

Protecting American Soybean Farmers from a Trade War: An Analysis of the Dispute Resolution Clause in the U.S. & China Trade Agreement

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I. INTRODUCTION

American farmers and the agriculture industry have long played an important economic role in the United States.¹ Today, this role is potentially in jeopardy due to the contentious trade relationship between the United States and China.² Farmers were able to breathe a sigh of relief upon the execution of the “Phase One” Trade Deal (Agreement) between the two

¹ Carolyn Dimitri et al., *The 20th Century Transformation of U.S. Agriculture and Farm Policy*, U.S.D.A. ERS EIB-3 (June 2005), https://www.ers.usda.gov/webdocs/publications/44197/13566_eib3_1_.pdf.

² *U.S. Relations with China, 1949-2020*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/timelin/e/us-relations-china> (last visited Mar. 8, 2021) [hereinafter *U.S. Relations with China*].

countries in early January 2020, following a recent trade bout that caused soybean producers to endure a twenty percent reduction in profits.³ An emphasis of the Agreement was to remove the tariffs placed on American soybeans and have China commit to an increase of scheduled buying of soybeans and other American agriculture products moving forward.⁴ While the Agreement appears to be a good sign for the trade relationship and American soybean farmers, it does not necessarily follow that the Agreement is currently structured to handle future trade disputes in the best interests of our concerned farmers.

This Note proposes that the dispute resolution mechanism chosen for the Agreement too easily leaves open the door for China and the United States to resume the same tariff practices that the Agreement sought to extinguish. In the past, these practices caused China to implement a twenty-five percent tariff on seventeen billion dollars of American agricultural products and required a multi-billion dollar bail-out package for soybean producers.⁵ The following analysis provides two possible remedies to enhance the Agreement moving forward in amicably dealing with China to remove the possibility of uncapped and harmful tariffs that are detrimental to American trade, especially to the American soybean market, and the farmers who make up that market.

II. THE TRADE WAR PRECEDING THE “PHASE ONE” TRADE DEAL

It is established that the United States and China have a contentious relationship when it comes to trade and their respective positions in the global market.⁶ One particular area of contention is China’s importing of U.S. agriculture commodities, specifically soybeans. But how did this great trade rivalry begin between these two superpowers? While relations with China have always been a topic of discussion and debate, the recent trade relationship started with the United States extending an olive branch.⁷

In 2000, the United States passed trade legislation in an attempt with other WTO members to normalize trade with China and to help the growing nation join the WTO.⁸ This attempt proved successful because, by 2006, China had become one of the largest trade partners of the United States.⁹ While the

³ *Id.*; see Bill Chappell, *Agriculture Department Will Pay \$4.7 Billion to Farmers Hit in Trade War*, NAT’L PUB. RADIO (Aug. 28, 2018, 8:21 AM), <https://www.npr.org/2018/08/28/642525831/agriculture-dept-will-pay-4-7-billion-to-farmers-hit-in-trade-war>.

⁴ See Economic and Trade Agreement Between the Government of the United States of America and the Government of the People’s Republic of China, China-U.S., Jan. 15, 2020 [hereinafter *Trade Deal*].

⁵ Chappell, *supra* note 3.

⁶ See *U.S. Relations with China*, *supra* note 2.

⁷ *Id.*

⁸ H.R. 4444, 106th Cong. (2d Sess. 2000).

⁹ *U.S. Relations with China*, *supra* note 2.

countries grew their business together, they also began to experience more turmoil. Following the increase in trade, the two countries began to have multiple trade disputes brought to the WTO.¹⁰ These disputes were centered around the United States' contestation of China's trade policies and practices.¹¹

While disputes were taking place, the United States was building a monumental grain force that was essential for both countries. This was important in two respects, the first being that the United States had grown into the world's largest producer of soybeans.¹² The other important piece is that China was, and continues to be, the world's leading importer of soybeans.¹³ This positioning has led to the United States exporting approximately sixty-two percent of American soybeans to China.¹⁴

These were very encouraging numbers for American soybean farmers, but unfortunately, they have since begun to whittle away.

Tensions started to boil over between the United States and China when President Donald Trump came into office in 2016, pledging to make better trade deals for the country—with an emphasis placed on U.S. trade with China.¹⁵ The pledge to return to U.S. trade dominance with China began with accusations from the Trump administration regarding Chinese theft of U.S. intellectual property (IP) and trade secrets.¹⁶ In an attempt to combat China's trade practices, the United States initiated stiff tariffs across an array of Chinese goods.¹⁷ In response to these increases, China countered U.S. tactics with equally harsh tariffs against American products, including a twenty-five percent tariff stamped on American soybeans.¹⁸ China also switched their importing emphasis of soybeans to Brazil, the second largest producer of soybeans behind the United States.¹⁹

This was a crushing blow for American soybean producers as the price for soybeans dropped and production prices rose.²⁰ Producers also faced an approximate twenty-six percent decrease in imports in 2018 as compared to

¹⁰ Chad P. Bown, *U.S.–China Trade Conflicts and the Future of the WTO*, 33 FLETCHER F. WORLD AFF. 27, 28 (2009).

¹¹ *Id.*

¹² Ethan Sabala & Stephen Devadoss, *Impacts of Chinese Tariff on World Soybean Markets*, 44 J. AGRIC. & RES. ECON. 291, 291 (2019).

¹³ Mahsa Shahbandeh, *Import Volume of Soybeans Worldwide in 2020/2021, by Country*, STATISTA (Jan. 26, 2021), <https://www-statista-com.proxy.lib.uiowa.edu/statistics/612422/soybeans-import-volume-worldwide-by-country/>.

¹⁴ Sabala & Devadoss, *supra* note 12.

¹⁵ *See U.S. Relations with China*, *supra* note 2.

¹⁶ *Id.*

¹⁷ Sabala & Davadoss, *supra* note 12.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *See id.*

the similar period of 2017.²¹ Total agriculture exports to China would go on to suffer an approximate fifty percent decrease in trade between 2017 and 2018 overall.²² The United States provided a relief package of almost five billion dollars to American producers, with eighty percent of that money going to soybean producers in 2018.²³ At the same time, large parts of the country experienced an increase of farm bankruptcies over the same one year period, with ten-year highs of Chapter 12 bankruptcies in portions of the Midwest.²⁴ Research also pointed to an increase in farmers seeking mental health services and reportedly increases in suicides across the country coinciding with these events.²⁵ The resulting stalemate of economically draining tariffs against each other required the two countries to negotiate a trade deal.

