violation Complaints — The element (1) established in the *Japan — Film* case above suggests that the measure should be attributable to the conduct of the WTO member, taking into account the possible manner in which the VIEs were implemented domestically and the extent of governmental intervention by the WTO members. A VIE, as an agreement, does not directly constitute a measure, but actions taken by the parties in the course of the performance of the VIE may establish a so-called measure. The quantitative objectives of VIEs are mostly achieved by means of state trading[105] or import subsidy[106], which are not directly imposed on importers to maintain the prima facie compliance of the measures with WTO rules. There is no doubt that state trading is subject to very strong government intervention and can be classified as a conduct of the WTO member. However, when the goal of import expansion is accomplished indirectly through active import promotion such as import subsidy, the measure then does not create a legally binding obligation, the volume of imports remains in the hands of the dominant importer and the role of the member government is relatively diluted. Thus, it is also possible that the legal implications of the different ways in which VIEs can be implemented do not depend directly or exclusively on the conduct of the WTO member.

As for the import subsidy and other non-binding actions, the Panel in *Japan — Film* clarified that they may constitute a measure within the meaning of Article 23.1(b) because a government policy or action need not necessarily have a substantially binding or compulsory nature for it to entail a likelihood of compliance by private actors in a way so as to nullify or impair legitimately expected benefits within the purview of Article 23.1(b).[107] Consequently, the Panel was open to giving a broad definition of the term measure for purposes of Article 23.1(b), which considers whether or not a non-binding government action has an effect similar to a binding one. Therefore, there is not much of an obstacle for actions taken by WTO

[104] *See* Panel Report, *Japan — Measures Affecting Consumer Photographic Film and Paper*, ¶ 10.41, WTO Doc. WT/DS44/R (adopted Apr. 22, 1998) [hereinafter *Japan — Film* Panel Report].
[105] *See* Qin, *supra* note 37, at 468.
[106] *See* WBG, *supra* note 5, at 142.
[107] *See Japan — Film* Panel Report, *supra* note 104, ¶ 10.49.

臺灣大學學術期刊資料庫

members to implement VIEs to fall within the scope of a measure required in Article 23.1(b) in legal form.

2. Whether the Third Party Has a Benefit Under the Relevant WTO Agreements Should Be a Legitimate Expectation — According to the Panel in *Japan — Film*, in all GATT cases dealing with Article 23.1(b), except one, the claimed benefit was that of legitimate expectations of improved market-access opportunities arising out of relevant tariff concessions.[108] And then, the third parties need to know what benefits they could legitimately have expected from the concessions with the importing countries to VIEs. However, the Panel in *EC — Asbestos* noted that previous panels approached the question differently, insofar as they appear to have assumed the existence of a benefit in the form of improved market access opportunities and then considered whether a party could have had a legitimate expectation of a given benefit.[109] Thus, the benefit is assumable as long as there are tariff concessions between the third parties and the importing countries to VIEs.

3. Whether There Is Nullification or Impairment of the Benefit as the Result of the Application of the Measure — Reviewing this element, according to the *Japan — Film*, the complainant need not prove an adverse impact on trade flows (presumably, a decline in its export volume or market share), only that the competitive balance has been altered.[110] As mentioned above, there will be changes in the competitive opportunities if the domestic market demand in importing countries has not generated a corresponding increase under a VIE, which will be a nullification or impairment of the benefit. But, the third element in essence refers to causality. The Panel in *Japan — Film* considered that:

> Four issues related to causation merit general discussion. First, the question of the degree of causation that must be shown—"but for" or less. Second, the relevance of the origin-neutral nature of a measure to causation of nullification or impairment. Third, the relevance of intent to causality. And fourth, the extent to which measures may be considered collectively in an analysis of causation.[111]

As for the first issue, the parties to VIEs would make more than a *de minimis* contribution to nullification or impairment. The reason for this is that not only is the initial conclusion of VIEs decided by the government of the party to the agreement, but also that although the implementation of the

[108] *Id.* ¶ 10.62.
[109] Panel Report, *European Communities — Measures Affecting Asbestos and Products Containing Asbestos*, ¶ 8.285, WTO Doc. WT/DS135/R (adopted Apr. 5, 2001).
[110] *See* Robert W. Staiger & Alan O. Sykes, *Non-Violations*, 16 J. INT'L ECON. L. 741, 750 (2013).
[111] *Japan — Film* Panel Report, *supra* note 104, ¶ 10.83.

