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## Jinping and the Beanstalk: The Tale of Feuding International Giants and How the Planting of Agricultural Tariffs Cultivated a Trade War

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# JINPING AND THE BEANSTALK: THE TALE OF FEUDING INTERNATIONAL GIANTS AND HOW THE PLANTING OF AGRICULTURAL TARIFFS CULTIVATED A TRADE WAR

## INTRODUCTION

Agriculture has consistently received protections dating all the way back to Ancient Greece, a time when the Greek government would punish an individual who made a serious mistake pertaining to agriculture by death.<sup>1</sup> Food is one of life's necessities that is critical for maintaining a sustainable life, both for organisms and overall development.<sup>2</sup> Take China's soybean imports from the United States for example: the oil seed is used for animal feed, human consumption, cooking oil, and other products.<sup>3</sup>

Unfortunately, the need for food makes for a strategy that hurts innocent people in an effort to win a relentless trade war. Specifically, the media coverage of the 2018 Trade War between the United States and China has incited fear in citizens by warning of increased prices for several everyday products.<sup>4</sup> But what some of the media fails to emphasize is that as the trade war progresses, the U.S. agricultural industry is fighting a daunting trade deficit and bringing down the U.S. economy.<sup>5</sup> The United States has seen a twenty percent reduction in the farming industry's profit from China's tariff, or tax, imposed on U.S. soybeans alone.<sup>6</sup> Food not only drives animal life, but also the life of the international and U.S. economies as well.<sup>7</sup>

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<sup>1</sup> Destaw A. Yigzaw, *WTO Agricultural Trade and the Unfulfilled Promise of Development*, 11 S.C. J. INT'L L. & BUS. 163, 168 (2015) (citing P. Spitz, *The Right to Food for Peoples and for the People: A Historical Perspective*, in *THE RIGHT TO FOOD* 169, 173–74 (P. Alston & K. Tomagevski eds., 1984)).

<sup>2</sup> Yigzaw, *supra* note 1 at 170.

<sup>3</sup> Megan Durisin & Sam Dodge, *Why Soybeans Are at the Heart of the U.S.-China Trade War*, BLOOMBERG, (July 5, 2018), <https://www.bloomberg.com/graphics/2018-soybean-tariff/> (explaining that soybeans, an oilseed, are critical to Chinese life and provide for several different parts of life in China).

<sup>4</sup> Bob Bryan, *Trump's Tariffs are About to Hit You Where It Really Hurts*, BUS. INSIDER (Sept. 24, 2018), <https://www.businessinsider.com/trump-tariff-china-trade-war-consumer-goods-2018-9>.

<sup>5</sup> Durisin & Dodge, *supra* note 3; Bill Chappell, *Agriculture Department Will Pay \$4.7 Billion to Farmers Hit in the Trade War*, NAT'L PUB. RADIO (Aug. 28, 2018), <https://www.npr.org/2018/08/28/642525831/agriculture-dept-will-pay-4-7-billion-to-farmers-hit-in-trade-war> (explaining that the aid package will further contribute to the deficit).

<sup>6</sup> Chappell, *supra* note 5.

<sup>7</sup> Catherine Boudreau, *How China Will Target U.S. Agriculture*, POLITICO (Apr. 4, 2018), <https://www.politico.com/story/2018/04/04/how-china-will-target-us-agriculture-458530> (explaining that U.S. agriculture comprises a large amount of U.S. exports and China is the main benefactor of those agricultural exports).

Consequently, the world is left to reconcile the raging trade war between two of its top economies. The United States and China consistently struggle to find a common ground through their attempts at negotiating a solution, but the World Trade Organization (WTO) has offered to step in if the parties are willing.<sup>8</sup> While the WTO may be able to mediate some of the trade issues, the Organization may not be equipped to tackle China's unique economic structure. Therefore, the 2018 Trade War between the world's economic powers may spark a reevaluation of WTO rules among treaty members, so the WTO can be better suited for complaints which concern an evolving world economy of technology.<sup>9</sup>

In 1994, the United States and European Union spearheaded the creation of the WTO at the Uruguay Round of negotiations concerning international trade.<sup>10</sup> Specifically, the negotiations covered the regulation of international trade, improvement of market access, and the establishment of a system to better resolve disputes.<sup>11</sup> The Uruguay Round was unique in that it was the first time that the world witnessed the implementation of technological protections.<sup>12</sup> The Uruguay Round presented a forum for international intellectual property rights and protections of said rights to be negotiated as part of the WTO.<sup>13</sup>

China joined the WTO in 2001, and has since made its presence known in the international community by its participation in approximately 190 cases and numerous propositions to the WTO.<sup>14</sup> Despite China's international advocacy through the WTO, the sovereign has domestically violated several aspects of international trade in its short tenure, and it has undermined the rule of law. Yet, the United States and other countries fail to hold China accountable.<sup>15</sup> Most importantly, the United States claims that China has consistently stolen U.S.

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<sup>8</sup> Larry Elliot, *WTO Head Offers to Mediate Between China and US Over Trade War*, GUARDIAN (Sept. 19, 2018), <https://www.theguardian.com/business/2018/sep/19/wto-head-offers-to-mediate-between-china-and-us-over-trade-war>; John Schoen and Jacob Pramuk, *This Timeline Shows How the US-China Trade War Led to the Latest Round of Talks in Beijing*, CNBC (Jan. 6, 2019), <https://www.cnbc.com/2019/01/04/timeline-of-us-china-trade-war-and-trump-tariffs-as-talks-in-beijing-start.html> (explaining that preexisting tariffs are still imposed but there is a truce regarding more tariffs as a potential agreement is negotiated over the course of three months).

<sup>9</sup> Mark Wu, *The "China, Inc." Challenge to Global Trade Governance*, 57 HARV. INT'L L. REV. 261 (2016).

<sup>10</sup> Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].

<sup>11</sup> *Id.*

<sup>12</sup> DAVID NIMMER, 5 NIMMER ON COPYRIGHT § 18.06 (2019).

<sup>13</sup> *Id.*

<sup>14</sup> Gregory Shaffer & Henry Gao, *China's Rise: How It Took on the U.S. at the WTO*, 2018 U. ILL. L. REV. 115, 127 (2018).

<sup>15</sup> Brad W. Setser, *U.S.-China Trade War: How We Got Here*, COUNCIL ON FOREIGN RELATIONS, (July 9, 2018), <https://www.cfr.org/blog/us-china-trade-war-how-we-got-here>.

intellectual property (IP) rights and is therefore attempting to handle the IP issues with China on its own, without international dispute resolution mechanisms.<sup>16</sup> This includes imposing tariffs in response to the IP theft and justifying the tariffs by alleging that the theft is a threat to U.S. national security.<sup>17</sup> Both countries are implementing protectionist trade policies in an attempt to settle the score for trade abuses and further protect their respective economies.<sup>18</sup>

This Comment suggests that the WTO is the proper channel for resolving this international dispute to prevent a growing trade deficit and international agricultural waste. But to be effective, the disputing member countries should file a claim with the WTO.<sup>19</sup> Thus, the United States should file its own complaint with the WTO regarding China's targeted tariffs on U.S. agriculture. The country must also deliver on its promise to enforce WTO regulations, rather than take matters into its own hands and allow the trade war to fester. In turn, the WTO has a daunting challenge to face because the IP abuses that the United States claims against China get to the root of China's unique economic structure.<sup>20</sup> China filed a complaint against the United States for its actions and the United States will likely justify its tariffs by alleging the national security defense.<sup>21</sup>

Additionally, the WTO will likely have to discern whether the Chinese tariffs against U.S. agriculture were justified. The spark of the trade war can be attributed to IP theft and soybeans, along with other U.S. agricultural products, that fell victim to tariffs.<sup>22</sup> The agricultural tariffs require recourse because they

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<sup>16</sup> *Id.*

<sup>17</sup> Riley Walters, *Is the China Trade War Legal?*, HILL (Sept. 28, 2018), <https://thehill.com/opinion/international/409012-is-the-china-trade-war-legal>.

<sup>18</sup> Robert W. McGee, *An Economic Analysis of Protectionism in the United States with Implications for International Trade in Europe*, 26 GEO. WASH. J. INT'L L. & ECON. 539, 540 (1993); *Trade Wars, Trump Tariffs and Protectionism Explained*, (July 26, 2018), BBC NEWS, <https://www.bbc.com/news/world-43512098>; Wes Peterson, *Who Wins Trade Wars?*, FARMFUTURES (July 18, 2018), <https://www.farmfutures.com/commentary/who-wins-trade-wars>.

<sup>19</sup> WORLD TRADE ORG., <https://www.wto.org/index.htm> (last visited Oct. 23, 2018).

<sup>20</sup> *Read Donald Trump's Speech on Trade*, TIME (June 28, 2016), <http://time.com/4386335/donald-trump-trade-speech-transcript/>; see Part II.C.

<sup>21</sup> Doug Palmer, *US Sides with Russia in WTO National Security Case Against Ukraine*, POLITICO (July 30, 2018), <https://www.politico.eu/article/us-sides-with-russia-in-wto-national-security-case-against-ukraine>; see also Marc Busch, *Trump Claims that a National Security Exception Allows Him to Block Imports. Is He Right?*, WASH. POST (Jan. 11, 2019), [https://www.washingtonpost.com/news/monkey-cage/wp/2019/01/11/trump-claims-that-a-national-security-exception-allows-him-to-block-imports-is-he-right/?utm\\_term=.1d0b1e98fe3d](https://www.washingtonpost.com/news/monkey-cage/wp/2019/01/11/trump-claims-that-a-national-security-exception-allows-him-to-block-imports-is-he-right/?utm_term=.1d0b1e98fe3d).

<sup>22</sup> *What's at Stake in the U.S.-China Agricultural-Trade War*, WALL STREET J. (Oct. 2, 2018), <https://www.wsj.com/articles/whats-at-stake-in-the-u-s-china-agricultural-trade-war-1538532060>.

violate both the Agreement on Agriculture and the U.S.-China Bilateral Concession Agreement which were created prior to China's WTO participation.<sup>23</sup> Lastly, it is difficult to determine how the WTO would handle the United States' national security defense,<sup>24</sup> but the WTO may ultimately hold in favor of the United States because the United States did not act illegally according to domestic laws.<sup>25</sup> In essence, this Comment intends to provide a solution for the ongoing trade deficit in the U.S. agricultural industry to further prevent international inefficiency and waste.