The resulting negotiations led to the signing of the “Phase One” trade deal, officially signed by both countries on January 15, 2020.²⁶ In general, the Agreement consists of a commitment on China’s part to buy American goods on an accelerated buy schedule over the next two years.²⁸ The important provision for soybean producers is that China is required to increase imports of American agriculture products by approximately thirty-two billion dollars over the two-year period.²⁹ To the hopeful and casual eye, this was a huge win for farmers and their futures. However, upon further examination, the dispute resolution mechanism utilized by the two countries in the Agreement leaves the option of retaliatory tariffs readily on the table for the parties to utilize against each other in the future.³⁰

III. THE “BEDR” & DISPUTE RESOLUTION

A. *The Mechanism & Process*

What is known about the Agreement is the dispute resolution provisions with which the parties have chosen to resolve conflicts. It comes as no surprise that the Trump administration chose a private approach, and more specifically, one that does not deal with the WTO.³¹ President Trump was an outright critic

²¹ Wes Peterson, *Who Wins Trade Wars?*, FARM FUTURES (July 18, 2018), <https://www.farmfutures.com/commentary/who-wins-trade-wars>.

²² Chuck Jones, *Amid Trump Tariffs, Farm Bankruptcies and Suicides Rise*, FORBES (Aug. 30, 2019, 11:28 A.M.), <https://www.forbes.com/sites/chuckjones/2019/08/30/amid-trump-tariffs-farm-bankruptcies-and-suicides-rise/?sh=15c836522bc8> (detailing several factors agitating the American ag industry, including China’s retaliatory tariffs).

²³ See Chappell, *supra* note 3.

²⁴ Jones, *supra* note 22.

²⁵ See *id.*

²⁶ Trade Deal, *supra* note 4.

²⁸ See *id.*

²⁹ *Id.* at p. 6-3.

³⁰ See *Trade Deal*, *supra* note 4.

³¹ *Trade Deal*, *supra* note 4, art. 7.4, ¶1.

of the WTO, believing the organization rules unfairly against the United States in trade disputes.³² This animosity against the WTO can also be seen in the gridlock that the Trump administration created.³³ The United States blocked appointments of new judges to the Appellate Body of the WTO, causing the dispute mechanism of the WTO to come to a standstill.³⁴ The United States has several claimed concerns regarding the Dispute Settlement Body (DSB) of the WTO, including what it identified as “overreach” by the Appellate Body and WTO panels in making decisions that affect the United States when they are not directly involved in the disputes.³⁵ Judicial overreach has also been a concern for other member countries, despite the success of the WTO.³⁶ One of the main criticisms of the WTO is that the body has been unable to update rules regarding decision making. The United States and others believe that this situation allows the Appellate Body to render decisions that are circumventing member countries’ rights to revise rules and are being made without proper authority.³⁷

To avoid outside influence, the two countries have instead created a Bilateral Evaluation and Dispute Resolution Office (BEDR) to hold each other accountable to the Agreement.³⁸ This is a private process that takes place outside of the purview of the WTO and also relies on private disclosure exclusively.³⁹ Following the agreement, each country is to establish a BEDR Office to monitor progress and to evaluate disputes that may arise from either party.⁴⁰ Again as mentioned above, these complaints or “appeals” are to remain private between the two offices.⁴¹ The complaints are to be first resolved by the designated trade representatives for each country within twenty-one days upon receiving the appeal.⁴² If the appeal cannot be resolved at this stage, then it goes up a level to the designated U.S. Trade Representative and China’s

³² Donald J. Trump (@realDonaldTrump), TWITTER (JUL. 26, 2019, 1:29 PM), <https://www.thetrumparchive.com/?dates=%5B%222019-07-26%22%2C%222019-07-27%22%5D>.

³³ Tetyana Payosova, Gary Clyde Hufbauer, and Jeffrey J. Schott, *The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures*, PETERSEN INST. FOR INT’L ECON. (March, 2018), <https://www.piie.com/system/files/documents/pb18-5.pdf>.

³⁴ *Id.*

³⁵ *Id.*

³⁶ See David Unterhalter, *What Makes the WTO Dispute Settlement Procedure Particular: Lessons to be Learned for the Settlement of International Disputes in General?*, in INTERNATIONAL DISPUTE SETTLEMENT: ROOM FOR INNOVATIONS? 5, 7 (Rüdiger Wolfrum & Ina Gätzschmann eds., 2013).

³⁷ Payosova et al., *supra* note 32, at 2.

³⁸ Press Release, Office of U.S. Trade Representative, USTR Announces Formation of Bilateral Evaluation and Dispute Resolution Office Pursuant to U.S.-China Phase One Agreement (Feb. 14, 2020), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/february/ustr-announces-formation-bilateral-evaluation-and-dispute-resolution-office-pursuant-us-china-phase>.

³⁹ See *Trade Deal*, *supra* note 4, art. 7.4.

⁴⁰ *Id.* art. 7.4, ¶1.