臺灣大學學術期刊資料庫

agreement is carried out specifically by the private entity, the private entity's actions, whether based on active importation arising from incentives or passive importation due to the presence of potential penalties, are the result of measures that may be taken by the government. In respect of the second issue, in terms of the neutrality of the measures involved, VIEs clearly do not meet this requirement and already create de jure discrimination between the parties to the agreement and those outside the agreement, as discussed above and not repeated. The third issue is the relevance of intent to causality. The Panel in *Japan — Film* noted, however, that Article 23.1(b) does not require proof of intent of nullification or impairment of benefits by a government adopting a measure. What matters for purposes of establishing causality is the impact of a measure, i.e., whether it upsets competitive relationships.[112] For a VIE, while the immediate intention is to expand imports from one party to another agreement, while the intention to restrict imports from other WTO members may not be present or at least not detectable on the surface, changes in the terms of competition are easily detectable in the trading system. This is because whether positive or negative measures are taken to promote the volume of imports from a particular party to an agreement, they will result in relatively preferential treatment for this party. Finally, the Panel agreed that examine the impact of the measures in combination as well as individually because a measure, when analyzed in isolation, may have only very limited impact on competitive conditions in a market, but may have a more significant impact on such conditions when seen in the context of—in combination with—a larger set of measures.[113] In the implementation of VIEs, whether a single measure or a series of measures are adopted, based on the consistency of the objectives of the measures, there is limited margin for discussion as to whether the combination has little impact on the determination of causality between the measures and the nullification or impairment of benefits. It can be found that there is causality between the VIEs and the nullification or impairment of the benefits.

Then, for the burden of proof, due to the fact that Article 23.1(b) should remain an exceptional remedy,[114] the Panel in *Japan — Film* considered that the complaint, with respect to its claim of non-violation nullification or impairment under Article 23.1(b), bears the burden of providing a detailed justification for its claim in order to establish a presumption that what is claimed is true.[115]

First, the complainant has to prove that there is an application of a measure by the importing country. This measure certainly encompasses a law or regulation enacted by a government. In the Panel's view, it is broader than

[112] *Id.* ¶ 10.87.
[113] *Id.* ¶ 10.88.
[114] *Id.* ¶ 10.37.
[115] *Id.* ¶ 10.32.

臺灣大學學術期刊資料庫

that and includes other governmental actions short of legally enforceable enactments and actions taken by private parties may be deemed to be governmental if there is sufficient government involvement with it.[116] And the *EC — Asbestos* Appellate Body looked to the text of Article 23.1(b) and found that the use of the word "any" suggests that measures of all types may give rise to such a cause of action.[117] For the complainant of VIEs, documents issued by the government of the importing country or quasi-governmental entities[118] with various forms of expanded procurement from the other party may be proffered as evidence of the existence of the measure, so long as the complainant demonstrates that the measure does in fact result in nullification or impairment of expected benefits.[119] Of course, the importing country of VIEs may also adopt unwritten measures whose "existence and precise contours are uncertain," and which the complainant could try to raise, as this type of measure was challenged successfully in *Japan — Trade in Semi-conductors*.[120] Second, the existence of a product-specific tariff concession between the complainant and the importing country needs to be demonstrated to ensure that the complainant has legitimate expectations of a benefit.[121] This requirement is more objective and can be evidenced by the documentation of past trade negotiations between them. Third, as mentioned before, evidence of competitive balance has been altered should be proffered. According to the Panel in *Japan — Film*, in an Article 23.1(b) case the issue is whether the relative conditions of competition which existed between products as a consequence of the relevant tariff concessions have been upset.[122] For VIEs, the relative conditions of competition should refer to the one between the complainant and the exporting country.