Even if the WTO rejects the United States' justification that it began imposing tariffs for national security purposes, the WTO would have to reconcile China's state-run data-sharing and determine how to limit Chinese state access in international trade to prevent further IP theft. This Comment suggests that the WTO lacks a first impression regarding the United States' claims of China's IP theft. However, the WTO could use this opportunity to set new precedent by establishing new policies or inspire another negotiation round.

This Comment provides a solution to the ongoing trade war between China and the United States which is negatively affecting the United States' agricultural industry. Part I explores the current issue in the international community. Part II discusses the history of protectionism, its place in international trade, and how the philosophy has made a comeback since the time of The Great Depression. Further, Part II uses the backdrop of protectionist policies to explain the initiation of trade wars, the start of the WTO, and China's accession to the WTO. Part III examines the current trade war between the United States and China to better understand how the trade war has progressed and provides some insight regarding why agriculture is targeted. Part IV explains why ameliorating the trade war is critical, theories on how to fix it, and how the WTO can use this hard-hitting case as a turning point toward fairness in international trade.

## I. FACTUAL BACKGROUND

This Part discusses protectionist trade policies and historical repercussions of their implementation. Although there are few notable trade wars, those sparked by the United States have had devastating consequences and are most

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<sup>23</sup> See Part II.C.

<sup>24</sup> Kellie Ell, *Steel and Aluminum Tariffs are a 'Complete Violation of WTO Rules': Former Deputy Trade Representative*, CNBC (Mar. 2, 2018), <https://www.cnbc.com/2018/03/02/tariffs-a-complete-violation-of-wto-rules-former-deputy-trade-rep.html>.

<sup>25</sup> Trade Act of 1974 § 301, 19 U.S.C. 2101 (2018).

relatable to the 2018 Trade War. After exploring the history of trade wars, this Section explains the history of the WTO and China's arduous accession to the Organization. Finally, the Part ends by explaining longstanding abuses that underlie the tensions of the trade war.

#### A. *Protectionism and the Historical Effects of a Trade War*

Protectionism is the idea that a country must reduce imports, often by imposing tariffs on goods, to boost that country's industry, increase trade revenue, and protect that country from foreign competition.<sup>26</sup> In short, it is the concept of placing one's own country before any other country.<sup>27</sup> Experts differ in their views on protectionist measures and their efficacy, but history has shown that protectionist trade policies worsen well-being in the countries that adopt them and harm consumers and the industries that rely on imported products.<sup>28</sup> Although protectionist measures are employed to protect a state's own economy and jobs, history shows that such measures result in more job loss and reduced economic growth.<sup>29</sup> Protectionist measures have the potential to destroy relationships with international trading partners and restrict international trade.<sup>30</sup>

The current U.S. administration began imposing protectionist measures on steel and aluminum so that U.S. companies would buy locally.<sup>31</sup> But history demonstrates that in the rare situations where protectionist policies may succeed, success only results in certain industries.<sup>32</sup> Moreover, where industries have to pay more to compensate for their raw materials, the consumer pays the difference.<sup>33</sup> In turn, the countries who maintain trade relationships with the tariff-imposing country retaliate with their own tariffs on that country's products, and thus create a "tit-for-tat" escalation known as a trade war.<sup>34</sup>

Trade wars are rare, but their presence in history have revealed devastating ramifications. In 1930, Congress enacted the Smoot-Hawley Act, also known as the Tariff Act of 1930, to counteract the drought that damaged a majority of U.S.

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<sup>26</sup> McGee, *supra* note 18 at 540; Mark Wu, *Antidumping in Asia's Emerging Giants*, 53 HARV. INT'L L.J. 1, 2 (2012).

<sup>27</sup> Wu, *Antidumping in Asia's Emerging Giants*, *supra* note 26, at 2; McGee, *supra* note 18, at 540.

<sup>28</sup> McGee, *supra* note 18, at 540–42; *Trade Wars, Trump Tariffs and Protectionism Explained*, BBC NEWS, (July 26, 2018), <https://www.bbc.com/news/world-43512098>; Peterson, *supra* note 18.

<sup>29</sup> McGee, *supra* note 18, at 565–66; Wu, *Antidumping in Asia's Emerging Giants*, *supra* note 26, at 72.

<sup>30</sup> *Id.*

<sup>31</sup> *Trade Wars, Trump Tariffs and Protectionism Explained*, *supra* note 28.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

crops.<sup>35</sup> President Hoover was quick to sign the Act into law because it simultaneously provided him a way to support his campaign-promised agenda to make trade fairer.<sup>36</sup> Congress created the Act so the Executive could impose large import tariffs on foreign goods and encourage U.S. citizens to support local farmers.<sup>37</sup> Hoover believed that U.S. agriculture relied too much on foreign markets and therefore isolated the agricultural economy by strictly regulating domestic production and imposing tariffs.<sup>38</sup> In turn, the tariffs resulted in increased food prices for Americans who were already suffering from The Great Depression.<sup>39</sup>

Additionally, other countries retaliated with tariffs which decreased global trade by sixty-five percent.<sup>40</sup> Farmers comprised twenty-five percent of the U.S. work force at the time, and food prices were already high as the world recovered from World War I.<sup>41</sup> President Hoover provided subsidies to farmers to assist with the lacking trade and growing deficit.<sup>42</sup> Thus, the increasing tariffs exacerbated the effects of the Great Depression in the agricultural industry even more, and worsened the livelihood of the American people.<sup>43</sup> Some economists claim that these protectionist trade measures were similarly embraced around the world and propelled the start of World War II.<sup>44</sup> The economic crises underlying World War II led to some coalescence in international trade at the conclusion of the wars.

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<sup>35</sup> Chantal Thomas, *Challenges for Democracy and Trade: The Case of the United States*, 41 HARV. J. ON LEGIS. 1, 6 (2004); Kimberly Amadeo, *What the Smoot Hawley Act Can Teach Protectionists Today*, BALANCE (June 4, 2018), <https://www.thebalance.com/smoot-hawley-tariff-lessons-today-4136667>.

<sup>36</sup> Amadeo, *supra* note 35.

<sup>37</sup> *Id.*; Thomas, *supra* note 35.

<sup>38</sup> Jon Lauck, *Against the Grain: The North Dakota Wheat Pooling Plan and the Liberalization Trend in World Agricultural Markets*, 8 MINN. J. GLOBAL TRADE 289, 295 (1999).

<sup>39</sup> Amadeo, *supra* note 35.

<sup>40</sup> *Id.*; Thomas, *supra* note 35 at 5–6.

<sup>41</sup> Amadeo, *supra* note 35.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*; Theodore Phalan et al., *The Smoot-Hawley Tariff and the Great Depression*, (Feb. 29, 2012), FOUND. FOR ECON. EDUC., <https://fee.org/articles/the-smoot-hawley-tariff-and-the-great-depression/>; Thomas, *supra* note 35, at 5.

<sup>44</sup> Ben Chu, *How We Can Learn From the History of Protectionism*, INDEPENDENT (June 6, 2018), [https://www.independent.co.uk/news/long\\_reads/protectionism-history-how-learn-trump-trade-tariff-law-smoot-hawley-a8384216.html](https://www.independent.co.uk/news/long_reads/protectionism-history-how-learn-trump-trade-tariff-law-smoot-hawley-a8384216.html); Jaden Urbi, *One of the Biggest US Trade Wars of the Past Had a Tragic Consequence – Here's What Happened*, CNBC (June 1, 2018), <https://www.cnbc.com/2018/06/01/one-of-the-biggest-us-trade-wars-of-the-past-had-a-tragic-consequence-heres-what-happened.html>. *Contra* Todd Tucker, *Did Smoot-Hawley Bring Ragnarok?*, MEDIUM (Mar. 21, 2018), <https://medium.com/@toddtucker/did-smoot-hawley-bring-ragnarok-211642544b6e>

### 1. *The Chicken Trade War*

In the 1962 Chicken War, the United States exploited a German market that elected to import and buy several U.S. frozen chickens at an unbeatable price.<sup>45</sup> Despite preexisting tariffs that Germany imposed on imports, the U.S. maintained a large profitability for its chicken exports to Germany throughout the late 1950s.<sup>46</sup> Nonetheless, the low-cost U.S. chickens took away from the European market, which was closely regulated by the European Economic Community (EEC).<sup>47</sup> The EEC implemented a system of import-regulations and imposed tariffs on U.S. chickens.<sup>48</sup> The additional EEC tariffs revealed protectionist tendencies because they favorably restricted trade and imports among European countries.<sup>49</sup> The harshest effects of the trade war were projected to happen in the year following implementation of the system.<sup>50</sup> U.S. agricultural exports were down by \$1.2 billion because of the EEC tariffs in that year.<sup>51</sup>

Although the General Agreement on Tariffs and Trade (GATT) provided some protections from the dangers of tariffs imposed on agricultural imports and exports, the EEC found a way to unbind the contractual demands from the GATT tariff guidelines (“schedules”).<sup>52</sup> The states comprising the EEC unbound themselves through Article XXVIII, which allowed the formation of a “Customs Union” that permitted states to unify and replace previous rate commitments with the Union’s own tariff rates.<sup>53</sup> Nevertheless, the GATT demanded that in such a Union, affected parties had negotiating rights before tariffs took effect and the Union had to reach an agreement over the proposed new tariffs taking effect over six months.<sup>54</sup> The EEC, as a Customs Union, negotiated with its various trading partners for at least eighteen months each.<sup>55</sup> The tariffs would have collectively affected half of U.S. exports to EEC-affiliated countries. Even though most tariffs were successfully negotiated, U.S. agricultural products made up ten percent of U.S. trade and were expected to receive no remedy.<sup>56</sup>

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<sup>45</sup> Herman Walker, *Dispute Settlement: The Chicken War*, 58 AM. J. INT’L L. 671, 671 (1964).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 672–73 (stating that, at the time, the EEC was comprised of France, Germany, Italy, and the Benelux); see also Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 4.