⁴¹ *Id.*

⁴² *Id.* ¶4, Annex 7-1.

designated Vice Minister.⁴³ The final stage of resolving the appeal with trade representatives lies with the U.S. Trade Representative and China's designated Vice Premier.⁴⁴ At this stage, the highest designated representatives are to resolve the appeal within forty-five days of receipt.⁴⁵

If the issue goes unresolved at these levels, the parties are to begin expedited consultations to address and resolve the damages or losses that have resulted from the appeal.⁴⁶ The final option for the parties is that a party may, based on information gathered at the consultations, suspend part of the agreement to remedy the issue or use other remedial measures they see fit with the goal in mind of continuing bilateral trade to prevent further escalation.⁴⁷ The final sentence of the dispute provision states that if a party deems actions taken to remedy a dispute were done in bad-faith, that party may withdraw from the agreement with notice.⁴⁸

It is clear that these remedies are designed to promote cooperative, bilateral dispute resolution.⁴⁹ There is also arguably some incentive for the parties to cooperate to resolve these issues as the remedies, or more or less retaliations, can be quite serious for the two countries and their bilateral trade relationship.⁵⁰ While it appears China may be able to make a good-faith argument regarding performance given the unforeseen tolls of Covid-19, it truly remains unknown what the performance and the relationship will look like going forward.⁵¹

B. Implications of a Change in Trade Regime

For an agreement that rests on the United States and China being able to resolve these disputes amongst themselves, a Joe Biden administration throws a new wrinkle into the situation. Again presenting no surprises, Biden is a critic of the Agreement that his predecessor struck with China.⁵² Claiming China was the "real winner" of the trade deal, Biden felt the deal did not resolve the "real issues" at its heart.⁵³ Biden believed some of the essential components were missing, including addressing industrial subsidies, support

⁴³ *Id.*

⁴⁴ *Trade Deal*, *supra* note 4, art. 7.4, ¶4.

⁴⁵ *Id.* Annex 7-A.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *See Trade Deal*, *supra* note 4, art. 7.4.

⁵⁰ *See id.* ¶ 4.

⁵¹ *Id.* art. 7.6, ¶ 2.

⁵² *See* Jennifer Epstein, *Biden Slams Trump-China Trade Deal as Lacking on Key Disputes*, BLOOMBERG (Jan. 15, 2020, 10:23 AM), <https://www.bloomberg.com/news/articles/2020-01-15/biden-slams-trump-china-trade-deal-as-lacking-on-key-disputes>.

⁵³ *Id.*

for state owned entities, cyber theft, and a general lack of protections against predatory practices in both trade and technology.⁵⁴ Addressing China during his campaign, Biden stated that he wanted to protect against state surveillance and prevent Chinese technology companies from spreading hate.⁵⁵ Biden plans to accomplish this by hosting a “Summit” with other world leaders to build diplomatic relations to tackle issues such as these and others around the world.⁵⁶ Biden also believes that the United States needs to be more competitive with China and plans to do this through innovative investments and leveraging U.S. GDP with allies to obtain more favorable trade deals.⁵⁷

However, there are multiple dimensions to Biden’s relationship with China stemming from his long public service career. In 2001, Joe Biden was the chairman of the Senate Foreign Relations Committee when the United States was working to normalize trade with China.⁵⁸ Biden played an important role in helping bring China into the WTO.⁵⁹ Following a trip there, Biden reported that the perils of helping bring China into the WTO were outweighed by the promise of the country.⁶⁰ Today, Biden has a less optimistic view on China. The former vice president now wants to “get tough on China” by advocating a global defense of democracy against their policies and tactics.⁶¹

Since Candidate Biden has now become President Biden, the new president, while making some contradictory statements on the campaign trail, is sticking to the path commenced by the Trump Administration for now.⁶² The Biden camp has stated it will not appoint new members to the Appellate Body as the United States “continues to have systemic concerns” with the WTO.⁶³ While these concerns were more publicly known under the Trump Presidency, this has been the American stance for the last sixteen years.⁶⁴ While Biden does not plan on ending the Agreement, he is staying tough on China and

⁵⁴ *Id.*

⁵⁵ Biden-Harris, <https://joebiden.com/americanleadership/> (last visited November 8, 2020).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Edward Wong, Michael Crowley, & Ana Swanson, *Joe Biden’s China Journey*, N.Y. TIMES, (Sept. 6, 2020), <https://www.nytimes.com/2020/09/06/us/politics/biden-china.html>.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Bryce Baschuk, *Biden Picks Up Where Trump Left Off in Hard-Line Stance at WTO*, BLOOMBERG (Feb. 22, 2021, 10:55 AM), <https://www.bloomberg.com/news/articles/2021-02-22/biden-picks-up-where-trump-left-off-in-hard-line-stances-at-wto>.

⁶³ *Id.*

⁶⁴ *Id.*

wants to use a “more systematic approach” compared with the previous administration.⁶⁵

IV. PROVIDING MORE PROTECTION FOR AMERICAN SOYBEAN FARMERS

In applying the current dispute resolution mechanism moving forward, it remains to be seen how effective it will be in ensuring trade safety for American soybean farmers. The Agreement relies on the capability of two parties, with a strained relationship and history of trade conflicts, to resolve future conflicts amongst themselves.⁶⁶ This bargaining is done in the shadow of retaliatory tariffs that have already scarred the American ag market.⁶⁷ The deal was made with an American delegation that has now changed and will likely have different views on how trade situations should be handled moving forward.⁶⁸ The time frame created by the agreement ensures that the parties will have to timely deal with disputes, preventing them from being drawn out or delayed.⁶⁹ The Agreement itself has the additional benefit of allowing parties to keep information confidential and have matters handled internally without outside influence or prejudice.⁷⁰

As mentioned above, the BEDR does not guarantee against the potential use of detrimental tariffs, which is what truly threatens American soybean farmers who are still recovering or will never recover from the previous round of tariffs.⁷¹ The evidence clearly shows that retaliatory tariff practices have caused the financial ruin of farms across the United States, at levels almost worse than the 1980s farm crisis.⁷² Not to mention that the toll on mental health, as evidenced by an increase of suicides amongst American farmers, makes it clear that tariffs are not just a financial matter, but a matter of life and death.⁷³

Additionally, there is a potential of forfeiture of the Agreement if the current negotiating officials cannot settle a trade dispute within the mechanism.⁷⁴ This arrangement was also contemplated by an administration with a different approach to trade than the current administration, and it is unknown how the new actors in the relationship will be able to work with each

⁶⁵ Yen Nee Lee, *Biden's Team Says it Will Use 'All Available Tools' to Fight China's Unfair Trade Practices*, CNBC (Mar. 2, 2021 2:33 AM), <https://www.cnbc.com/2021/03/02/biden-administration-releases-report-on-trade-agenda-china-challenge.html>.

⁶⁶ *See Trade Deal*, *supra* note 4.

⁶⁷ *See id.*; *see also supra* Part II.

