

Origins of the Sino-American Trade War: A Case Study of Three Shakespearean Proverbs on Expectations

EDITORIAL NOTE

This Obiter Dictum was subject to a single-blind peer review, in which the anonymity of the reviewer was guaranteed.

There is much to say about the trade war between America and China. So much to say that it is an honour to have authored *Trade War: Causes, Conduct, and Consequences of Sino-American Confrontation*, a 710-page analysis, published contemporaneously with this *Obiter Dictum*.¹ The thesis of that book is straightforward: America and China are locked in a trade war to which there is no obvious end in sight. The causes of which lie in their different values; the conduct of which extends far beyond commerce; and the consequences of which are dangerous. The thesis of this essay complements the thesis of that book and, in a sense, lines up chronologically before it. Here, the question addressed is what are the origins of the Trade War? Succinctly put, the answer – the complementary thesis – is *disappointed expectations*. In other words, the origins of the Trade War date back nearly 75 years to the expectations surrounding China's effort to enter (or re-enter – given its ancient history) the world trade system. Those expectations were inflated, even unrealistic. They remain unfulfilled. Hence, unsurprisingly, in retrospect, disappointed expectations led to an outright, across-the-board commercial conflict between the Eagle and the Dragon. Three of Shakespeare's proverbs (quoted below) aptly summarise this *expectations* narrative.

The starting point for this expectations narrative is 30 October 1947. That was the birthdate of the modern multilateral trade system through the signing of the General Agreement on Tariffs and Trade (GATT).²

¹ See BHALA, CAUSES, CONDUCT AND CONSEQUENCES OF SINO-AMERICAN CONFRONTATION (2023), <https://cap-press.com/books/isbn/9781531027438/Trade-War>.

² See 1 Raj Bhala, Modern GATT Law: A Treatise on the Law and Political Economy of the General Agreement on Tariffs and Trade and Other World Trade Organization Agreements, ch. 1 (Thomson Sweet & Maxwell eds., 2nd edition, 2013), www.sweetandmaxwell.co.uk/Catalogue/ProductDetails.aspx?recordid=5273.



GATT, which entered into force on 1 January 1948, was both the institutional architecture and constitutional treaty for world trade until 1 January 1995 when the World Trade Organization (WTO) was born. China, along with the United States, as well as India and Pakistan, was one of the 23 original GATT contracting parties. But which “China” was that signatory?

It was the “China” governed by the Nationalists under the *Kuomintang* (KMT) under Generalissimo Chiang Kai-Shek (1887-1975).³ The KMT lost the 1927-1949 Chinese Civil War and fled to the then island of Formosa – now known as Taiwan.⁴ On 1 October 1949, the Chinese Communist Party (CCP), led by Chairman Mao Zedong (1893-1976), hoisted the Red Flag over Tiananmen Square.⁵ A year later, in October 1950, a mysterious telex was sent from Taiwan to the GATT Secretariat – the headquarters of GATT – in Geneva. The telex said “China” was withdrawing from GATT.⁶

Mao’s government, in control of Mainland China, but not Taiwan, did not pay much attention to the withdrawal that purported to cover both the Mainland and Taiwan. The CCP had little interest in being part of what would quickly evolve into a post-Second World War, Cold War, capitalist trading system. Moreover, as famed Mao biographer Ross Terrill (1938-) writes of the Chairman:

[. . .] Ambivalence marked his [Mao’s] view of America. [. . .]

The root of Mao’s ambivalence lay in the mixed feelings he had had toward the West as a young man. The U.S. was both capitalist and non-Chinese. It was hard for Mao to bring himself to rely on such a force. The U.S. was advanced, yes, but maybe also sated by its wealth and comforts, maybe doomed by Marx’s “laws” to fall even quicker than it had risen.⁷

The *KMT* worried that if its “China” remained in GATT, then – per GATT Article I:1 – industries on the Mainland would receive the most favoured nation (MFN) treatment from all other contracting parties.⁸ At the time, Taiwan was relatively less industrialised.