<sup>48</sup> Walker, *supra* note 45, at 672.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 673.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 674–75.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*



The United States and Germany could not come to an agreement before implementation of the tariff regime, so both parties called upon the GATT's Council of Representatives to provide a panel and administer an advisory opinion regarding U.S. poultry exports.<sup>57</sup> The United States argued under an exception found in Article XXVIII of the GATT Treaty that the United States was the "principal supplier" of poultry to Germany and Germany could not unbind itself from the GATT tariff schedules for this reason.<sup>58</sup> The panel provided a report describing U.S. valuation for loss of exports under the EEC's tariffs, but did not provide an opinion on the law that gave rise to the claim or an action recommendation.<sup>59</sup> The United States used the panel report's amount from the loss of exports as the amount of tariffs it could impose on Germany out of its own retaliation.<sup>60</sup>

The United States and Germany negotiated a solution before the United States imposed its retaliating tariffs.<sup>61</sup> The Chicken War showed the potential for a devastating trade war between the United States and European nations left to their own devices.<sup>62</sup> The GATT panel was helpful in an advisory role by providing a valuation of the loss in exports.<sup>63</sup> However, the limited opinion and remaining unanswered questions revealed the shortcomings of the GATT, obviating the need for a dispute resolution body.<sup>64</sup>

## 2. *The Banana Trade War*

Later on in the 1990s, the EEC signed a five-year agreement to provide preferential treatment for bananas that were originally exported from African, Caribbean, and Pacific countries.<sup>65</sup> These areas encompass most of Europe's previous colonies.<sup>66</sup> For this reason, analysts declare that the agreement was riddled with protectionist policies to retain profitability resulting from international trade among specific European countries and their affiliates.<sup>67</sup> The

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<sup>57</sup> *Id.* at 678–79.

<sup>58</sup> *Id.* at 677.

<sup>59</sup> *Id.* at 679.

<sup>60</sup> *Id.* at 681.

<sup>61</sup> *Id.* at 682.

<sup>62</sup> *Id.* at 682–83.

<sup>63</sup> *Id.* at 683.

<sup>64</sup> *Id.*

<sup>65</sup> Zsolt Bessko, *Going Bananas Over EEC Preferences?: A Look at the Banana Trade War and the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes*, 28 CASE W. RES. J. INT'L L. 265, 265–66 (1996) (at this time, Britain, Ireland, and Denmark acceded to the EEC).

<sup>66</sup> Michelle Williams, *Caribbean Shiprider Agreements: Sunk by Banana Trade War*, 31 U. MIAMI INTER-AM. L. REV. 163, 167 (2000).

<sup>67</sup> *Id.*

favor toward these specific countries kept profitability high for EEC affiliates, but negatively affected five banana-producing Latin American countries that relied on the European market.<sup>68</sup> After GATT negotiating principles failed, the Latin American countries collectively filed a complaint through the GATT's Dispute Settlement Body.<sup>69</sup> The panel decided that the EEC's banana regime violated several Articles of the GATT and soon-to-be implemented WTO.<sup>70</sup>

Nonetheless, the EEC expanded its preferences for its past colonies in other ways. For example, the EEC removed all tariffs and duties on bananas exported by African, Caribbean, and Pacific countries.<sup>71</sup> In turn, the EEC provided all other countries with restrictive quota licenses and twenty-percent tariffs on banana exports.<sup>72</sup> The Latin American countries responded with another complaint at the GATT and the GATT's dispute resolution body delivered an opinion in favor of the Latin American countries.<sup>73</sup> Even though the EEC abolished its banana import regime before going to the GATT, the GATT addressed the legality of the regime.<sup>74</sup> The GATT held against the EEC and called for removal of all collective trade restrictions because such unions were inconsistent with free trade under the pending WTO.<sup>75</sup> In addition to its findings, the panel recommended that the two countries further negotiate a resolution to the remaining portions of the banana regime.<sup>76</sup>

In addition to the Latin American countries, the Hawaiian banana industry petitioned the U.S. Trade Representative alleging that the agreement between the EEC and Latin American countries was discriminatory and a burden on U.S. commerce.<sup>77</sup> Section 301 of the U.S. Code allows the Trade Representative to investigate complaints pertaining to practices that violate U.S. rights under any trade agreement and any practices that are unjustifiable or a burden on U.S. commerce.<sup>78</sup> The United States then refers the situation to a GATT/WTO Panel and that panel decides whether rights were violated.<sup>79</sup> The mechanism is similar to the procedure followed under specific articles from the GATT/WTO.<sup>80</sup> As a

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<sup>68</sup> *Id.* at 168.

<sup>69</sup> *Id.* at 168, 170–71.

<sup>70</sup> *Id.* at 168, 171.

<sup>71</sup> Bessko, *supra* note 65, at 273.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 274.

<sup>74</sup> *Id.* at 275.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 284.

<sup>77</sup> *Id.* at 282–83.

<sup>78</sup> *Id.* at 283.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

result of the Representative's investigation, the Representative consulted with the EEC to withdraw from its proposed agreement with the Latin American countries and to seek a solution through the dispute resolution body.<sup>81</sup>

*B. The General Agreement on Tariffs and Trade, World Trade Organization, and China's Accession*

After World War II and the Chicken War, several countries came together to form the GATT to establish global trade regulations and create a mechanism for solving international trade disputes.<sup>82</sup> World War II and the Chicken War revealed the ramifications of nationalism and protectionist policies, and thus several countries in the world wanted to prevent recurrence in the future.<sup>83</sup> However, the GATT was merely provisional and required extensive revisions, such as a more sustainable regulation to protect agriculture.<sup>84</sup> Several round table discussions took place to establish a sustainable international organization that would be well-equipped to handle the changing world.<sup>85</sup> Thus, the Uruguay Round finalized the creation of the WTO.<sup>86</sup> Additionally, Congress amended federal trade law to align with the Uruguay Round agreements and replaced the troublesome parts of the Smoot-Hawley Act of 1930.<sup>87</sup>

Today, the WTO acts as the global trade body that facilitates regulations and resolves trade disputes.<sup>88</sup> States gathered to create the WTO with the intention to prevent any future devastating trade wars similar to what sparked World War II and the Chicken War.<sup>89</sup> The WTO established a Dispute Settlement Body

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<sup>81</sup> *Id.* at 283.

<sup>82</sup> General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194; *see* Peterson, *supra* note 18.

<sup>83</sup> Peterson, *supra* note 18.

<sup>84</sup> WORLD TRADE ORG., *The GATT years: from Havana to Marrakesh*, WORLD TRADE ORGANIZATION: THE WTO, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact4\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm) [hereinafter WORLD TRADE ORG., *GATT Years*]; *See generally* JANE M. PORTER & DOUGLAS E. BOWERS, AGRIC. & RURAL ECON. DIV., ECON. RESEARCH SERV. U.S. DEP'T OF AGRIC., *A SHORT HISTORY OF U.S. AGRICULTURAL TRADE NEGOTIATIONS* (1989) (demonstrating the U.S.' consistent fight for strict agriculture protections in the negotiating rounds preceding the WTO's creation).

<sup>85</sup> WORLD TRADE ORG., *GATT Years*, *supra* note 84; *see also* Peter Tasker, *Trade Wars—Lessons from the 1980s*, NIKKEI ASIAN REV., (Mar. 30, 2018), <https://asia.nikkei.com/Opinion/Trade-wars-lessons-from-the-1980s2> (advanced technologies in Japan, like IBM and computer memory, concerned the U.S. about industrial espionage, thus fueling another trade war in the 1980s); Andy Kessler, *Lessons From an '80s Trade War*, WALL STREET J. (Oct. 7, 2018), <https://www.wsj.com/articles/lessons-from-an-80s-trade-war-1538950192> (the Japanese semiconductor industry was a great concern of the U.S. and lacked regulations).

<sup>86</sup> WORLD TRADE ORG., *GATT Years*, *supra* note 84.

<sup>87</sup> The Tariff Act of 1930, 7 U.S.C. §§ 701–783 (2012).

<sup>88</sup> Peterson, *supra* note 18.

<sup>89</sup> *Id.*

(DSB) which has the authority to apply rules and procedures as covered in the WTO's Understanding document.<sup>90</sup> Upon receiving a complaint from a member state, the DSB may establish panels, adopt the panel reports that result from the panels, authorize suspension of specific concessions, and monitor implemented recommendations and rulings.<sup>91</sup> These actions extend to agreements establishing the WTO, including the Agreement on Agriculture, and any multilateral or plurilateral trade agreements.<sup>92</sup>

One of the most noteworthy changes from the GATT to WTO is the stricter limitation on unilateral action.<sup>93</sup> The limitation is an attempt to encourage the DSB as a multilateral system and to promote member states to rely on the DSB.<sup>94</sup> A member state is unable to make its own determination that there was a violation unless there is recourse explained through the dispute settlement process or the state takes action that is consistent with the DSB's adopted panel reports.<sup>95</sup> If a sovereign believes it has experienced a violation, the state must receive DSB authorization before responding or retaliating against the alleged violation.<sup>96</sup> Since its inception, the WTO's DSB has held against Indonesia, Russia, and the U.S. in situations similar to the current tariffs imposed on U.S. agricultural products.<sup>97</sup> The results of these more recent cases show that the WTO is not afraid to hold against international giants that violate international trade agreements, including the Agreement on Agriculture.<sup>98</sup>

Scholars believe that the U.S. and EU began laying the foundation of the WTO after the Cold War and used it to shift an international ideology of liberal trade norms.<sup>99</sup> Some economists believe that the protectionist policies espoused before World War II influenced the formation of the WTO and that the WTO

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<sup>90</sup> Bessko, *supra* note 65, at 288.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 291.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 292.

<sup>97</sup> Panel Report, *Indonesia—Importation of Horticultural Products, Animals and Animal Products*, WTO Doc. WT/DS478/R (adopted Dec. 22, 2016); Panel Report, *Russia—Tariff Treatment of Certain Agricultural and Manufacturing Products*, WTO Doc. WT/DS485/R (adopted Aug. 12, 2016); Panel Report, *United States – Measures Relating to Shrimp from Thailand*, WTO Doc. WT/DS343/R (adopted Feb. 29, 2008).

<sup>98</sup> See generally, Panel Report, *Indonesia—Importation of Horticultural Products, Animals and Animal Products*, WTO Doc. WT/DS478/R (adopted Dec. 22, 2016); see generally, Panel Report, *Russia—Tariff Treatment of Certain Agricultural and Manufacturing Products*, WTO Doc. WT/DS485/R (adopted Aug. 12, 2016); see generally, Panel Report, *United States – Measures Relating to Shrimp from Thailand*, WTO Doc. WT/DS343/R (adopted Feb. 29, 2008).