⁶⁸ *See* Epstein, *supra* note 51; Baschuk, *supra* note 61.

⁶⁹ *See Trade Deal*, *supra* note 4, at ch. 7, Annex 7-A.

⁷⁰ *See id.* art. 7.4.

⁷¹ *See* Sabala & Devadoss, *supra* note 12.

⁷² Jones, *supra* note 22.

⁷³ *Id.*

⁷⁴ *See Trade Deal*, *supra* note 4, art 7.4.

other.⁷⁵ It is with these concerns and previous struggles of soybean farmers in mind that this Note argues that the current Agreement offers too little protection and that trade agreements between China and the United States should be structured to better protect the interests and futures of American soybean producers.

Given these criticisms, the following sections analyze systems that the United States should consider adopting when dealing with China in the future. The “Phase One” trade deal is missing an important component in resolving disputes, especially between staunch adversaries: the element of third-party decision making.⁷⁶ The parties have long been active members of the WTO, and it is argued that with their tenuous relationship, they should continue to use it for the best interest of both countries.⁷⁷ While there are alleged issues with the WTO system, it is a third party dispute settlement system that is geared towards delivering results with minimal harm to the adversarial parties.⁷⁸ While using the WTO to resolve trade disputes with China is one avenue, the United States is also not a stranger to placing private dispute settlement mechanisms in their trade agreements.

There is also the possibility of using an enhanced form of private dispute resolution compared with the system chosen by the parties for the Agreement. Previously, the United States has used private dispute mechanisms that have been more extensive and geared towards maintaining a long term successful trade relationship.⁷⁹ These two sections suggest that the United States should consider these factors in making dispute resolution mechanisms in trade agreements with China to provide more protection against retaliatory actions harming American soybean farmers and to provide more trade stability moving forward for both countries.

A. Using the World Trade Organization (WTO)

1. The WTO Founding & Process

While the Trump administration has shown clear opposition to the WTO, it is difficult to find a true basis in that claim outside of fears of judicial overreach by the dispute body.⁸⁰ The WTO was founded in 1995 to be the international organization that handles trade relations between its members throughout the world and to build upon the General Agreement on Tariffs and

⁷⁵ Lee, *supra* note 64.

⁷⁶ See *Trade Deal*, *supra* note 4.

⁷⁷ WORLD TRADE ORG., *Members and Observers*, (last visited on Nov. 9, 2020), https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

⁷⁸ See generally, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter *WTO Founding Document*].

⁷⁹ See Canada-United States Free Trade Agreement, ch. 19, Jan. 2, 1988, 27 I.L.M. 281 [hereinafter *Canada FTA*]; see also Agreement Between the United States of America, The United Mexican States, and Canada, Dec. 11, 2019 [hereinafter *USMCA*].

⁸⁰ Payosova et. al., *supra* note 32.

Trade (GATT).⁸¹ The United States is an original charter member of the organization.⁸² Annex II of the WTO charter establishes the dispute settlement process to be used by the parties to an agreement.⁸³ Agreements that are covered under the WTO have their disputes settled under these rules unless the specific agreement provides otherwise.⁸⁴ The WTO has heard over several hundred disputes since its founding and has helped resolve over half of them through the full dispute process.⁸⁵

The WTO has a multistep process to help countries resolve their disputes and foster fair trade globally. The dispute resolution process has two important features that make it successful. The first piece is that when a party files a complaint, the process allows for parties to resolve their disputes in a private setting through consultations amongst themselves.⁸⁶ As mentioned above, the consultation stage is often successful for many parties and allows for faster resolutions.⁸⁷

The second successful feature the WTO offers is the independent panel review process when parties are unable to resolve their dispute in the consultation stage.⁸⁸ These panels consist of independent individuals who have no stake in the disputes and are made up of members with expertise in international trade and the WTO.⁸⁹ The panels are then required to create a report after hearing from both parties about the dispute, and that report is to be accepted by the Dispute Settlement Body (DSB) unless there is an appeal to the report.⁹⁰ Parties who must remedy their actions are allowed “reasonable time” to do so following a report to be adjusted per agreement of the parties, providing a degree of flexibility to the remedy process.⁹¹ If the parties are not compliant, the matter is sent to arbitration to enforce “prompt compliance” with the report.⁹²

⁸¹ *WTO Founding Document*, *supra* note 77.

⁸² *Members and Observers*, *supra* note 76.

⁸³ *WTO Founding Document*, *supra* note 77, annex II, art. 1.

⁸⁴ *Id.* at art. 2.

⁸⁵ World Trade Organization, *A Unique Contribution*, https://www.wto.org/english/thewto_e/what_is_e/tif_e/templ_e.htm.

⁸⁶ *WTO Founding Document*, *supra* note 77, annex 2, art. 4.

⁸⁷ Jeffery J. Schott & Euijin Jung, *In US-China Trade Disputes, the WTO Usually Sides with the United States*, PETERSEN INST. FOR INT'L ECON. (Mar. 12, 2019, 3:15 PM), <https://www.piie.com/blogs/trade-and-investment-policy-watch/us-china-trade-disputes-wto-usually-sides-united-states>.

⁸⁸ *WTO Founding Document*, *supra* note 77, Annex 2, art. 6.

⁸⁹ *Id.* Annex 2, art. 8.

⁹⁰ *Id.* art. 16.

⁹¹ *Id.* art. 21, ¶3(b).

⁹² *Id.* ¶3(c).

Additionally, per consent of both parties, the dispute may be entered into good offices, conciliation, or mediation during any part of the consultation or panel processes.⁹³ The DSB then oversees the implementation process of the reports, ensuring timely implementation and additionally may take action against non-complying parties to enforce compliance.⁹⁴ For example, the DSB can modify or suspend portions of covered agreements until the issue is remedied.⁹⁵

Additionally, the DSB may enforce agreements through the use of tariffs, and although they are hardly ever used against non-complying parties, the WTO does not ban the complaining party from using tariffs within reason.⁹⁶ For example, the United States has had success in using the power of tariffs to enforce agreements against the EU.⁹⁷ Overall, the WTO dispute settlement mechanism is generally a trusted system that has been used to resolve hundreds of trade disputes around the world, including for both of the countries involved.