³ See John King Fairbank, *The United States and China*, Chapters 9-11 (Harvard University Press ed., 4th edition, 1983) [Hereinafter, Fairbank].

⁴ See e.g., Barbara W. Tuchman, *Stilwell and the American Experience in China, 1911-1945* (The Macmillan Company ed., 1971), for a classic account of how the American war effort on behalf of the Nationalists was wasted; Edgar Snow, *Red Star Over China* (Victor Gollancz ed., 1st revised and enlarged edition, 1968), for a classic, first-hand account of the Chinese Civil War by the first Westerner to meet and interview Chinese Communist officials.

⁵ Fairbank, *supra* note 3, ch. 13-14.

⁶ See 1 Raj Bhala, *International Trade Law: A Comprehensive Textbook*, ch. 19, 423 n.2 (5th edition, 2019), <https://cap-press.com/books/isbn/9781531014711/International-Trade-Law-A-Comprehensive-Textbook-Four-Volume-Set-Fifth-Edition>, [Hereinafter, Bhala, *Trade Textbook*].

⁷ Ross Terrill, *Mao: A Biography* 396 (Stanford University Press ed., revised and expanded edition, 1999).

⁸ On the MFN rule, see 1 Bhala, *supra* note 6, ch. 28.

Hence, the *KMT* essentially sought what might be called infant industry protection and import substitution by keeping “China” out of GATT.⁹

Accordingly, China, as in Mainland China, was out, and so was Taiwan. This would remain true until 11 December 2001,¹⁰ when China joined the WTO, as did Taiwan one month later on 11 January 2002.¹¹ History, of course, is replete with ironies. In retrospect, Taiwan would have benefitted from the non-discrimination and market access rules of GATT as it raced far ahead of the Mainland to industrialise in the decades immediately following the War. It became an export powerhouse – one of the East Asian Four Tigers (along with Hong Kong, Korea, and Singapore).¹² Mainland Chinese trade policy was, after 1950 until the late 1970s, autarky, *i.e.*, no trade.¹³ To be sure, the Mainland did engage in imports and exports, but not with the U.S. or most other countries in the Western Alliance, nor with India (with which it fought a border war in 1962).¹⁴ Rather, the Mainland sought to be self-reliant, and its interest in trade, if any, was confined to other Socialist or Communist Countries, like North Korea after the 1950-53 Korean War, and the former Soviet Union until the Sino-Soviet split in 1961. Amidst its self-imposed isolation and inward-looking economic policies, China from 1966 to 1976 underwent a Cultural Revolution. Its hideous consequences – including for human rights – taught some senior CCP leaders that they needed to reconsider their relationship with the world trading system. Even Chairman Mao, who died in 1976, agreed to the February 1972 *Shanghai Communiqué* with U.S. President Richard Nixon (1913-1994) and his Secretary of State, Henry Kissinger (1923-).

The tide against international trade turned for China Deng Xiaoping (1904-1997) – China’s pragmatic top leader from December 1978 to November 1989. Famous for catchy progressive phrases like, “It doesn’t matter if a cat is black or white, so long as it catches mice”; “Reform is China’s second revolution”; and “To get rich is glorious”,¹⁵ he catalysed a series of market-oriented changes to the Mainland’s sclerotically

⁹ On modern Taiwanese economic history, see Peter C. Chow, *Taiwan in the Global Economy: From an Agrarian Economy to an Exporter of High-Tech Products* (Praeger Publishing ed., 2002).

¹⁰ See World Trade Organization, *China and the WTO*, https://www.wto.org/english/thewto_e/countries_e/china_e.htm.

¹¹ See World Trade Organization, *Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei) and the WTO*, https://www.wto.org/english/thewto_e/countries_e/chinese_taipei_e.htm.

¹² See The World Bank, *The East Asian Miracle: Economic Growth and Public Policy* (Oxford University Press ed., 1993).

¹³ For this and other points about the modern political economy of China, see Fairbank, *supra* note 3, ch. 15-17; see also Dwight H. Perkins, *China’s Modern Economy in Historical Perspective* (Stanford University Press ed., 1st ed., 1975).