<sup>99</sup> Shaffer & Gao, *supra* note 14, at 125.

protects countries which exhibit protectionist policies.<sup>100</sup> The Western makeup of the WTO arguably barred China's accession early on and pressured the country to adopt western trade practices.<sup>101</sup> Accession to the WTO happens in two ways, dependent on whether the country seeking accession is a founding party of the GATT or the country is not a founding member.<sup>102</sup> China was a founding member of the GATT and thus its accession to the WTO fell under Article XXXII.<sup>103</sup> Accession under Article XXXII is a two-step process that first requires the applicant to negotiate a bilateral concession agreement with each party of the WTO who asks for one. The second step demands that the applicant state negotiate a protocol of accession to the WTO and its members, as a whole.<sup>104</sup>

China had to jump through several hurdles in both steps because of its trade barriers and inconsistent domestic practices at the time. Like most western countries, China's economic policy stemming from the 1960s embraced the inward goal toward achieving self-reliance.<sup>105</sup> The first step's call for bilateral deals meant that China had to make promises to each WTO member detailing how China would open its market on a government-to-government basis with that specific member.<sup>106</sup> There is the *option* for countries to request a bilateral deal but with a market like China's, several countries had export interests in the Chinese market.<sup>107</sup> As a result, forty WTO members, including the United States, made a request for bilateral deals, and such negotiations delayed the second step of accession.<sup>108</sup> The United States specifically emphasized market access for agricultural goods and intellectual property in its deal with China.<sup>109</sup> The United States and China agreed to decrease tariffs and phase out all tariffs on soybeans.<sup>110</sup> Again, this was just one of forty bilateral agreements that China

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<sup>100</sup> Yigzaw, *supra* note 1, at 223.

<sup>101</sup> Shaffer & Gao, *supra* note 14, at 127.

<sup>102</sup> Raj Bhala, *International Economic Law: Enter the Dragon: An Essay on China's WTO Accession Saga*, 15 AM. U. INT'L L. REV. 1469, 1472 (2000).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 1472-73.

<sup>105</sup> Pasha L. Hsieh, *China-United States Trade Negotiations and Disputes: The WTO and Beyond*, 4 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 369, 373 (2009).

<sup>106</sup> Bhala, *supra* note 102, at 1472-73.

<sup>107</sup> *Id.* at 1473.

<sup>108</sup> *Id.*

<sup>109</sup> Agreement on Market Access Between the People's Republic of China and the United States of America, China-U.S., Nov. 15, 1999, U.N.T.S. [hereinafter Market Access Agreement]; Press Release, Office of the United States Trade Representative, USTR Releases Details on U.S.-China Consensus on China's WTO Accession (June 14, 2001) (on file with author).

<sup>110</sup> See Market Access Agreement, *supra* note 109.

had to negotiate with the members of the WTO who requested a deal before China could take the next step toward accession.<sup>111</sup>

The second step required the WTO members to agree on China's accession and then draft separate protocol that all the members agreed would allow China's actual accession.<sup>112</sup> Generally, the protocol in any given case outlines the applicant's most recent trade policies and compares those laws to the minimum WTO requirements.<sup>113</sup> The protocol aims to identify points of inconsistency, and members work with applicants to establish an agenda detailing the applicant's intention and schedule to implement the necessary changes.<sup>114</sup> If an accession-seeking sovereign is a developing country, it can accede to the WTO with reduced obligations or "special and differential treatment."<sup>115</sup> This allows the developing country to suspend certain obligations so it can meet economic pressures, or to phase in obligations over a longer period.<sup>116</sup>

Essentially, China's accession was conditioned by each member's bilateral agreement, and then accession was conditioned on final rules that all members believed China had to meet before acceding. The first step had to be accomplished because unsatisfied members would have been able to block the vote on deciding whether China could move to the second and final step.<sup>117</sup> China negotiated enough to move to the next step and protocol negotiations.<sup>118</sup> In total, China abolished or amended 2,600 statutes and regulations because they were inconsistent with the WTO's accession agreement.<sup>119</sup> China also passed legislation on new issues, including intellectual property.<sup>120</sup> China's entry into the WTO resulted in at least a thirty-eight percent increase in Chinese exports, but entry as a developing country would require a larger increase because of the benefit of reduced obligations; thus, China advocated for special and differential treatment as a developing country.<sup>121</sup>

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<sup>111</sup> See Bhala, *supra* note 102, at 1473.

<sup>112</sup> *Id.* (noting that these steps are demonstrated in direct application to China but are required for every sovereign that wishes to accede).

<sup>113</sup> *Id.* at 1474.

<sup>114</sup> *See id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 1481.

<sup>117</sup> *Id.* at 1474.

<sup>118</sup> *Id.*

<sup>119</sup> Neil Hughes, *A Trade War with China*, 84 FOREIGN AFF. 94, 99 (2005).

<sup>120</sup> *Id.*

<sup>121</sup> See Bhala, *supra* note 102, at 1479–80.

Although China argued for status as a developing country, the United States and other members advocated against this.<sup>122</sup> China's market was already booming with its current production and was not considered a developing country for that reason.<sup>123</sup> For example, China produced one-seventh of the world's shoes and clothing with high tariffs at the time.<sup>124</sup> With its accession to the WTO, several sovereigns knew that China's success would multiply with increased market access in world trade; therefore, China was not in need of status as a developing country.<sup>125</sup>

The United States, Japan, and the EU were China's largest adversaries on the question of special treatment, but the United States was alone in demanding that China meet every term under protocol. These demands included among other things: a decrease of excessive tariffs, including tariffs on agricultural products, and the implementation of more acceptable labor standards (e.g., higher hourly rates, no more child and prison labor, and a cap to hours one can work in a week).<sup>126</sup> The United States's demands prevailed and China cut tariffs to more than half of what they were pre-protocol.<sup>127</sup> China also agreed to the extension of agricultural trade beyond state-controlled trade and permitted private parties to trade between each other.<sup>128</sup> Ultimately, China assumed all obligations provided by the WTO.<sup>129</sup>

### C. *China's Success and Usurpation of WTO Regulations Since Its Accession*

Within a decade of accession, China became the top exporter and largest trading nation in the world.<sup>130</sup> However, this success cannot be attributed to full compliance with the WTO's regulations and other agreements. China amassed fifty-four WTO cases against it because of its questionable internal measures.<sup>131</sup> The countries bringing these claims have often prevailed at the WTO and have exposed unlawful Chinese practices.<sup>132</sup> Additionally, between 2009 and 2015,

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<sup>122</sup> *Id.* at 1480.

<sup>123</sup> *See id.* at 1479.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 1481-86.

<sup>127</sup> *Id.* at 1512; Shaffer & Gao, *supra* note 14, at 130.

<sup>128</sup> *See* Bhala, *supra* note 102, at 1512.

<sup>129</sup> *Id.* at 1519.

<sup>130</sup> Wu, *supra* note 9, at 262.

<sup>131</sup> *See* Shaffer & Gao, *supra* note 14, at 128.

<sup>132</sup> Wu, *supra* note 9, at 294.

cases against China accounted for ninety percent of the cases raised at the WTO.<sup>133</sup>

Some scholars explain that China's different economic structure is what contributes to its non-compliance.<sup>134</sup> Specifically, the WTO is rooted in the western ideology of liberalized trade which much of the world has adjusted to through the WTO, but China's entire regime would have to change to fully comply. For example, the state owns virtually every enterprise (State Owned Enterprise (SOE)) and "acts as the dominant economic player" in which it uses its markets to further its political gain.<sup>135</sup> At the same time, the WTO was established to better regulate economic practices, including protection of the people.

China's government functions by its controlling political party; thus, labor and industry associations lack power to bargain for their constituents because the government already controls it.<sup>136</sup> The WTO and the regulations it imposes provide an opportunity for other nations to raise claims of these abuses not only for their own economic benefit, but for the benefit of the people residing in the country that is employing illegal practices.<sup>137</sup> Finally, there is concern that the WTO is not equipped to handle all of China's practices and potential violations because the sovereign's economic structure is so different.<sup>138</sup> China's trading partners believe that the WTO is successful in resolving trade disputes under its framework, but this is true because the disputes are confined to the behavior exhibited by other nations.<sup>139</sup> Thus, because China is structurally different and the WTO is founded on western liberalization, there are likely several Chinese state practices that have gone unnoticed.

## II. THE 2018 TRADE WAR

The 2018 U.S.-China Trade War stems from intellectual property violations that China has consistently committed.<sup>140</sup> The U.S. agricultural industry is caught in the middle of the 2018 Trade War, which is a strategic tactic China employs as retaliation for the U.S.' actions. This Section describes the United States and Chinese tactics for imposing tariffs on one another and how each state

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<sup>133</sup> *Id.* at 263.

<sup>134</sup> *See id.* at 261; Bhala, *supra* note 102, at 1469.

<sup>135</sup> Wu, *supra* note 9, at 270.

<sup>136</sup> *Id.* at 287-88.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 307-08.

<sup>139</sup> *Id.* at 308.

<sup>140</sup> U.S. TRADE REP. ANN. REP. (2017); U.S. TRADE REP. SPECIAL 301 REP. (2017).



is counteracting the economic damage. Jennifer Hillman, a previous member of the WTO Appellate Body and previous Commissioner of the U.S. International Trade Commission, succinctly summarizes why the United States is involved in a trade war with China:

China . . . is consistently acting in ways that undermine the global system of open and fair trade. Market access barriers too numerous to mention; forced technology transfers; intellectual property theft on an unprecedented scale; indigenous innovation policies and the Made in China 2025 program; discriminatory use of technical standards; massive government subsidies that have led to chronic overcapacity in key industrial sectors; and a highly restrictive foreign investment regime.<sup>141</sup>

With this context, one can understand the underlying tension and leading causes to the spark of the trade war.

#### A. *The United States's First Economic Strike and Its Justification*

The United States began imposing fifty billion dollars in tariffs on Chinese goods in July 2018, claiming authority under Section 301 of the Trade Act of 1974.<sup>142</sup> The administration's team of analysts and economists estimate that China's illegal practices concerning U.S. IP has cost the United States \$50 billion annually.<sup>143</sup> As stated previously, the Trade Act allows the U.S. Trade Representative to discern whether any practice or act of a foreign country burdens or restricts U.S. commerce or is unjustifiable.<sup>144</sup> Although the establishment of the WTO restricted unilateral action, Section 301 is internationally permitted as a first procedural step under unilateral action.<sup>145</sup> The United States is permitted to investigate specific measures and respond to requests for consultations over international restrictions.<sup>146</sup> However, in turn, the United States may not retaliate before WTO approval after its own request of a WTO panel.<sup>147</sup> Specifically, the Trade Act provides mandatory actions for the

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<sup>141</sup> Jennifer Hillman, *The Best Way to Address China's Unfair Policies and Practices Is Through A Big, Bold Multilateral Case at the WTO*, U.S.-China Economic and Security Review Commission, (June 8, 2018) (citing Statement as delivered by Ambassador Dennis Shea, Deputy U.S. Trade Representative and U.S. permanent Representative to the WTO, WTO General Council, Geneva, May 8, 2018).