2. U.S. Case History in the WTO

Despite the deviation in the United States' trade practices, both countries have used the dispute process and are currently using the process against each other.⁹⁸ Historically, the United States has brought multiple disputes to the WTO and has had great success at winning.⁹⁹ One notable case the United States won, briefly mentioned above, was against the EU and its discriminatory import restrictions on bananas that U.S. companies shipped internationally.¹⁰⁰ It was notable because it was the first time the WTO allowed the United States to use retaliatory tariffs against the EU, which refused to follow the WTO report.¹⁰¹ While the WTO limited the amount of the tariffs to the amount of loss suffered by American exporters, the United States was able to strategically levy approximately \$191 million against EU goods.¹⁰² Almost more importantly, these tariffs were levied only after the WTO gave approval following the dispute, not by unilateral action.¹⁰³

⁹³ *WTO Founding Document*, *supra* note 77, Annex 2, art. 5.

⁹⁴ *Id.* art. 21.

⁹⁵ *Id.* art. 2.

⁹⁶ Bown, *supra* note 10, at 35.

⁹⁷ Panel Report, *European Communities-Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc. WT/DS27/R (adopted Sept. 25, 1997).

⁹⁸ Panel Report, *China-Tariff Rate Quotas for Certain Agriculture Products*, WTO Doc. WT/DS517/R (adopted May 28, 2019); Panel Report, *United States-Tariff Measures on Certain Goods from China*, WTO Doc. WT/DS543/R.

⁹⁹ Bown, *supra* note 10, at 35; Schott & Jung, *supra* note 86.

¹⁰⁰ Bown, *supra* note 10, at 36.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *See id.*

Looking at the larger picture, the United States has brought over 120 claims in the WTO, twenty-three of which have been against China.¹⁰⁴ The United States has had twenty of those claims resolved in its favor with the final three claims currently pending against China, a perfect record.¹⁰⁵ On the flip side, China has brought sixteen cases against the United States, of which only five have been resolved in its favor, with six disputes still pending.¹⁰⁶ Additionally, in regard to disputes being tied up in the full process, which on average lasts just over one year,¹⁰⁷ forty percent of U.S. claims against China are resolved within eight months of filing.¹⁰⁸

A good example of a US win against China in the WTO came in 2010.¹⁰⁹ The United States brought an intellectual property claim alleging books and movies were being improperly distributed and sold within China.¹¹⁰ The United States advocated against the discriminatory practices China used against consumers.¹¹¹ More generally, a win for the United States means that the WTO rules mostly in favor with their requested relief.¹¹² Historically, the WTO has favored trade practices in line with American trade policies.¹¹³

However, the WTO is not a perfect system and also has its drawbacks for the United States. While the United States has had success defending the claims brought by China, the United States generally loses around eighty-four percent of the cases brought against them.¹¹⁴ Statistically, the United States has similar records to the other member countries and really does not have an overall edge in the WTO.¹¹⁵ While the WTO generally sides with the United States, it does not accept every claim made by the United States and will, at times, outright reject claims the country brings.¹¹⁶ Additionally, some of the

¹⁰⁴ WORLD TRADE ORG., *Disputes by Member*, https://www.wto.org/english/tratop_e/dispu_e/dispu_e_by_country_e.htm#complainant (last visited Mar. 8, 2021) [hereinafter *Disputes by Member*].

¹⁰⁵ Schott & Jung, *supra* note 86; *Disputes by Member*, *supra* note 103 (data is found in the disputes by complainant table; the three most recent cases have yet to be decided by the appointed panels).

¹⁰⁶ *Id.*

¹⁰⁷ WORLD TRADE ORG., *Dispute Settlement*, https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (last visited Sept. 25, 2021).

¹⁰⁸ Schott & Jung, *supra* note 86.

¹⁰⁹ Panel Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc. WT/DS363/R (adopted Jan. 19, 2010).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Schott & Jung, *supra* note 86.

¹¹³ *Id.*

¹¹⁴ Peterson, *supra* note 21.

¹¹⁵ *See id.*

¹¹⁶ See Panel Report, *China—Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R (Adopted Sept. 25, 2013); see also *China—Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States*, WT/DS440/R (Adopted June 18, 2014).

problems between the two countries are falling outside of WTO rules and regulations, and there are claims that the rules must be updated to have the capability of dealing with today's current issues regarding certain investments and intellectual property rights.¹¹⁷

3. Applying the WTO to the Agreement

Given all of the above, it is clear that the WTO provides multiple levels of relief in resolving trade disputes with multiple reviews by *independent, third parties*.¹¹⁸ These features give a great deal of security to WTO members in the dispute resolution process. Not only is this system trusted by many other countries, but even the parties concerned here still have current disputes before the WTO.¹¹⁹ However, this is not to say the WTO system is not flawed in any way.

While the process is an established one, it can be a lengthy process that delays remedies for damaged parties. The WTO estimates that, on average, most dispute claims last a little over a year from when the consultation is requested.¹²⁰ In analyzing the above mentioned disputes still pending between the United States and China, the U.S. claim brought against China is still active after being initiated in 2016, and the claim brought by China is still active after being filed in 2018.¹²¹ Although the United States' refusal to appoint new members to the appellate board of the WTO has undoubtedly contributed to the delays in resolving these pending disputes, overall the dispute process can still be slower than a private method and possibly cost the countries significantly in its effects on trading if not resolved in a timely manner.¹²²

While the Agreement provides for potentially faster resolution of disputes, this fact alone does not outweigh the benefits of the WTO system, which importantly provides more protections for trade agreements and from unilateral retaliatory tariff tactics.¹²³ The mental, physical, and financial detriments American farmers have faced in the last decade are worse than some of the most catastrophic events that have plagued the ag market in years

¹¹⁷ Schott & Jung, *supra* note 86.

¹¹⁸ See WTO Founding Document, *supra* note 77, annex II.

¹¹⁹ Panel Report, *China-Tariff Rate Quotas for Certain Agriculture Products*, WTO Doc. WT/DS512/R (adopted May 28, 2019); Panel Report, *United States-Tariff Measures on Certain Goods from China*, WTO Doc. WT/DS543/R (adopted Sept. 15, 2020) [hereinafter China-US Panel Reports].