E. Other Rules That May Be Violated

In addition to the above-mentioned rules which may be violated, there are other WTO rules which may be involved in some specific cases. It may also be inconsistent with Article 10 and Article 17 of the GATT when, for example, the importing government resorts to state trading in order to fulfil the purchase obligations under the VIE. Insofar as the importing government's instructions to its State-trading firms regarding the targeted purchases are kept confidential, it may violate Article 10 which performs as

[116] *Id.* ¶ 10.43-.56.
[117] *See* Appellate Body Report, *European Communities — Measures Affecting Asbestos and Products Containing Asbestos*, ¶ 188, WTO Doc. WT/DS135/AB/R (adopted Apr. 5, 2001).
[118] *See Japan — Film* Panel Report, *supra* note 104, ¶ 10.90.
[119] *Id.* ¶ 10.60.
[120] *See* Cherise Valles et al., *Challenging Unwritten Measures in the World Trade Organization: The Need for Clear Legal Standards*, 22 J. INT'L ECON. L. 459, 459-62 (2019).
[121] *See Japan — Film* Panel Report, *supra* note 104, ¶ 10.72-.81.
[122] *Id.* ¶ 10.86.

臺灣大學學術期刊資料庫

a provision of fundamental importance as the embodiment of the principles of transparency and due process in the WTO legal system[123] and requires publishing all laws, regulations, judicial decisions and administrative rulings of general application pertaining to trade. Furthermore, Article 17 provides that a State enterprise shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment. Even though GATT was never expected to comprehensively regulate the activities of State Trading Enterprises in a way that would eliminate all of the potential obstacles to international trade they might cause,[124] Article 17 can still be applied and play a role in practice. Especially, there are differential treatments resulting from VIEs alleged to constitute discrimination contrary to the general principles of the GATT which can be identified under Article 1.1.[125]

IV. THE COMPATIBILITY OF VIES UNDER WTO PRINCIPLES

VIEs can also be regulated by WTO legal principles. Among them, the principle of good faith has the potential to regulate them. Although the principle of good faith is abstract and does not have a definite concept in international law, and is still being enriched and developed, it has become a fundamental value and principle of international law, which can guide and regulate the behavior of members of the international community. Good faith might be described as a principle of WTO law[126] and has been widely applied in WTO dispute settlement practices.[127] In international law, good faith is an inherently abstract notion and may thus find expression in various ways. The principle of good faith thus conceived finds manifestation in related principles or concepts such as legitimate expectations, *pacta sunt servanda*, estoppel, acquiescence, equity, *abus de droit* and others.[128] As for a VIE, it might involve a breach of the prohibition of *abus de droit*.

WTO practice has sometimes made use of the notion of *abus de droit* as an application of the general principle of the law of good faith, and the

[123] *See* Padideh Ala'i, *From the Periphery to the Center? The Evolving WTO Jurisprudence on Transparency and Good Governance*, 11 J. INT'L ECON. L. 779, 780 (2008).
[124] *See* Andrea Mastromatteo, *WTO and SOEs: Article XVII and Related Provisions of the GATT 1994*, 16(4) WORLD TRADE REV. 601, 618 (2017).
[125] *See* Appellate Body Report, *Canada — Measures Relating to Exports of Wheat and Treatment of Imported Grain*, ¶¶ 110-12, WTO Doc. WT/DS276/AB/R (adopted Sept. 27, 2004).
[126] *See* Andrew D. Mitchell, *Good Faith in WTO Dispute Settlement*, 7 MELB. J. INT'L L. 339, 352 (2006).
[127] For example, Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (adopted Nov. 21, 2001) [hereinafter *US — Shrimp* Appellate Body Report]; Appellate Body Report, *European Communities — Trade Description of Sardines*, WTO Doc. WT/DS231/AB/R (adopted Oct. 23, 2002).
[128] *See* Andreas R. Ziegler & Jorun Baumgartner, *Good Faith as a General Principle of (International) Law, in* GOOD FAITH AND INTERNATIONAL ECONOMIC LAW 9, 12-13 (Andrew D. Mitchell et al. eds., 2015).