<sup>142</sup> Walters, *supra* note 17.

<sup>143</sup> *Id.*

<sup>144</sup> Trade Act of 1974 § 301, 19 U.S.C. 2101 (2018); *see also* Walters, *supra* note 17.

<sup>145</sup> Bessko, *supra* note 65, at 292. Also, any state can act unilaterally in circumstances that the Treaty and Understanding establishing the WTO does not cover. *Id.* However, the 2018 Trade War concerns bilateral and multilateral treaties that concern the WTO. *Id.*

<sup>146</sup> Trade Act of 1974 § 301, 19 U.S.C. 2101 (2018).

<sup>147</sup> *Id.*

## Trade Representative:

## Sec. 301 Actions by United States Trade Representative.

## (a) Mandatory Action

(1) If the United States Trade Representative determines under section 304(a)(1) that—

(A) The rights of the United States under any trade agreement are being denied; or

(B) an act, policy, or practice of a foreign country—

(i.) violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or

(ii.) is unjustifiable and burdens or restricts United States commerce;

The Trade Representative shall take action authorized in subsection (c) . . .<sup>148</sup>

If the Representative finds such practices, then he may take any action set within his scope of authority as laid out in the statute.<sup>149</sup> The U.S. government created the Trade Representative position for transparency purposes.<sup>150</sup> Likewise, various countries employ their own executive trade representatives and committees, like China's Ministry of Commerce, to signify to trading partners that "we are watching you."<sup>151</sup> In the 2018 Trade War, the administration justified its tariffs against China through the U.S. Trade Representative under this U.S. law.<sup>152</sup>

In the early months of his tenure, President Trump announced that the United States would begin imposing tariffs on China for not complying with the WTO nor abiding by international trade regulations.<sup>153</sup> His rhetoric echoes the protectionism regime expressed years ago, but explains that the regime aligns with WTO regulations.<sup>154</sup> Specifically, the United States Trade Representative (USTR) released in both his WTO Compliance Annual Report and an additional

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *See id.*

<sup>151</sup> Hsieh, *supra* note 105, at 379.

<sup>152</sup> *See* Trade Act of 1974 § 301, 19 U.S.C. 2101 (2018); Robyn Dixon, *China Challenges Fairness of U.S. Tariffs and Asks World Trade Organization to Intervene*, L.A. TIMES, (July 16, 2018, 6:56 PM), <http://www.latimes.com/world/asia/la-fg-china-wto-20180716-story.html#>; *see also* Walters, *supra* note 17.

<sup>153</sup> *Read Donald Trump's Speech on Trade*, *supra* note 20.

<sup>154</sup> *See* McGee, *supra* note 18, at 540; *see also* *Trade Wars, Trump Tariffs and Protectionism Explained*, *supra* note 18; Peterson, *supra* note 18.

Special Report that China was placed on the Priority Watchlist because of China's constant abuses regarding misappropriation of U.S. IP through forced technology transfer.<sup>155</sup> The Trade Representative explained in the Special Report:

USTR continues to place China on the Priority Watch List because longstanding and new IP concerns strongly merit attention. China is home to widespread infringing activity, including trade secret theft, rampant online piracy and counterfeiting, and high levels of physical pirated and counterfeit exports to markets around the globe. China imposes requirements that U.S. firms develop their IP in China or transfer their IP to Chinese entities as a condition to accessing the Chinese market. China also requires that mandatory adverse terms be applied to foreign IP licensors, and requires that U.S. firms localize research and development activities. Structural impediments to civil and criminal IPR enforcement are also problematic, as are impediments to pharmaceutical innovation.<sup>156</sup>

The need for priority watch and the spark of the trade war all stems from the fact that the Chinese government owns virtually every enterprise through its unique economic structure.<sup>157</sup> Market access between China and the United States regarding IP trade has allegedly been harming the U.S. economy because both U.S. businesses in China and U.S. businesses trading with China must share their data with the Chinese government.<sup>158</sup>

In turn, China has access to U.S. trade secrets, trademarks, and original technology through a system that requires full access to information of every entity that is housed in China, which causes globally unfair competition.<sup>159</sup> Biotechnology patents, which assist the United States in maintaining their edge in the agricultural industry, are collected under this system.<sup>160</sup> The USTR explains in his Report regarding China's compliance with WTO regulations that despite China's policy changes for accession into the WTO, the state is now revising revisions which conditioned its accession:

After its accession to the WTO, China undertook a wide-ranging revision of its framework of laws and regulations aimed at protecting the intellectual property rights (IPR) of domestic and foreign rights

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<sup>155</sup> U.S. TRADE REP. ANN. REP. (2017); U.S. TRADE REP. SPECIAL 301 REP. (2017); *see Trade Wars, Trump Tariffs and Protectionism Explained*, *supra* note 18.

<sup>156</sup> U.S. TRADE REP. SPECIAL 301 REP. (2017).

<sup>157</sup> *See generally* Shaffer & Gao, *supra* note 14, at 127, 161–62.

<sup>158</sup> U.S. TRADE REP. SPECIAL 301 REP. (2017).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*; *What's at Stake in the U.S.-China Agricultural-Trade War*, *supra* note 22.

holders, as required by the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement). Currently, China is in the midst of an extended round of revisions to these laws and regulations. Despite various plans and directives issued by the State Council in 2017, inadequacies in China's IPR protection and enforcement regime continue to present serious barriers to U.S. exports and investment. As a result, China was again placed on the Priority Watch List.<sup>161</sup>

China's alleged reversion to old practices further undermines the rule of law established by the WTO and fosters unfair trade practices.<sup>162</sup> The United States has a longstanding record of USTR reports explaining China's longstanding abuses<sup>163</sup> and would benefit from using the reports and documentation of attempted negotiations with China to justify its actions at the WTO.

### B. *China's Retaliatory Tariffs*

In today's international economy, the United States is a front-runner in few areas, however agriculture is an area that propels the United States to the top.<sup>164</sup> Additionally, agriculture is the third largest U.S. export industry, meaning that the United States makes a large net profit on the products it sends to other countries.<sup>165</sup> Many of the United States' most dominant agricultural products make China's list of top imports and the areas in which the products are grown represent much of Trump's voting population; thus, revealing an ideal area for China to retaliate against the United States.<sup>166</sup> China initially retaliated with a twenty-five percent tariff on \$50 billion of U.S. exports, agricultural products equaling \$17 billion of the total.<sup>167</sup>

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<sup>161</sup> U.S. TRADE REP. ANN. REP. (2017); *see also* Bhala, *supra* note 102, at 1533 (explaining the several changes that China had to make to its government policies to abide by WTO regulations and accede to the WTO); Wu, *supra* note 9, at 270 (describing the challenges that China would face because of its unique government infrastructure which allows the Chinese government to have access to every course of business in China).

<sup>162</sup> U.S. TRADE REP. ANN. REP. (2017) ("[T]he United States has urged China to make certain key amendments to its trade secrets-related laws and regulations, particularly with regard to a draft revision of the *Anti-unfair Competition Law*.").

<sup>163</sup> *See generally id.*

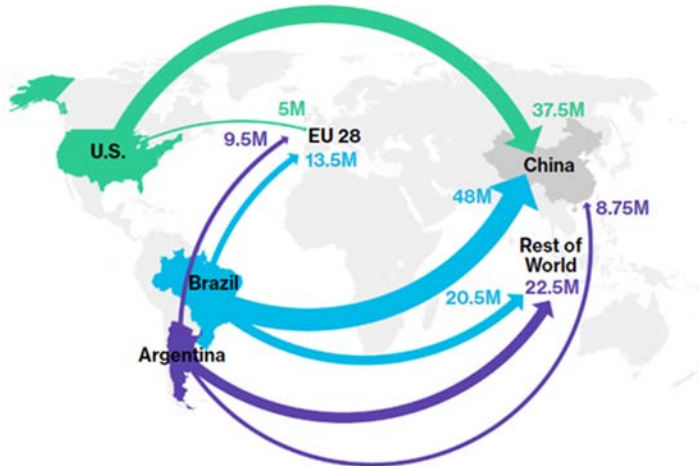
<sup>164</sup> Boudreau, *supra* note 7.

<sup>165</sup> Alan Bjerga and Mario Parker, *American Farmers are Losing Billions from Trump's Trade War –But They're Still Supporting Him*, FIN. POST (July 17, 2018), <https://business.financialpost.com/commodities/agriculture/american-farmers-are-losing-billions-from-trumps-trade-war-but-theyre-still-supporting-him>.

<sup>166</sup> Boudreau, *supra* note 7; Catherine Boudreau, *Trump Country Hit Hard by Chinese Tariffs*, POLITICO (July 6, 2018), <https://www.politico.com/story/2018/07/06/trump-china-tariffs-farmers-672103> [hereinafter Boudreau, *Trump Country Hit Hard by Chinese Tariffs*].

<sup>167</sup> *Id.*

Just as the U.S. administration promotes protectionist measures, one could argue that China is doing just the same, as it failed to initially negotiate or file a claim with the WTO prior to retaliating with tariffs. A large chunk, or \$19.6 billion, of the U.S. agricultural exports are exported to China, and farmers are beginning to worry that the longstanding trade relationship with China is crumbling to the point of no return.<sup>168</sup> Of the \$19 billion of U.S. agricultural products exported to China in 2017, U.S. soybean and oilseed exports to China made up \$12–\$14 billion.<sup>169</sup> The depiction below demonstrates the amount of soybeans exported from the U.S. to China in metric tons.



Source: Rabobank

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As depicted above, China is the United States' top recipient for exported soybeans. The soybean side of the agriculture industry between China and the United States is as robust as it is today because of the sovereigns' decades-long trade relationship.<sup>171</sup> In turn, the United States is ranked first as the world's top producer of soybeans, but the trade war has restrained the United States. The

<sup>168</sup> *Perspectives on U.S. Agricultural Trade*, The American Farm Bureau Federation (Sept. 13, 2018); Forrest Laws, *China's Response to Tariffs Hitting Soybean Farmers Hard*, DELTA FARM PRESS (Aug. 29, 2018), <https://www.farmprogress.com/marketing/china-s-response-tariffs-hitting-soybean-farmers-hard>.