¹⁴ On the Sino-Indian War, see Bruce Riedel, *JFK’s Forgotten Crisis: Tibet, The CIA, and the Sino-Indian War* (Brookings Institution Press ed., 2015); Jasjit Singh ed., *China’s India War, 1962: Looking Back to See the Future* (KW Publishers Pvt Ltd ed., 2013).

¹⁵ *Deng Xiaoping Quotes*, BRAINYQUOTE, <https://www.brainyquote.com/authors/deng-xiaoping-quotes>.

underperforming economy. Most notably among them, the creation of Special Economic Zones (SEZs), in which limited private enterprise, was permitted.

By 1986, China applied to join, or re-join, GATT, as a contracting party.¹⁶ That was an inauspicious year, in that the GATT contracting parties – by then numbering around 100 – had launched the biggest round of multilateral trade talks ever: the Uruguay Round. The Uruguay Round, between 1986 and 1994, produced roughly 20 trade treaties spanning about 1,000 pages, including the *Agreement Establishing the WTO*.¹⁷ Throughout the Uruguay Round, negotiators in the U.S., EU, and most other contracting parties knew China was on the verge of becoming a manufacturing powerhouse – the world’s factory. That anticipated new status would be a blessing to their producer-exporters, which would set up factories in China and ship goods with the benefit of MFN treatment from the importing WTO Members. That status also was a curse, specifically on domestic producers in other WTO Members. They might – and, indeed, did (to one degree or another – depending on their market position, management, and ability to adjust to technological change) – suffer from competition on like or directly competitive merchandise made in China by low-cost labour that was neither represented by independent trade unions nor protected by rigorous environment regulations to guard against toxins of all sorts.

So, the plot, as it were, was to finish the Uruguay Round texts first while negotiating with China to join the “Club” but not invite China into the Club until the texts were set. China then would have to accept the rules the existing Club members wrote. That plot unfolded. The Uruguay Round negotiations were concluded on 15 December 1993, were signed in Marrakesh on 15 August 1994, and entered into force on 1 January 1995 (save for the *Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs)*, which took effect on 1 January 1996). China’s application to accede to the WTO was not finalised until nearly 13 years after it was first launched, in November 1999, when China and the U.S. reached a key agreement on China’s commercial terms of entry.¹⁸

Those terms of entry, finalised by the Administration of President Bill Clinton (1993-2001) and Chinese Premier Zhu Rongji (1928-, Premier, 1998-2003), were breath-taking.¹⁹ What made them so impressive was their breadth and depth: they spoke

¹⁶ See Raj Bhala, *Enter the Dragon: An Essay on China’s WTO Accession Saga*, 15 *American University International Law Review* 1469-1538 (2000) [Hereinafter, Bhala, *Enter the Dragon*].

¹⁷ See 1 Bhala, *supra* note 6, ch. 20 § I-II.

¹⁸ See U.S.-China Bilateral WTO Agreement, Nov. 15, 1999, <https://clintonwhitehouse4.archives.gov/WH/New/WTO-Conf-1999/factsheets/fs-004.html>.

¹⁹ Bhala, *Enter the Dragon: An Essay on China’s WTO Accession Saga*, 15 *AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW* 1469-1538 (2000).

to the CCP's intention to open its economy to foreign goods and services and Foreign Direct Investment (FDI); protect intellectual property rights (IPRs); and subject itself to the WTO dispute settlement system. As in just one example, China committed to slash its auto tariffs from 100 per cent to 25 per cent (by 1 July 2006), and permit non-bank, foreign, auto financiers to lend to Chinese customers so they could afford to buy foreign cars.²⁰ Premier Zhu said the Chinese people could (to paraphrase the Chinese expression) "eat bitterness" and suffer competition from overseas. Their culture of hard work and entrepreneurship would help them succeed in the new, post-Cold War trading system China was joining. Integration into this system would help further alleviate poverty in China, and create job opportunities in export industries for millions of Chinese citizens. Besides, China could not afford to stay out of this system if it was to re-emerge on the world stage as a great power.