臺灣大學學術期刊資料庫

doctrine of *abus de droit* was only explicitly recognized in the *US — Shrimp* case.[129] In international law, the doctrine of *abus de droit* forbids a state from "exercising a right either in a way which impedes the enjoyment by other States of their own rights or for an end different from that for which the right was created, to the injury of another State."[130] The *US — Shrimp* Appellate Body agreed that one application of the principle of good faith, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right "impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably."[131]

Sovereignty denotes the right and power to control over internal governance, control of borders, and control over relations with other sovereign entities.[132] Simply put, under the concept of sovereignty, states enjoy broad powers to pursue and enforce regulatory interests in an economic context and enjoy freedom from any unilateral constraints and undue interference imposed upon them by other states.[133] More specifically, trade policy could fall within a country's economic sovereignty and within that sovereignty countries have the freedom to decide what trade policy to adopt, but this sovereign act is not free from any restrictions. When the sovereign power allows for the exercise of discretion, the discretion must be exercised in good faith and "in conformity with the spirit of the law and with due regard for the interests of others."[134] The control and coordination of members' trade policies is an important aspect of the WTO legal regime, and it is the result of each member agreeing to self-impose limits on the economic sovereign powers or rights it holds, which is implicitly a requirement to prevent members from abusing their trade rights.

With the current multilateralization of international trade relations and the expansion of trade regulation, trade agreements between WTO members inevitably have an impact on other members, which requires members to uphold the principle of good faith and restrict their freedom of trade policy to a certain extent to prevent negative impacts on other members. VIEs can hardly avoid involving trade management of one country's imports into another country in order to fulfil purchase targets, but this could have a trade-restrictive effect on other members to the detriment of their trade benefits.

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[129] *See* MARION PANIZZON, GOOD FAITH IN THE JURISPRUDENCE OF THE WTO: THE PROTECTION OF LEGITIMATE EXPECTATIONS, GOOD FAITH INTERPRETATION AND FAIR DISPUTE 89 (2006).
[130] *See* ANDREW D. MITCHELL, LEGAL PRINCIPLES IN WTO DISPUTES 119 (2010).
[131] *See US — Shrimp* Appellate Body Report, *supra* note 127, ¶ 158.
[132] *See* Ronald A. Cass, *Trade and Sovereignty: What You Can See by Looking*, 45 HARV. J. L. & PUB. POL'Y 17, 18-19 (2022).
[133] *See* MATTHAIS HERDEGEN, PRINCIPLES OF INTERNATIONAL ECONOMIC LAW 77 (2d ed. 2016).
[134] *See* CHARLES T. KOTUBY JR. & LUKE A. SOBOTA, GENERAL PRINCIPLES OF LAW AND INTERNATIONAL DUE PROCESS: PRINCIPLES AND NORMS APPLICABLE IN TRANSNATIONAL DISPUTES 118 (2017).

臺灣大學學術期刊資料庫

As discussed before, the trade benefits are legitimate interests[135] and legitimate expectations[136] arising out of relevant tariff concessions. While not directly negating these trade benefits, VIEs *de facto* change the conditions of competition by increasing the preferential treatment of particular members, to undermine the trade benefits that other WTO members can expect. Although VIEs can temporarily alleviate the trade deficit between the parties to the agreement, it effectively provides a market for the exporters of the agreement at the expense of the trade opportunities of the other WTO members, to null or impair their benefits. Hence, the parties to VIEs might not exercise their right to trade as embedded in sovereignty honestly, sincerely, and reasonably.[137]

In several decisions, the Panel and the Appellate Body have held that good faith is to be presumed; but the presumption does not imply in all cases that the complainant has the full and complete burden of proof.[138] However, establishing a prima facie case by the complainant is still required.[139] In *Korea — Government Procurement*, the Panel concluded that the affirmative proof should be that measures have been taken that frustrate the object and purpose of the treaty and the reasonably expected benefits that flow therefrom, without proving actual bad faith.[140] Observing that both the non-violation complaint and the good faith principle involve the protection of the legitimate expectations of third parties and that non-violation complaint has been regarded as a reflection of the principle of good faith in WTO law.[141] On the basis of the correlation identified in practice,[142] there are similarities between the two in terms of the burden of proof. To some extent, the aforementioned evidentiary requirements for a non-violation complaint can also apply to the claims based on the principle of good faith.