¹²⁰ World Trade Organization, *Dispute Settlement*, https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm; see World Trade Organization, *Case Study: The Timetable in Practice*, https://www.wto.org/english/thewto_e/whatis_e/tif_e/disps3_e.htm (at the upper end of the spectrum of dispute timelines, the WTO provided a case study of a U.S. and Venezuela dispute that lasted over two years).

¹²¹ China-US Panel Reports, *supra* note 118.

¹²² Payosova et. al., *supra* note 32.

¹²³ See *Trade Deal*, *supra* note 4, art. 7-A.

past.¹²⁴ American soybean producers are global grain market powerhouses, and the continued use of such retaliatory practices targeted at an important sector of the American economy will ultimately bring it to its demise, as the fallouts from 2018 demonstrate.¹²⁵

Additionally, not every dispute gets wrapped up in the resolution process. The WTO still allows for disputes to go through *private* consultations between the parties to resolve their dispute before having to go through the full process, which on average takes around eight months.¹²⁶ It essentially allows for the same process the Agreement does, but instead of incentivizing an agreement to prevent retaliatory actions, the WTO system is structured to prevent escalation through the panel and appeal process with independent, third-party reviewers.¹²⁷ The possibility of saving a matter of months of dispute resolution time in exchange for the protection afforded to our soybean farmers by third-party review, especially when the agreement deals with the world's largest soybean importer, is not enough to favor such a system.

Factually, it is hard to counter the fact that the United States has a solid record against China when it comes to disputes.¹²⁸ Relying on the trade representatives of two countries to come together to solve their disputes after having such a historically contentious relationship is arguably a very tall order.¹²⁹ One would think that the United States would want to use the WTO system above all else given its success, especially against China, even considering the reservations American trade leaders have with the WTO.¹³⁰ This sort of agreement seems to be based upon the Trump administration's belief that its deal making ability is the superior option when compared to the independent review done through the WTO.¹³¹ However, this reliance on deal making ability is potentially putting farmers at risk of suffering from China's retaliatory tariffs tactics again, as they are still an accessible remedy under the dispute resolution mechanism of the Agreement.¹³²

Additionally, if the United States is concerned about enforcing agreements against China through the use of stronger mechanisms, the WTO has allowed for stronger enforcement before—in fact, the first time it did so was in favor of the United States.¹³³ While the WTO process allows for the imposition of tariffs, it is still a rare and limited remedy, with protective caps on the amount of

¹²⁴ Jones, *supra* note 22.

¹²⁵ Sabala & Devadoss, *supra* note 14; see Jones, *supra* note 22.

¹²⁶ Schott & Jung, *supra* note 86.

¹²⁷ See *WTO Founding Document*, *supra* note 77, annex II.

¹²⁸ Schott & Jung, *supra* note 86.

¹²⁹ See *Trade Deal*, *supra* note 4, art. 7.4, see also *U.S. Relations with China*, *supra* note 2.

¹³⁰ Payosova et. al., *supra* note 32.

¹³¹ See Trump, *supra* note 31.

¹³² See *Trade Deal*, *supra* note 4.

¹³³ See Bown, *supra* note 10, at 35.

tariffs that can be imposed.¹³⁴ In contrast, the Agreement provides no limits on such retaliatory tactics, and if the other party believes they are implemented in bad faith, it can withdraw from the agreement altogether, killing the agreement and bringing the parties back to square one. The last time American soybean producers had to face Chinese retaliatory tariffs, the United States lost its position as the top world exporter of soybeans, and U.S. prices decreased while the prices in other countries went up.¹³⁵ Our farmers cannot sustain another blow like this, and something needs to be done to better protect these interests in future trade deals with China.

The WTO dispute system is frequently used for trade disputes around the world, including those between the United States and China. The United States has had very good success in the past in winning these disputes. The WTO dispute system allows for uninterested third parties to help resolve disputes instead of placing faith in each country's self-interested trade representatives to strike a resolution. With a relationship that is so contentious and constantly changing, there should be greater protections in place to insulate vulnerable industries and workers, like our soybean farmers, from potential economic fallout and uncapped retaliatory tariffs. The WTO is a proven system upon which both countries have relied and with which both have had success. Moving forward, the United States should take into consideration the utility and stability the WTO offers over bilateral agreements like this one and reassess how to deal with China in resolving future trade disputes.

B. Using a Private Trade Dispute System

1. Historical Analysis

The United States has a history of developing private trade dispute mechanisms, much like the one created in the Agreement. One example of this is one of the trade agreements the United States brokered with Canada in the 1980s. The countries pursued a free trade agreement to improve trade relations and partnership with their respective bordering neighbor.¹³⁶ In their wisdom, the two countries devised a review system that would allow each of them to track the progress of trade.¹³⁷ This "binational panel" consisted of members from each country to ensure the proper administration of trade remedy laws so each country was receiving fair treatment in the other's market place.¹³⁸ The agreement not only allowed for each country to monitor each

¹³⁴ *See id.*

¹³⁵ Sabala & Devadoss, *supra* note 12.

¹³⁶ Canada-United States Free Trade Agreement, Can.-U.S., ch. 19, Jan. 2, 1988, 27 I.L.M. 281 [hereinafter *Canada FTA*].

¹³⁷ *See id.*

¹³⁸ *See id.*

other's trade actions, but it also allowed for agreements to be sought and adapted under what was at the time GATT and what is now the WTO.¹³⁹

This example demonstrates the possibility of establishing a private system within the bounds of the WTO.¹⁴⁰ It was a way that both parties could evaluate each other and deal with disputes amongst themselves. Again, as opposed to the Agreement, this private dispute system still relied on the independent review of the WTO in resolving disputes and also limited the use of unilateral tariffs by virtue of its reliance on established WTO standards.¹⁴¹ This would not be the last time the United States would agree to such a mechanism, arguably, to their benefit.