To be sure, China never committed to becoming a western-style, multi-candidate, multi-party democracy with an American-style Bill of Rights. The CCP never pledged that it would let the *KMT* contest elections against itself on the Mainland; invite the 14th Dalai Lama back to Tibet (whence he had fled to India in March 1959 amidst the Tibet Uprising); nor that it would launch a transparent inquiry into the 4 June 1989 Tiananmen Square massacre. Nor did the CCP need to do so. There never were any political or civil rights criteria necessary to join GATT as a contracting party, and nor were there any to join the WTO. After all, the Kingdom of Saudi Arabia – an absolute monarchy – acceded to the WTO in 2005.²¹

But, amidst the euphoria of the post-Cold War Washington consensus in favour of free, open trade, it was widely – and reasonably – expected that China's economic liberalisation, and its commercial law reforms, necessitated by WTO Membership, would extend to some degree into the political realm. What William Shakespeare (1564-1616) wrote in Act III, Scene 2 of *Troilus and Cressida* (1602), the words of Troilus, could have been the words of the WTO Members, and even of some constituencies on the Mainland:

I am giddy, expectation whirls me round.
The imaginary relish is so sweet
That it enchants my sense.²²

²⁰ See 1 Bhala, *supra* note 6, ch. 20 § I-II.

²¹ See Raj Bhala, *Saudi Arabia, the WTO, and American Trade Law and Policy*, 38 *The International Lawyer* 741-812 (2004).

²² SHAKESPEARE, *TROILUS AND CRESSIDA*, act. 3, sc. 2, <https://www.folger.edu/explore/shakespeares-works/troilus-and-cressida/read/3/2/>.

Many, if not most, Members were “giddy” with the “expectation” that China would move, albeit at its own pace, toward freer, capitalist-style markets. They were “enchanted” by the “imaginary relish” of Milton Friedman (1912-2006) in his classic *Capitalism and Freedom* (1962).

That is, as the 1976 Nobel Economics laureate indicates in chapter 1 (“The Relation between Political Freedom and Economic Freedom”) of his book:

It is widely believed that politics and economics are separate and largely unconnected; that individual freedom is a political problem and material welfare an economic problem; and that any kind of political arrangements can be combined with any kind of economic arrangements. The thesis of this chapter is that such a view is a delusion, that there is an intimate connection between economics and politics, that only certain combinations of political and economic arrangements are possible, and that, in particular, *a society which is socialist cannot also be democratic, in the sense of guaranteeing individual freedom.*

Economic arrangements play a dual role in the promotion of a free society. On the one hand, freedom in economic arrangements is itself a component of freedom broadly understood, so economic freedom is an end in itself. In the second place, *economic freedom is also an indispensable means toward the achievement of political freedom.*²³

So, WTO Members thought (or, at least, hoped) economic liberalism required by China’s WTO accession commitments (a transition from an almost entirely state-controlled economy) would lead to expanded political liberalism (some individual democratic-like liberties). Even though the express texts of GATT-WTO treaties do not link the two, in theory, and ultimately in practice, economic and political freedoms are intertwined: in Shakespeare’s phraseology, they “whirl around” together.²⁴ Surely, political domination by a CCP autocracy ultimately would be incompatible with China’s desire to match the U.S. economically because openness to trade and investment ultimately somehow leads to tolerance in governance.

²³ Milton Friedman, *Capitalism and Freedom* 7-8 (The University of Chicago Press ed., 1962).

²⁴ Arguably, the way in which certain provisions of these treaties are applied, such as the use of GATT Article XX(a), XX(e), and XXI, concerning (respectively) exceptions for public morality, prison labour, and national security, aim to advance democratic principles. See 2 Bhala, *supra* note 6, ch. 40-42 (public morality), 2 Bhala, *supra* note 7, ch. 17, 19 (national security), 3 Bhala, *supra* note 6, ch. 22-23 (labor issues).