In summary, tensions exist between VIEs and WTO rules and principles. But one issue that cannot be ignored is whether the general exceptions or the national security exception can be invoked to justify departure from WTO obligations. This article believes it is rather difficult for the respondent to invoke the exception rules. Since this is to be assessed on a case-by-case basis,[143] it is pertinent to observe how the US would act under the China–US ETA. For the general exceptions, "public morals", provided for in Article

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[135] *See* Ziegler & Baumgartner, *supra* note 128, at 32.
[136] *See* PANIZZON, *supra* note 129, at 91.
[137] *See* Ziegler & Baumgartner, *supra* note 128, at 32.
[138] *See* Helge Elisabeth Zeitler, *'Good Faith' in the WTO Jurisprudence—Necessary Balancing Element or an Open Door to Judicial Activism?*, 8(3) J. INT'L ECON. L. 721, 724-25 (2005).
[139] *See* Panel Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products (Recourse to Article 21.5 by Malaysia)*, ¶ 5.19, WTO Doc. WT/DS58/RW (adopted Nov. 21, 2001).
[140] *See* Panel Report, *Korea — Measures Affecting Government Procurement*, ¶ 7.99, WTO Doc. WT/DS163/R (adopted June 19, 2000).
[141] *See* Mitchell, *supra* note 126, at 366; PANIZZON, *supra* note 129, at 143.
[142] *See* PANIZZON, *supra* note 129, at 151.
[143] *US — Shrimp* Appellate Body Report, *supra* note 127, ¶ 159.

臺灣大學學術期刊資料庫

20(a) of the GATT, may be a choice for the US as what it did in *US — Tariff Measures*,[144] because the China–US ETA was reached in the same broad context of the trade war. Previous cases have shown that WTO members should have some scope to define and apply for themselves the concept of public morals in their respective territories and the right to determine the level of protection that they consider appropriate.[145] However, it may still be questionable what and how "public morality" is protected by measures taken in VIEs for economic reasons, such as reducing trade deficits.[146] Even if the US could show that VIEs would protect a certain public morality, there is uncertainty as to whether VIEs are necessary to protect it. Particularly, the trade volume involved in the China–US ETA is enormous, which has significant effects on international trade. A large category of products is covered in VIEs, apparently without careful consideration of the impact of these products themselves on public morality, which makes the relationship between VIEs and public policy objectives too indirect. [147] In *US — Tariff Measures*, after a holistic and specific assessment, the Panel considered that the US has not provided an explanation that demonstrates how the measures contribute to the public morals objective as invoked by the US.[148] It also demonstrates, in part, the difficulty of proving that a measure taken largely for economic reasons makes a substantial contribution to the objective of protecting public morals. More clearly, as discussed above, VIEs also constitute "disguised restrictions on international trade" on third parties and hardly satisfy the requirements of the chapeau of Article 20 of the GATT. For the national security exception, the US will not generally invoke it because there is no "war" or "emergency in international relations"[149] among the parties involved in VIEs. There is an absence of the objective state of affairs to invoke Article 21 of the GATT.

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[144] *See* Panel Report, *United States — Tariff Measures on Certain Goods from China*, ¶ 7.127-.128, WTO Doc. WT/DS543/R (circulated Sept. 15, 2020) [hereinafter *US — Tariff Measures* Panel Report].

[145] *See* Panel Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 6.461, WTO Doc. WT/DS285/R (adopted Apr. 20, 2005); *China — Publications and Audiovisual Products* Panel Report, *supra* note 83, ¶ 7.759.

[146] *See US — Tariff Measures* Panel Report, *supra* note 144, ¶ 7.114.

[147] *Id.* ¶ 7.177.

[148] *Id.* ¶ 7.229.

[149] In *Russia — Traffic in Transit*, the panel considered that political or economic differences between Members are not sufficient, of themselves, to constitute an emergency in international relations; and an emergency in international relations would, therefore, appear to refer generally to a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state. *See* Panel Report, *Russia — Measures Concerning Traffic in Transit*, ¶¶ 7.75-76, WTO Doc. WT/DS512/R (adopted Apr. 26, 2019).

臺灣大學學術期刊資料庫

V. CONCLUSION

It is important to examine the WTO compatibility of VIEs. VIEs are "grey area" measures in the WTO legal system, and although they are not explicitly prohibited by the WTO legal rules, as is the case with the VERs, they may still be restricted through the interpretation of the WTO rules and the use of the principle of good faith. If VIEs have trade-restrictive effects in practice, to the detriment of third-party rights, they can be challenged in WTO litigation.