2. The USMCA & Private Dispute Resolution

A current example of the United States using a private dispute system that is structured to prevent retaliatory trade tactics comes almost at the same time of the signing of the "Phase One" Trade Deal. The Agreement Between the United States of America, the United Mexican States, and Canada (USMCA) was signed at the end of 2019 to replace the previous agreement the countries had formed, the North American Free Trade Agreement.¹⁴² The USMCA is of important relevance in determining why the United States took the approach it did with China given how the countries decided to structure their agreement before the signing of the "Phase One" trade deal. The three countries of the USMCA decided to use a mechanism that closely resembles the WTO dispute resolution system but it is established only between the three countries.¹⁴³

Much like the WTO process, when a party to the USMCA has a dispute with another party or believes that a party is not fulfilling its duties to it or another, the complaining party is able to request a consultation with that country to resolve the issue.¹⁴⁴ These requested consultations are kept *private* and undisclosed with the parties of the dispute.¹⁴⁵ Again, much like the WTO, if the parties fail to reach a resolution and fail at the consultation stage, then a party may request a panel to review the dispute.¹⁴⁶

The panel is used to *independently* review the dispute to help the parties come to a resolution.¹⁴⁷ These panels are made up of individuals who were nominated to the panel and have expertise or experience in international law

¹³⁹ Arun Vankataraman, Note, *Binational Panels and Multilateral Negotiations: A Two-Track Approach to Limiting Contingent Protection*, 37 COLUM. J. TRANSNAT'L L. 533, 579 (1999).

¹⁴⁰ See *Canada FTA*, *supra* note 135.

¹⁴¹ See *id.*; see also *Trade Deal*, *supra* note 4.

¹⁴² *USMCA*, *supra* note 78, pmbl.

¹⁴³ See *id.* ch. 31.

¹⁴⁴ *Id.* art. 31.4.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* art. 31.5.

¹⁴⁷ See *USMCA*, *supra* note 78, art. 31.5.

or trade.¹⁴⁸ Additionally, members are also to “*be selected on the basis of objectivity, reliability, and sound judgment.*”¹⁴⁹ To serve on the panel, members are also required to “*be independent of, and not be affiliated with or take instructions from, a Party.*”¹⁵⁰ The parties are to nominate thirty panelists and designate ten of those individuals to sit on the panel if the countries are unable to reach a consensus on who should serve among the thirty members appointed.¹⁵¹ There are additional provisions provided in the USMCA to handle disputes over the panelists and what controls in those instances.¹⁵²

Once members are selected to serve on the panel, the time limit on resolving disputes begins.¹⁵³ The panelists are then tasked with evaluating the facts and offering a resolution along with their justifications for that resolution.¹⁵⁴ Unless otherwise agreed to, the initial report of the panel is due 150 days from the time of the selection of the last panelist.¹⁵⁵ A final report by the panel is due thirty days following the issuance of the initial report.¹⁵⁶ The parties then have forty-five days from the final report to implement the resolution to the dispute.¹⁵⁷ If the party or parties fail to implement the report within those forty-five days, the panel has the discretion to consider suspending benefits under the USMCA that go to the non-complying party or parties.¹⁵⁸ In summary, this very detailed panel process offers essentially what the WTO offers, except that it consists of only the members to the USMCA and offers additional control and flexibility in allowing the parties to nominate who resolves their disputes.¹⁵⁹

3. Applying a Private Dispute System

Previous American trade practices and the detailed dispute mechanism of the USMCA demonstrate that it is possible to get everything the Trump administration was trying to achieve in the Agreement without sacrificing the panel process. In defense of the Agreement, a binational review panel has been shown to be successful in years past.¹⁶⁰ However, that panel was established in the shadow of the WTO with the possibility of independent review of

¹⁴⁸ *Id.* art. 31.8.

¹⁴⁹ *Id.* ¶(2)(b).

¹⁵⁰ *Id.* ¶(2)(c).

¹⁵¹ *Id.* art. 31.8.

¹⁵² *USMCA*, *supra* note 78, art. 3.9.

¹⁵³ *Id.* art. 31.17.

¹⁵⁴ *Id.* art. 31.13.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *USMCA*, *supra* note 78, art. 31.19.

¹⁵⁸ *Id.*

¹⁵⁹ See *WTO Founding Document*, *supra* note 77, annex II; see also *USMCA*, *supra* note 78, ch. 31.

¹⁶⁰ See *Canada FTA*, *supra* note 135.

disputes.¹⁶¹ This path, the one chosen in the USMCA, should serve as a goal post moving forward as to how the United States should deal with trade disputes between it and China.

Like the WTO, the USMCA is not without potential flaws, and one of the potential issues moving forward is the fact that this system is not necessarily proven to work. This agreement is in its earliest stages and was signed towards the end of an American president's term in office.¹⁶² It is still unclear whether this independent panel system set up by the parties will be something that simply sounds good on paper but ultimately fails when it is applied in actual circumstances. But because the USMCA system is designed similarly to the WTO dispute process, history shows that such a system would benefit the United States immensely in dealing with trade disputes with China for several reasons.

One of the benefits of using a system similar to the WTO is the United States' success rate against China in using such a process.¹⁶³ The United States, on the whole, has had great success against China in the WTO dispute process, whether at the consultation stage or through implementation of the full review process.¹⁶⁴ While not successful on every claim brought, the United States has a high margin of success in achieving its overall goals in its WTO disputes.¹⁶⁵ These facts alone seem to undermine the system selected in the Agreement and suggest that a better approach exists for dealing with China.

Another major improvement that an approach similar to the USMCA would afford the United States in its dealings with China is the severity of available remedies and how they are selected. While the Agreement utilizes multiple stages of trade representatives to remedy disputes, there are not sufficient barriers to prevent the parties from resorting to retaliatory trade actions against one another. Furthermore, if these actions are deemed to be done in bad faith, they can lead to the cancellation of the entire agreement.¹⁶⁶ These rapidly escalating remedies are quite severe and destabilizing when compared to the USMCA system, which only allows for the panel to determine and award remedial actions to the extent needed to enforce its panel reports—in practice, this has meant that remedies are limited to the denial of certain benefits of the agreement.¹⁶⁷ This would be a much needed improvement to protect farmers from crippling tariffs that have already pushed soybean producers to their demise.¹⁶⁸

¹⁶¹ *See id.*

¹⁶² *See USMCA, supra* note 78.