Surely not. That expectation was dashed – worse yet, in both the economic and political sense. The apt phrase attributed to Shakespeare comes from Act III, Scene 1 of *Hamlet* (1599-1601). The protagonist says in his famous “To be or not to be” a soliloquy:

[. . .] and by a sleep to say we end
The heartache and the thousand natural shocks
That flesh is heir to.²⁵

Perhaps from Hamlet’s statement is the proverb Shakespeare is said to have coined, namely, “expectation is the root of all heartache.”²⁶

China’s post-accession behaviour in the WTO entailed a “thousand shocks”, which caused a “heartache” “rooted” in disappointed expectations. As China’s participation in the WTO continued in the early 2000s, America and many other WTO Members felt China failed to play by WTO rules. For example, China did not grant foreign banks the licences to do business (including retail deposit-taking and local currency lending) across the Mainland (not only on its Eastern Seaboard in the Beijing-Shanghai-Guangzhou corridor, but inland as well), which China supposedly promised it would.²⁷ As another example demonstrates, China discriminated in favour of its own credit card and payment system providers against MasterCard and Visa.²⁸

But were the expectations of the Americans disappointed because of the CCP? Or, perhaps, did they crash upon lessons not learned from the most basic of first-year law school courses: Legal Writing? It became clear the U.S. and its WTO Member-Allies arguably had not nailed down China’s commitments in its *WTO Accession Protocol* the way they thought they had. In particular, on key points, they accepted promises from the CCP that it would push through future legal reform, after joining the Club, rather than insisting on implementation of conforming legislation before gaining Membership.

By no means did pre-Trump American Administrations accept the inevitability of a “heartache.” To the contrary, successive U.S. Presidents before President Donald J. Trump (1946-, President, 2017-2021) laboured mightily for a cure. Specifically, during the Administrations of Presidents George W. Bush (1946-, President, 2001-2009) and Barack H. Obama (1961-, President, 2009-2017), before the Trade War, the U.S. strategy pursued a two-track strategy with China:

²⁵ SHAKESPEARE, *HAMLET*, act. 3, sc.1, https://publictheater.org/contentassets/696d609cf4fe4451a9de5eb46867aa67/scripts/bns_week8_hamlet.pdf.

²⁶ See *Expectation Is The Root Of All Heartache*, SHAKESPEARE GEEK, <https://www.shakespearegeek.com/2010/08/expectation-is-the-root-of-all-heartache.html/>.

²⁷ See 1 Bhala, *supra* note 6, ch. 20 § I-II.

²⁸ See World Trade Organization, DS 413: *China - Certain Measures Affecting Electronic Payment Services*, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds413_e.htm.

(1) Dialogue –

The U.S. (in partnership with Allies) held regular discussions with China to discuss their concerns about China's implementation of the specific commitments it made in its 2001 *Protocol of Accession*, and in general to GATT-WTO rules.²⁹ Their talks also embraced WTO-related issues not explicitly covered by the *Protocol* or WTO treaties, most notably, currency manipulation.

(2) Litigation –

The U.S. (along with other WTO Members, including Australia, Canada, EU, and South Africa) brought dozens, indeed, hundreds, of trade remedy cases against China: with respect to unfair trade; anti-dumping (AD) and countervailing duty (CVD) contentions; and with respect to fair trade, safeguard actions.. The cases were lodged at the WTO level and in domestic adjudicatory systems. For instance, they involved allegations that China dumped steel products in Western markets, and shipping illegally subsidised aluminium merchandise to those markets (AD and CVD cases, respectively). Chinese car tires surged into the U.S. (triggering an Obama-era safeguard case).

Alas, the dual strategy of litigation and dialogue failed. In retrospect, that America (and its Allies) would be disappointed in their expectations of success is unsurprising. That is for three reasons.