It is possible that if the importing country is truly expanding its imports from the other party voluntarily, it would be difficult to argue that this is WTO inconsistent. But this is too idealistic and there are some barriers. On the one hand, VIEs are not easy to implement without violating WTO law. Even if the importing country is truly voluntary, the import targets in VIEs cannot be achieved without implementation by its domestic importers, and guidance or intervention in the commercial conduct of its domestic importers is then required. In the absence of explicit VIEs, importing countries may argue that there is no intervention with domestic importers, but once there are written VIEs, government intervention could be presumed. On the other hand, if the importing country is truly voluntary, is it necessary for it to adopt written form VIEs to place legal shackles on itself? Once VIEs have been adopted in writing, it is an indication that the implementation of VIEs is unlikely to be entirely voluntary. When the import targets are set in the agreement, the will of the importing country to expand imports depends not only on itself but is also subject to treaty obligations and monitoring by the other party.[150] As previously analyzed, VIEs belong to "grey area" measures, the essence of which is to circumvent international trade obligations by means that do not clearly violate WTO rules. It was because of the difficulty of identifying the true intentions of the parties in "grey area" measures and the lack of clear rules in the GATT to regulate them that the participants of the Uruguay Round decided to outlaw them to prevent serious distorting effects on trade.[151] The same should apply to VIEs.

Similar to VERs, VIEs are also the products of international power politics operating to inject political factors into international trade relations, distorting multilateralism into bilateralism or unilateralism. And they are illegal forms for the WTO members to implement settlements in trade wars by violating the WTO law. The resurgence of VIEs in the multilateral trading system is due in large part to the fact that the WTO legal system is not

[150] *See* Ernst-Ulrich Petersmann, *Grey Area Policy and the Rule of Law*, 22(2) J. WORLD TRADE 23, 29 (1988).

[151] *See* Yong-Shik Lee, *Revival of Grey-Area Measures? The US–Canada Softwood Lumber Agreement: Conflict with the WTO Agreement on Safeguards*, 36(1) J. WORLD TRADE 155, 156 (2002).

臺灣大學學術期刊資料庫

sufficiently binding on members to completely prohibit them from using non-legal means to address trade concerns outside the WTO system, providing a loophole in the system for WTO members to resort to "grey area" measures in seeking to regulate trade. Although the vast majority of "grey area" measures have been restricted, some are still hidden and lurking in the multilateral trading system. In this regard, WTO members need to declare them unlawful by way of an understanding or decision, specifying them as a quantitative restriction measure under Article 11.1 of the GATT or as "any other similar measures" under Article 11.1(b) of AoS.

In so doing, it would also help eliminate asymmetrical trading arrangements in the international community due to countries' unequal economic and political power, provide members with a legal tool to reject VIEs and avoid accepting similar agreements in trade negotiations. This is because, although VIEs constitute a violation of WTO law, a party that "voluntarily" expands its imports will generally not sue the other party in the WTO. In terms of the China–US ETA, there are several explanations: firstly, as previously analyzed, it is profitable for China to accept the US proposal to reach VIEs, through which China hopes to exchange for the US not resorting to or even eliminating tariff measures. Secondly, for the third parties, China and the US are responsible as parties to VIEs for the trade restrictions caused by VIEs and the damage to their benefits. Both China and the US may not want the WTO incompatibility of VIEs to be confirmed in the multilateral trading system. Thirdly, the conclusion of VIEs, whether voluntary or not, demonstrates the consent of the parties. As with VERs, being the parties to the agreement, neither China nor the US would likely challenge their own agreement.[152] In other words, VIEs embodied in a legally binding instrument ("treaty") this agreement itself, as between its parties, may prevent any "GATT liability" of the parties towards each other.[153]

It can be challenging to fulfil VIEs in practice, with the achievement of trade figures depending on different factors such as the consumption capacity of the importing country, and the supply capacity of the exporting country, and may also be affected by unanticipated external factors. The fulfilment of the China–US ETA has been affected by the pandemic as well as inflation, which has instead resulted in a renewed widening of the trade deficit between the US and China. VIEs might not be an effective and sustainable trade tool to resolve trade disputes between members, but rather has side effects. What the disputing parties should do is negotiate on the basis of the rules under the WTO multilateral trading system and actively promote the reform of WTO

[152] *Id.* at 163.
[153] *See* John H. Jackson, *Consistency of Export-Restraint Arrangements with the GATT*, 11(4) WORLD ECON. 485, 492 (2005).

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rules to respond to their appeals instead of resorting to managed trade measures.

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