<sup>169</sup> Laws, *supra* note 168.

<sup>170</sup> Durisin & Dodge, *supra* note 3 (showing where soybeans are imported and exported in metric tons to further show the impact that the United States is experiencing from China's tariffs against U.S. soybeans).

<sup>171</sup> Laws, *supra* note 168.

United States is unable to sell the crops harvested in fall 2018 because over half the soybean harvest was scheduled and regularly shipped to China.<sup>172</sup>

Additionally, U.S. pork is negatively-affected by the trade war because China is a world leader in pork consumption.<sup>173</sup> At the start of the trade war, China placed a twenty-five percent tariff on pork.<sup>174</sup> After the trade war festered for about a month, China retaliated with an additional twenty-five percent tariff on pork.<sup>175</sup> More recently, the tariff on pork has risen to an amount of over seventy percent on U.S. pork exports.<sup>176</sup> Pork helps the United States internationally dominate in the agricultural industry by bringing in almost \$20 billion of revenue, but the trade war has an estimated potential loss of as much as \$911 million in just the pork industry alone.<sup>177</sup>

U.S. agriculture comprises only two percent of the United States' total economy, so one could argue that it is a less effective target for the Chinese government to impose tariffs on to weaken the U.S. economy.<sup>178</sup> However, agriculture experts agree that U.S. agriculture is an appealing target because the United States is dependent on agriculture exports for its economy to remain stable.<sup>179</sup> Additionally, strategists theorize that the Chinese government is imposing these tariffs for political reasons to inspire the election of a new U.S. president.<sup>180</sup> When the United States retaliates against China's tariffs, China retaliates and implements new waves of tariffs, especially those tariffs targeted toward agricultural products.<sup>181</sup> After two months of China's waves of tariffs during the trade war, China has increased or placed tariffs on soybeans,

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<sup>172</sup> Keith Good, *Agricultural Trade: Soybean Issues*, FARM POL'Y NEWS (July 29, 2018), <https://farmpolicynews.illinois.edu/2018/07/agricultural-trade-soybean-issues/>; Peterson, *supra* note 18.

<sup>173</sup> Bjerga & Parker, *supra* note 165.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> Jeff Daniels, *Rising US-China Trade Tensions 'Couldn't Come at a Worse Time': Iowa Agriculture Secretary*, CNBC (Sept. 18, 2018), <https://www.cnbc.com/2018/09/19/escalation-in-trade-war-comes-at-worse-time-says-iowa-ag-official.html>.

<sup>177</sup> Donnelle Eller, *Iowa Farming's \$2.2 Billion Trade Loss Could Ripple Through State's Economy*, DES MOINES REG. (Sept. 21, 2018), <https://www.desmoinesregister.com/story/money/agriculture/2018/09/21/trump-china-trade-war-effects-iowa-agriculture-farming-exports-tariffs-canada-pork-soybeans-steel/1368546002/>.

<sup>178</sup> Megan Henney, *American Agriculture with Tariffs*, FOX BUS. (July 6, 2018), <https://www.foxbusiness.com/politics/why-china-is-targeting-american-agriculture-with-tariffs>.

<sup>179</sup> *What's at Stake in the U.S.-China Agricultural-Trade War*, *supra* note 22.

<sup>180</sup> Henney, *supra* note 178; Boudreau, *Trump Country Hit Hard by Chinese Tariffs*, *supra* note 166; David Lynch, *Popularity of Tariffs on China May Lead to Political Pain for Trump*, CHICAGO TRIB. (June 23, 2018), <https://www.chicagotribune.com/business/national/ct-biz-china-tariffs-analysis-20180623-story.html>.

<sup>181</sup> Boudreau, *Trump Country Hit Hard by Chinese Tariffs*, *supra* note 166.

sorghum, alfalfa, cherries, apricots, peaches, wheat, and corn, and the list continues to grow.<sup>182</sup>

### *C. Circumventing the Trade War Damage*

Both China and the United States are harmed by the trade war and both parties are attempting to find other trade routes to lessen the damage they continue to cause to their economies. The trade war between the two countries has spiraled into a global trade war because the tariffs are affecting several other countries.<sup>183</sup>

#### *1. United States' Strategy*

The United States is attempting to ameliorate the agricultural issues it faces by entering into other agreements with its allies. For example, President Trump met with EU trade officials to make a deal to help cover some of the potential losses from soybean production.<sup>184</sup> However, even with the EU buying extra soybean exports, the trade deficit will remain significant.<sup>185</sup> The agreement between the EU and the U.S. intends to reallocate \$1.6 billion of the \$12.3 billion soybean exports which were expected to hit China's domestic market before the trade war; thus, an uncomfortable excess of soybeans will remain untraded.<sup>186</sup>

The United States created an aid package program to assist farmers who are affected by the trade war. The aid package is a \$12 billion subsidy to be released in necessary installments for which farmers may apply.<sup>187</sup> The Department of Agriculture had paid \$4.7 billion in the summer of 2018, and \$3.6 billion of the first installment had been allocated to soybean farmers.<sup>188</sup> The U.S. government also implemented a "Food Purchase and Distribution Program" to buy farmers' excess products because of reduced demand from the trade war.<sup>189</sup> Also, the U.S. government adopted a "Trade Promotion Program" that was intended to discover other markets of which the U.S. farming industry could trade.<sup>190</sup>

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<sup>182</sup> Shruti Date Singh & Tatiana Freitas, *As Trump Settles Scores with China, American Farmers Pick Up Tab*, DELTA FARM PRESS (Oct. 4, 2018), <https://www.farmprogress.com/farm-policy/trump-settles-scores-china-american-farmers-pick-tab>.

<sup>183</sup> Peterson, *supra* note 18.

<sup>184</sup> Good, *supra* note 172.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

The protectionist trade policies that the administration employs strike a similar comparison to President Hoover's policies leading up to World War II. President Hoover tried to be tough on trade, but his practices produced increasing economic disparities and subsidies while he attempted to counteract agricultural turmoil.<sup>191</sup> Economists say that recently-lowered soybean exports have lowered U.S. economic growth and the trade war is hindering the U.S. economy. Since the trade war began, U.S. trade has seen its worst contribution to the economy in 33 years.<sup>192</sup>

For several reasons, some analysts believe that the United States should be hesitant to file a complaint at the WTO. First, litigation resulting from the claim may offend China and insinuate an "act of bad faith."<sup>193</sup> Second, trade disputes are often seen as political conflicts rather than trade issues.<sup>194</sup> This political viewpoint could unite Chinese groups behind more protectionist measures and negatively impact U.S. exporters even more.<sup>195</sup> Third, WTO litigation could potentially backfire resulting in higher costs in the United States for raw materials if the WTO decides that Chinese regulations are non-compliant.<sup>196</sup> Additionally, past U.S. government administrations have hesitated to investigate Section 301 complaints against China.<sup>197</sup> Bilateral talks and agreements are mutually preferred by both parties.<sup>198</sup> At the same time, a U.S. threat of litigation at the WTO would likely encourage China to negotiate the ongoing dispute between the two nations.<sup>199</sup>

## 2. *China's Strategy*

Although the Chinese people rely on soybeans for their animal feed and other products of consumption, there are other suppliers that China can buy from to make up for its tariffs on U.S. soybean exports. Brazil dominates soybean shipments when the United States is off season and Brazil has expanded its harvest to increase its profit during the trade war.<sup>200</sup> China's longstanding high

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<sup>191</sup> Amadeo, *supra* note 35.

<sup>192</sup> Bob Bryan, *Trump's Trade War Took a Stunning Bites out of the US Economy, and It's the Strongest Evidence yet that He's Shooting Himself in the Foot*, BUS. INSIDER (Oct. 26, 2018), <https://www.businessinsider.com/gdp-trump-tariff-trade-war-us-china-2018-10>.

<sup>193</sup> Hsieh, *supra* note 105, at 383.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 384.

<sup>200</sup> Durisin & Dodge, *supra* note 3.



demand for soybeans has resulted in Brazil investing in more acreage and better capabilities to grow soybeans to meet China's demand.<sup>201</sup> Strategists project that the increasing tensions in the trade war would result in reliance on Brazilian exports in the long term, and the Chinese people would substitute soybeans with other agricultural products to compensate for the demand that Brazil cannot supply.<sup>202</sup>

Chinese executives claim that the Chinese people stand behind them and their actions, as evidenced by their lifestyle changes. Specifically, months into the trade war, Chinese officials explained at an agricultural trade conference that the Chinese people support the Chinese government and are learning how to innovate so they can overcome the shortage of soy.<sup>203</sup> Chinese officials have further worried U.S. farmers in their claims that the nation is weaning itself off U.S. soybean exports by slashing the soy in animal feed.<sup>204</sup> Moreover, the Chinese government has explained its plans to eliminate U.S.-imported soybeans from China's supply, through alternatives and by tapping into Brazil's market.<sup>205</sup>

#### *D. The Argument Against Agricultural Waste*

At the time of its inception, the original members of the WTO created the organization with the intent to increase international livelihood through trade accessibility and improve standards of living across the globe.<sup>206</sup> States often consider food and self-sufficiency in agriculture a critical part of their national security.<sup>207</sup> Agriculture is crucial for urban-poor families and those households without farmers—these households alone spend 80% of their income on food.<sup>208</sup> This fact is especially true for China, as the Chinese people are facing food security issues amidst the trade war and the Chinese government fails to provide for its people.<sup>209</sup>

The Uruguay Round of negotiations was the first time that agriculture was a topic of discussion for inclusion in international trade.<sup>210</sup> Analysts believe that

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<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Inside China's Strategy in the Soybean Trade War*, CNBC (Sept. 20, 2018, 3:53 AM), <https://www.cnbc.com/2018/09/20/inside-chinas-strategy-in-the-soybean-trade-war.html>.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> Marrakesh Agreement, *supra* note 10; Yigzaw, *supra* note 1, at 163.

<sup>207</sup> Yigzaw, *supra* note 1, at 179.

<sup>208</sup> *Id.* at 165.

<sup>209</sup> Laws, *supra* note 168.