First, dialogue-litigation was an episodic strategy, but the problems posed by how the CCP governed China's trade relations with the world were systemic. A trade case on steel or discussions on banking licences could not cover the broad, deep problem that the CCP – especially under the new, starting in November 2012 of President Xi Jinping (1953-) – was not as interested in market-based reforms as it had been in the 1980s and 1990s. President Xi certainly appreciated that he could not mercilessly privatise state-owned enterprises (SOEs) and state-owned commercial banks (SOCBs), and subject them to competition from American, European, and Japanese entities. Or, radically devalue the Chinese *yuan* to address concerns from overseas regarding currency manipulation. Such measures – however much they were expected of China under the letter or spirit of its WTO accession commitments – would be a recipe for social unrest that could undermine the grip on power of the CCP. Millions of workers might be laid off, and vent their frustrations in

²⁹ Protocol of accession of the Public Republic of China to WTO, Nov. 23, 2001, <https://worldtradelaw.net/document.php?id=misc/ChinaAccessionProtocol.pdf&mode=download>.

violent protests against a Communist Party that had breached its social contract with the Chinese people ever since 1 October 1949: a trade of economic prosperity in exchange for political constraints.

Second, this new CCP leadership, itself, was more nationalistic, and insistent on the great renewal of China. It saw concessions to foreigners today through the lens of the humiliating concessions of the 1842 *Treaty of Nanking* (ending the first, 1839-1842, Opium War).³⁰ China was not to be carved up again by what it called “unequal treaties”, imposed by neo-colonialist hegemons in the WTO, the way it had been by gunboat colonialists of the imperial period. Indeed, in the present Trade War, the seemingly endless rounds of American measures and tit-for-tat Chinese countermeasures evinces the dragon’s determination to fight back against the eagle.

Third, China had big ambitions: power overseas and unity at home. Externally, the CCP wanted reunification with Taiwan, even by force if necessary. It wanted to assert sovereignty across the Nine Dash Line of the South China Sea. Internally, the CCP expected Tibetan Buddhists in Tibet and Uyghur Muslims in Xinjiang to behave under the Party – or dare it be said, male-dominated Han – leadership.

In America, the dashing of expectations that Bush-Clinton-Bush-Obama dialogue-litigation would cajole China to change its offensive trade acts, policies, and practices coincided with an economic phenomenon that had grave political consequences: the loss of approximately two million manufacturing jobs in the U.S., particularly, in States rich with Electoral College votes.³¹

Enter Presidential candidate Donald J. Trump. Though the facts were that most of the job losses and income erosion was due to changes in technology across the 20-year period, 2001-2016, when China entered the WTO, the narrative of blaming China caught fire across the American electorate. Forget dialogue and litigation. It was time for an “America First” trade policy, toward China and, indeed, the world.

With the March 2018 publication by the United States Trade Representative (USTR) of a well-documented report under Section 301 of the *Trade Act of 1974*, accordingly amended,³² the Trade War was launched. Stiff tariffs on Chinese-origin merchandise ensued. Further justification for the successive waves of Section 301 tariffs came from two follow up reports – one in November 2018 by the USTR under Section 301, and one in June 2018 from the White House on Chinese economic aggression. The CCP’s reaction quickly exacerbated the conflict: to each American measure came a Chinese

³⁰ See John King Fairbank, *Trade and Diplomacy on the China Coast: The opening of the Treaty Ports, 1842-1854* (Harvard University Press ed., 1953).

³¹ See 1 Bhala, , *supra* note 6, ch. 11 § V.

³² See 19 U.S.C. § 2411 *et seq.*

countermeasure. The cycles of tit-for-tat retaliation continue. Ominously, the theatres of battle have expanded from tariffs to non-tariff barriers (NTBs), to human rights (most notably over Hong Kong), and to sabre-rattling over Taiwan.

Shakespeare again furnishes the perfect proverb to capture the *status quo*, and the *status futurus*, that is, where America, China, and the world now are, and where they appear headed. In Act II, Scene 1 of *All's Well that Ends Well* (1601-1605), Helena observes:

Oft expectation fails, and most oft there
Where most it promises; and
oft it hits where hope is coldest, and despair most fits.³³

China's long odyssey back into the world trading system "promised" the "most," and "expectations failed." "Hope" now is "cold." "Despair" seems to "fit." Or, perhaps, the Americans and Chinese can figure out a way to "end well" their Trade War for the benefit of "all".

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³³ SHAKESPEARE, ALL'S WELL THAT ENDS WELL, act 2, sc. 1, <http://www.literaturepage.com/read/shakespeare-alls-well-that-ends-well-22.html>.

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