¹⁶³ Schott & Jung, *supra* note 86.

¹⁶⁴ *Id.*

¹⁶⁵ Peterson, *supra* note 21.

¹⁶⁶ *See Trade Deal, supra* note 4, art. 7.

¹⁶⁷ *USMCA, supra* note 78, art. 31.19.

¹⁶⁸ *See Jones, supra* note 22.

It is clear from the USMCA that the United States is capable of creating a system that would essentially operate like the WTO dispute resolution system, but cut out the WTO as the mediator for trade issues and provide safer trading practices.¹⁶⁹ United States officials have stopped appointing members to the WTO in an attempt to get the WTO to update their rules.¹⁷⁰ The main reason for the request of rule changes is the fear of judicial overreach by the Appellate Body and a system that requires a high bar to amend the rules.¹⁷¹ The USMCA clearly solves this problem by taking the WTO process and controlling it privately with Mexico and Canada, thereby obviating the need to wait for another organization to update the rules.¹⁷² Additionally, the USMCA resolves the criticism by Trump and others that the WTO rules unfairly against the United States.¹⁷³ The panels are selected exclusively by the members based on who they believe possesses appropriate international law and trade experience as well as an ability to be independent reviewers of the dispute.¹⁷⁴ This selection process protects against the potential of outside prejudice in making determinations while retaining the important third-party review of disputes that, given the nature of the relationship between China and the United States, is essential to maintaining mutually beneficial trade between the two countries.

The system adopted by the USMCA also remedies the lengthy delays that WTO disputes often have. On average, WTO disputes through the full process take over a year.¹⁷⁵ Unless agreed otherwise by the parties, at the longest, the USMCA dispute process takes well under a year.¹⁷⁶ This is potentially a large time saver to allow for faster remedies and less financial distress for each country's trade industries. In short, such an agreement offers a structured system that is potentially much faster than the WTO process, but does not sacrifice the independent review of disputes.

For all of the above-mentioned reasons, the USMCA provides a clearer path for the United States to take when dealing with China and provides greater flexibility than merely relying on the WTO. While it is untested, it combines all of the benefits the WTO offers with an independent panel review process while also avoiding the potential pitfalls of being slow to modernize and adapt their rules to the current trade climate by providing clear guidance for the review process and avoiding any possible overreach by a panel.¹⁷⁷ The USMCA also allows for strict means of enforcement to resolve disputes without

¹⁶⁹ See *USMCA*, *supra* note 78.

¹⁷⁰ Payosova et. al., *supra* note 32.

¹⁷¹ *Id.*

¹⁷² See *USMCA*, *supra* note 78.

¹⁷³ See Trump, *supra* note 31.

¹⁷⁴ *USMCA*, *supra* note 78, art. 31.8.

¹⁷⁵ *Dispute Settlement*, *supra* note 106.

¹⁷⁶ See *USMCA*, *supra* note 78, ch. 31.

¹⁷⁷ See *USMCA*, *supra* note 78; see also Payosova et. al., *supra* note 32.

exposing the country's private sector to punishing retaliatory tariffs.¹⁷⁸ This approach to a dispute resolution mechanism seems, by design and in practice, to better protect the future financial interests and livelihoods of American soybean producers and should be considered by future leaders when making a trade deal with China.

V. CONCLUSION

This Note is quite clear on the fact that the "Phase One" trade deal by China and the United States does not protect the interests of American soybean farmers as well as it could and leaves open the possibility for the same crippling circumstances the agreement aimed to solve in the first place. This agreement is among the first of many steps to resolve the trade war and contentious relationship between the United States and China.¹⁷⁹ However, this agreement does not adequately address the strained relationship. The dispute resolution system, which fails to utilize an independent reviewing source to help resolve disputes between the parties, is something these two countries would clearly benefit from, especially to protect against retaliatory practices.¹⁸⁰

The United States has already created and participated in solutions that can be used to reorient this relationship. The United States has participated in the WTO since the founding of the organization twenty-five years ago.¹⁸¹ Not only has it participated, but it has had an impeccable record when it comes to bringing suits against China, as well as being victorious in a majority of the suits China brings against them.¹⁸² Even if the United States continues to feel the WTO is prejudiced against them, the country has solved this problem with the USMCA trade deal.¹⁸³ Disputes under the USMCA will not only be handled outside of the WTO, but will still utilize a multi-step process that both allows for private consultations amongst the parties as well as review and remedies from an objective and well-informed independent panel to render decisions.¹⁸⁴

Regardless of either remedy selected, something more needs to be done to protect the soybean farmers of the United States. American producers have not only lost their spot as a top exporter, but have suffered low market prices for multiple years now, and this path of decay has continued across American farms, requiring serious financial aid from the U.S. government.¹⁸⁵ Farmers took a serious blow following the Chinese tariffs, which not only caused them

¹⁷⁸ *USMCA*, *supra* note 78, art. 31.19.

¹⁷⁹ *U.S. Relations with China*, *supra* note 2; Baschuk, *supra* note 61.

¹⁸⁰ *See Trade Deal*, *supra* note 4, art. 7.4; *see U.S. Relations with China*, *supra* note 2.

¹⁸¹ *Members and Observers*, *supra* note 76.

¹⁸² Schott & Jung, *supra* note 86.

¹⁸³ *See id.*

¹⁸⁴ *See USMCA*, *supra* note 78, art. 31.4–31.6.

¹⁸⁵ Sabala & Devadoss, *supra* note 12, at 291; Jones, *supra* note 22; Chappell, *supra* note 3.

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financial ruin, but destroyed lives and families.¹⁸⁶ While a dispute resolution provision may be just boilerplate for some, this mechanism could potentially make or break American farmers and their families across the country. It is with this possibility in mind that leaders must consider these important factors in determining how to structure an agreement with China. American soybean farmers need protection against harsh tariffs, and the United States needs to change course regarding resolution of trade disputes with China to help protect these important interests and save our farmers from extinction.

¹⁸⁶ Jones, *supra* note 22.