<sup>210</sup> Yigzaw, *supra* note 1, at 196.

agriculture remains to be the “the deal-maker or breaker” as it is often the subject of multilateral trade negotiations.<sup>211</sup> Mutual agreements regarding agriculture presented obstacles for the GATT and WTO agreements and continues to halt progress in the Doha Round negotiations.<sup>212</sup> International agricultural trade has restrictive protections because 80% of agricultural trade is for people’s consumption.<sup>213</sup> Therefore, food is too critical for life and development to allow a free global market to decide distribution outcomes.<sup>214</sup> Member states formed the WTO with an important goal to promote food security throughout the world and prevent food waste.<sup>215</sup>

The Agreement on Agriculture was important for the WTO to prevent food waste and increase agricultural trade. The WTO Committee on Agriculture has reported that specific aspects of agriculture require continuous and distinct treatment within the WTO.<sup>216</sup> Agriculture is the “first area [of trade] where nearly all tariff lines are bound.”<sup>217</sup> Under the Agreement on Agriculture, China’s retaliatory tariffs against the U.S.’s agricultural products should be challenged at the WTO for potential legal violations.

### III. A PROPOSED SOLUTION

The U.S. Trade Representative believes that change in China will only happen with aggressive application of U.S. guidelines and enforcement of WTO rules by bringing claims against China.<sup>218</sup> For example, advisors close to the Representative explain:

[The Trade Representative] has told friends and associates that he is intent on preventing the president from being talked into accepting “empty promises,” like temporary increases in soybean or beef purchases. [Mr. Lighthizer] is pushing for substantive changes, such as forcing China to end its practice of requiring American companies to hand over valuable technology as a condition of doing business there. When Mr. Lighthizer senses that anyone might be going a little soft on China, he opens a paper-clipped manila folder he totes around

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<sup>211</sup> *Id.* at 169.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 170.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 199.

<sup>218</sup> Robert E. Lighthizer, *Evaluating China’s Role in the World Trade Organization Over the Past Decade*, U.S.-China Economic and Security Review Commission, June 9, 2010.

and brandishes a single-page, easy-reading chart that lists decades of failed trade negotiations with Beijing.<sup>219</sup>

Although the Representative has years of experience in trade, the rigid negotiation style he exudes has not been effective over the past few months and will likely fail to foster a future result.<sup>220</sup> Rather than handling international matters on its own, the United States should challenge China through the WTO with a case, ideally with countries joining to make the case multilateral, to hold China accountable for its consistent abuses. States generally bring viable claims which result in situations in which the complainant almost always wins, and the responding state almost always complies.<sup>221</sup>

Despite claims that the WTO is rooted in western ideals and thus favors the United States, the United States loses 89% of the cases brought against it and wins 91% of the cases it brings.<sup>222</sup> Statistics show that the United States' win-loss ratio is virtually identical to the ratios of any other country.<sup>223</sup> China has officially filed sixteen claims with the WTO and one more recent claim against the United States in response to the trade war.<sup>224</sup> Neither nation is unfamiliar with the fact that the WTO has asserted itself in several panel hearings and the United States has filed more than seven complaints against China at the WTO.<sup>225</sup> The United States should file claims against China to hold China accountable for its agricultural and IP violations. Overall, China's actions in the trade war specifically warrant consequences because its tariffs on U.S. agricultural goods violate the WTO's Agreement on Agriculture.

#### A. *The WTO's Approach to the U.S.'s Argument Under the National Security Exception*

Although the United States began imposing tariffs as a response to China's alleged theft of U.S. software, the United States likely has a strong case against China.<sup>226</sup> This is not to say that the United States will not face repercussions

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<sup>219</sup> Alan Rappoport, *As China Talks Begin, Trump's Trade Negotiator Tries to Keep President from Wavering*, N.Y. TIMES (Jan. 1, 2019), <https://www.nytimes.com/2019/01/01/us/politics/robert-lighthizer-president-trump.html>.

<sup>220</sup> *Id.*

<sup>221</sup> Roger Alford, *The Self-Judging WTO Security Exception*, 2011 UTAH L. REV. 697, 697-98 (2011).

<sup>222</sup> Dixon, *supra* note 152; Peterson, *supra* note 18.

<sup>223</sup> Peterson, *supra* note 18.

<sup>224</sup> *Disputes by Member*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_by\\_country\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm) (last visited Oct. 29, 2018).

<sup>225</sup> Hsieh, *supra* note 105, at 388-90.

<sup>226</sup> U.S. TRADE REP. SPECIAL 301 REP. (2017); *What's at Stake in the U.S.-China Agricultural-Trade War*, *supra* note 22.

because it failed to file a claim with the WTO initially. Specifically, in 1999, the WTO held that economically powerful countries are not permitted to threaten other countries with unilateral actions.<sup>227</sup> Therefore, the United States should face consequences when responding to China's complaint at the WTO. However, the United States could potentially justify its tariffs against China under the WTO's National Security Exception.

The U.S. administration has entertained the idea that the tariffs against China were in response to IP theft, which the United States considers a National Security issue.<sup>228</sup> Article XXI states that:

Nothing in this agreement shall be construed to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests, or to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests . . . .<sup>229</sup>

The National Security Exemption categorizes security interests as national security information, nuclear material, military goods and services, war and international emergencies, and United Nations Charter obligations.<sup>230</sup> The United States' strongest argument is found in protecting its national security information. China's economic structure has allegedly resulted in piracy of U.S. intellectual property and the United States can make a strong argument that the Chinese government has access to U.S. intelligence because of the U.S. corporations housed in China. Thus, the WTO's reasoning of the Exception will be important in this case because the Organization will either allow U.S. actions pertaining to the trade war to go unpunished, and potentially open the floodgates for other countries to follow, or WTO panelists will use the case as an opportunity to advocate for change in trade rules and better define the applicability of the Exception.<sup>231</sup>

Some analysts believe that the WTO avoids addressing the National Security Exception because the WTO would violate state sovereignty.<sup>232</sup> The WTO

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<sup>227</sup> Nicholas Moore, *Does the WTO have the Power to Stop a Trade War?*, CGTN (Apr. 6, 2018), [https://news.cgtn.com/news/78417a4e326b7a6333566d54/share\\_p.html](https://news.cgtn.com/news/78417a4e326b7a6333566d54/share_p.html).

<sup>228</sup> U.S. TRADE REP. SPECIAL 301 REP. 18, 35 (2017).

<sup>229</sup> General Agreement on Tariffs and Trade 1994 art. I, Apr. 15, 1994; Marrakesh Agreement, *supra* note 10.

<sup>230</sup> *Id.*; Alford, *supra* note 221, at 703.

<sup>231</sup> Arvind Panagariya, *By Invoking National Security Clause, Donald Trump Goes for Nuclear Option in Trade War*, ECON. TIMES, (Aug. 22, 2018), <https://economictimes.indiatimes.com/news/economy/foreign-trade/by-invoking-national-security-clause-donald-trump-goes-for-nuclear-option-in-trade-war/articleshow/65497966.cms>.

<sup>232</sup> *Id.*

would have to decide whether a sovereign's security interest is actually a security interest based on a standard that does not yet exist at the WTO.<sup>233</sup> Recently, Ukraine sued Russia at the WTO because Russia allegedly impeded agricultural exports that required railway access through Russia.<sup>234</sup>

Russia justified its blocking of the imports on the basis that Ukraine posed a security risk to its citizens, under the Security Risk Exception, because of its anti-Russian sentiment.<sup>235</sup> Ukraine argued that there were other reasons, like retaliating against the Ukraine because of Crimea, for Russia's impediments of imports.<sup>236</sup> Russia submitted several pieces of evidence to the WTO showing negative attitudes toward Russians in Ukraine that led to attacks against Russian entities, the deaths of several people, automatic Ukrainian prosecutions against Russian citizens for their entry into Crimea, and several other examples.<sup>237</sup>

The WTO explained that in cases in which illegal conduct is argued as justifiable for security risk reasons, the cases should be decided on a case-by-case basis.<sup>238</sup> The WTO reasoned that Russia did not act illegally in preventing Ukrainian imports because of Ukraine's anti-Russian political climate.<sup>239</sup> Further, the WTO agreed that Russia was ensuring the health and safety of its own employees and the Security Risk Exception was applicable.<sup>240</sup>

The United States was included as a third party to the Russian-Ukrainian lawsuit at the WTO and commended the WTO holding in favor of Russia.<sup>241</sup> One could argue that the WTO's decision for Russia opened the floodgates for a low threshold regarding the applicability of the National Security Exception. The National Security Exception has been a known loophole stemming from Article XXI of the GATT.<sup>242</sup> The Exception has rarely been used, lacks any

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<sup>233</sup> *Id.*

<sup>234</sup> Russia – Measures Affecting the Importation of Railway Equipment and Parts Thereof, Final Report of the Panel, July 30, 2018, WT/DS499/R ¶ 2.2. *See also* Busch, *supra* note 21.

<sup>235</sup> Russia – Measures Affecting the Importation of Railway Equipment and Parts Thereof, Final Report of the Panel, July 30, 2018, WT/DS499/R ¶ 7.316.

<sup>236</sup> *Id.*; *see generally* Michael Kofman, *The Crimean Crisis and Russia's Military Posture in the Black Sea*, WAR ON THE ROCKS (Aug. 19, 2016), <https://warontherocks.com/2016/08/the-crimean-crisis-and-russias-military-posture-in-the-black-sea/> (explaining the situation in Crimea at the time).

<sup>237</sup> *See* citations accompanying *supra* note 223.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> Palmer, *supra* note 21.

<sup>242</sup> Alford, *supra* note 221, at 698.

authoritative pronouncement as to its meaning, and welcomes creative arguments and ambiguity in how it applies to complaints.<sup>243</sup>

The Exception has been interpreted as self-judging based on the country that raises it, and it should be raised in good faith.<sup>244</sup> Essentially, the self-judging nature of the Exception places the argument outside of the domain of WTO judicial review.<sup>245</sup> This could explain why the WTO panel allowed Russia's justification for its conduct at the WTO and this interpretation may assist the United States in justifying its own tariffs against China. The United States likely commended the WTO's decision for Russia because it would be favorable precedent for the United States in the future.<sup>246</sup> Nevertheless, the WTO emphasized that security situations are determined on a case-by-case basis and the United States will require more than a previous case to justify its tariffs.<sup>247</sup>

Additionally, the WTO does have "sovereignty safety valves" to address concerns over invocations of the Security Risk Exception made in bad faith.<sup>248</sup> Member states are able to advocate for their national objective in other ways to prevent invocation of the Exception including: (1) the Non-Application Clause (a country is not forced to trade with an enemy); (2) Preferential Trade Agreements (mechanisms to compensate members for impaired or nullified trade benefits); and (3) WTO-authorized sanctions.<sup>249</sup> There is a general understanding at the WTO that the National Security Exception should be used in situations that threaten reciprocity between two states.<sup>250</sup> The National Security Exception should be considered a last resort.<sup>251</sup> Historically, sovereigns have not directly raised the National Security Exception in response to situations where a trading partner is unreliable, but scholars believe that it is not impossible to impose trade restrictions to protect essential security interests—it just has not been done.<sup>252</sup> In reply to China's complaint at the WTO, the United States will likely attempt to justify the tariffs against China under the National Security Exception.

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<sup>243</sup> *Id.* at 707 (The Exception has been notably used in The U.S. Marshall Plan, the Falkland War, and the Reagan Doctrine.).

<sup>244</sup> *Id.* at 705.

<sup>245</sup> *Id.* at 702.

<sup>246</sup> Palmer, *supra* note 21; *see also* Busch, *supra* note 21.

<sup>247</sup> *See* Palmer, *supra* note 21; *see also* Busch, *supra* 21.

<sup>248</sup> Alford, *supra* note 221, at 725.

<sup>249</sup> *Id.* at 726.

<sup>250</sup> *Id.* at 756.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 757.

A. *U.S. Allegations will Challenge the WTO's Ability to Handle China's Economic Structure*

The U.S. administration claims that the WTO is incapable of handling the unfair Chinese trade practices concerning intellectual property.<sup>253</sup> This case will likely challenge the WTO's ability to address China's unique economic structure.<sup>254</sup> As discussed in Section II above, China's economic structure of state-owned enterprises does not necessarily fit in with world trade liberalization.<sup>255</sup> Further, scholars explain that the only reason why China has gotten away with its state practices as long as it has is because China's practices have been confined to the violations that other countries commit.<sup>256</sup> However, the Chinese government's requirement that Chinese partners share their technical innovations with the government will prove to be a new challenge for the WTO.<sup>257</sup> The WTO should uphold its mission to encourage fair practices, and should handle China's state-owned enterprise regime the same way it applies to other nations' corporations and their IP rights. China will likely have to make some significant changes to its governing system to adjust to increasing market access and international trade overall.

B. *China's Violations of the Agreement on Agriculture*

China's tariffs on U.S. agricultural products violate the Agreement on Agriculture because the actions threaten the livelihood of farmers and hinder international economic efficiency.<sup>258</sup> WTO members created the Agreement on Agriculture to "increase market access and improve the livelihoods of farmers around the world."<sup>259</sup> As such, member states must notify WTO officials and the affected government of proposed tariffs and abide by a tariff schedule prior to official implementation.<sup>260</sup> The United States has followed these procedures by notifying the appropriate parties and individuals of its tariff plans, whereas China's retaliation was immediate and left the U.S. farming industry without

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<sup>253</sup> Dixon, *supra* note 152.

<sup>254</sup> See Section II.

<sup>255</sup> Wu, *supra* note 9, at 270.

<sup>256</sup> *Id.* at 308.

<sup>257</sup> Dixon, *supra* note 152.

<sup>258</sup> *What We Stand For*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/whatis\\_e/what\\_stand\\_for\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/what_stand_for_e.htm) (last visited Oct. 29, 2018); Marrakesh Agreement, *supra* note 10; Yigzaw, *supra* note 1, at 163–64.

<sup>259</sup> *See Agriculture*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm3\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm3_e.htm) (last visited Oct. 29, 2018).

<sup>260</sup> Marrakesh Agreement, *supra* note 10; see also *Market Access*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/agric\\_e/ag\\_intro02\\_access\\_e.htm](https://www.wto.org/english/tratop_e/agric_e/ag_intro02_access_e.htm) (last visited Oct. 29, 2018).

time to accommodate and negotiate.<sup>261</sup> Even though China has filed sixteen complaints against the United States with the WTO's dispute settlement body as of October 2018, China should have waited for the WTO to take action instead of retaliating with its own tariffs on U.S. agriculture to further maintain the international rule of law.<sup>262</sup>

Additionally, China's tariffs on soybeans specifically violate the Bilateral Concession Agreement with the United States, which conditioned China's accession to the WTO in addition to the specific protections inherent in the Agreement on Agriculture.<sup>263</sup> Before its accession to the WTO, China agreed to phase out all tariffs on soybean exports to increase market access.<sup>264</sup> China's specific targeting of soybeans in the trade war violated this initiative set out in the longstanding agreement. The Agreement on Agriculture places protections on specific agricultural products and oilseeds are one of the few with specific protections from tariffs.<sup>265</sup> Soybeans are categorized as an oilseed and therefore demand protection from unscheduled and excessive tariffs.<sup>266</sup> Whether the tariffs are excessive is for the WTO to decide, but the negative effects on the U.S. farmers expose a level of severity in which the excessiveness of agricultural tariffs, on soybeans especially, is likely.

The Agreement on Agriculture aims to prevent food waste by its promotion of increased market access through the WTO as a global trade system.<sup>267</sup> Because of China's agricultural tariffs, U.S. farmers are not able to sell their soy crops at cost because there is no longer a market.<sup>268</sup> Farmers are trying to stockpile their crops, but the potential for food waste is a constant concern.<sup>269</sup> The Chinese people may face a food security issue because the resulting tariffs result in less food supplies and higher prices as well.<sup>270</sup>

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<sup>261</sup> Dixon, *supra* note 152; Laws, *supra* note 168.

<sup>262</sup> *Disputes by Member*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_by\\_country\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm) (last visited Oct. 29, 2018); Charlene Zang, *New China Tariffs Show Impatience with WTO*, MARKETWATCH (Aug. 6, 2018), <https://www.marketwatch.com/story/new-china-tariffs-show-impatience-with-wto-2018-08-03>.

<sup>263</sup> Market Access Agreement, *supra* note 109. *See generally* Bhala, *supra* note 102, at 1481–86 (describing the several conditions that China had with different nations so it could accede to the WTO).

<sup>264</sup> Market Access Agreement, *supra* note 109.

<sup>265</sup> Marrakesh Agreement, *supra* note 10.

<sup>266</sup> *Id.*; Good, *supra* note 167.

<sup>267</sup> Marrakesh Agreement, *supra* note 10.

<sup>268</sup> Singh & Freitas, *supra* note 182.

<sup>269</sup> *Id.*

<sup>270</sup> Laws, *supra* note 168.



The strongest criticism against this paper proposing that the United States should file a claim regarding China's agricultural tariffs against the United States is found in the international general principle to negotiate in good faith.<sup>271</sup> Specifically, the principle calls on sovereigns to do their best to solve disputes through direct negotiations and resolutions.<sup>272</sup> Even though China and the United States are attempting to work through their differences and reach an agreement between January 2019 and March 2019, this Comment still advocates for claims of past violations to be filed with the WTO.<sup>273</sup> Such claims may worsen negotiations, but failing to hold China and the United States accountable for their respective questionable agricultural tariffs and unilateral action undermines the rule of law and sends a message that economic powers can get away with their abuses. Moreover, it is important that the WTO settle the dispute so that the IP and agricultural abuses central to the trade war present a first impression at the WTO and inspire new precedent for all sovereigns.

### CONCLUSION

Ideally, other countries would join the United States in filing a claim against China for its WTO regulation abuses. One of the WTO Dispute Resolution Panel's previous judges, Jennifer Hillman, called upon the United States to build a large case against China so other countries can join in the allegations.<sup>274</sup> This approach in combination with the United States' desire to aggressively apply WTO rules show a sense of solidarity in the international community in correcting past wrongs.<sup>275</sup> The United States has filed claims and won at the WTO for past abuses and should do the same regarding China's agricultural tariffs.<sup>276</sup> It is important that the United States file against China so that other countries feel they can be successful and not suffer from retaliatory tariffs.<sup>277</sup>

Some analysts agree that the 2018 Trade War would be the case for the WTO to handle the "deep connection between the ruling Communist party and commercial institutions" and force the institutions to "privatize, become more

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<sup>271</sup> Martin Rogoff, *The Obligation to Negotiate in International Law: Rules and Realities*, 16 MICH. J. INT'L L. 141, 155 (1994).

<sup>272</sup> *Id.*

<sup>273</sup> Schoen & Pramuk, *supra* note 8.

<sup>274</sup> Hillman, *supra* note 141.

<sup>275</sup> Lighthizer, *supra* note 218.

<sup>276</sup> U.S. TRADE REP. ANN. REP. (2017) (explaining the recent history of the U.S.'s complaint filings at the WTO in exercising and its successes in improving the rule of law).

<sup>277</sup> Hillman, *supra* note 141. Countries do not bring claims to the WTO, unless they feel that they can win. There is fear over China's protectionist trade policies resulting in retaliatory tariffs otherwise.

efficient, and compete on a level playing field.”<sup>278</sup> The WTO will have to reform or even create new trade rules to evolve with new technology and data. Ultimately, the WTO’s addressing of the 2018 Trade War will be a success for the international community because the Organization would have to reckon with China’s economic system and establish how it fits in the global community. The holding at the WTO would result in more fair and transparent international practices.

More recently, the United States and China set a schedule to negotiate over a specific span of time so they may reach an agreement without outside interference.<sup>279</sup> While this returns to the general principle of good faith negotiations, this comment still advocates for action from the WTO.<sup>280</sup> The United States should file a claim against China to not only protect its alleged security interest IP rights, but to show the world that even something as essential as agriculture still requires protection. In turn, the WTO should be firm in its consequences for China’s tariffs against agriculture to preserve the livelihood of farmers in all parts of the world and to protect the food interests of individuals. Ultimately, should the United States utilize the WTO, it will likely inspire other sovereigns to follow suit and further lead to an international community that better respects the rule of law.

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<sup>278</sup> Gabe Lipton, *The Elusive ‘Better Deal’ with China*, ATLANTIC (Aug. 14, 2018), <https://www.theatlantic.com/international/archive/2018/08/china-trump-trade-united-states/567526/>.

<sup>279</sup> Bob Davis & Vivial Salama, *Trump Names Lighthizer to Run U.S.-China Negotiations*, WALL STREET J. (Dec. 8, 2018), <https://www.wsj.com/articles/trump-says-u-s-china-relations-have-taken-big-leap-forward-1543847551>.

<sup>280</sup> Rogoff, *supra* note 271, at 155.

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