# A New and Controversial Approach to Dispute Resolution Under the U.S.-China Trade Agreement of 2020

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*The United States has hailed the 2020 U.S-China Economic and Trade Agreement (USCTA) as a breakthrough in suspending the trade war between the United States and China. Under the USCTA, China committed to purchase $200 billion of U.S. goods and services and to implement significant new protections for U.S. intellectual property rights. However, the true significance of the USCTA lies in its role as part of a larger U.S. scheme to usurp the role of the World Trade Organization (WTO) in resolving international trade disputes. The USCTA is an ominous portent of the future of the WTO.*

*The United States' scheme has three parts: first, cripple the WTO dispute settlement process so that WTO obligations become unenforceable; second, create a parallel dispute resolution mechanism in the USCTA to resolve USCTA and WTO disputes involving China that is under complete U.S. control; and third, induce China into violating its WTO obligations by granting the United States special privileges that can no longer be challenged by other WTO members due to the paralysis of the WTO dispute settlement system.*

*Although proponents of the WTO have stated that the paralysis of the WTO dispute settlement system is a life or death dilemma, these proponents must realize that this is only the first step in a larger U.S. scheme against the WTO. The United States is continuing to erode the WTO through its use of trade agreements that create an alternative mechanism allowing the United States to enforce WTO obligations. Each country that signs such an agreement, like China, becomes an accomplice in the U.S.' plot to undermine the WTO. Each new agreement represents a fresh deterioration of the WTO system, which will*

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*only accelerate as the United States induces more nations to violate the WTO.*

*The only way to save the WTO is for leading WTO nations to call for a full-scale multilateral negotiation on the WTO dispute settlement system that involves all WTO members. Proponents of the WTO must realize the urgency of the present crisis and act now before the decline of the WTO becomes irreversible.*

## Author's Note on the Election of President Biden

With the election of Joe Biden to the U.S. presidency, some observers believe that the United States might reject the adversarial and hostile approach of his predecessor, President Donald J. Trump, to China and to the dispute settlement system of the World Trade Organization. However, Biden was vice president when the Obama Administration took the first step in paralyzing the WTO by refusing to reappoint judges to the WTO Appellate Body. Regarding China, then President-Elect Biden vowed to "pursue policies targeting China's 'abusive practices,' such as 'stealing intellectual property, dumping products, illegal subsidies to corporations' and forcing 'tech transfers' from U.S. companies to Chinese counterparts."[1] Consistent with this approach, Biden announced that he would not immediately remove current tariffs on China and that he would not cancel the 2020 USCTA.[2] Ultimately, it remains to be seen whether the Biden Administration will take a more conciliatory approach to the WTO or to China, President Trump's main nemesis in intellectual property and trade disputes.

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1. *Biden Says Will Not Kill Phase 1 Trade Deal with China Immediately*, Reuters (Dec. 2, 2020), https://www.reuters.com/article/us-usa-trade-china/biden-says-will-not-kill-phase-1-trade-deal-with-china-immediately-nyt-idUSKBN28C0HV [https://perma.cc/B7ZG-G9Z8].

2. *Id.*

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## I. Introduction

On January 15, 2020, the United States and China signed Phase I of an agreement that suspended a two year trade war between the world's two largest economies that had threatened the stability of the global economy.[3] The Economic and Trade Agreement between the United States and China (USCTA) committed China to purchase $200 billion in U.S. goods and services over a two year period from January 1, 2020 to December 31, 2021[4] and also imposed a host of obligations on China centering on the protection of intellectual property rights.[5] In exchange for these commitments, the United States agreed to lift or suspend draconian tariffs imposed on the bulk of Chinese imports, which had triggered China to impose retaliatory tariffs

3. 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, https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic_And_Trade_Agreement_Between_The_United_States_And_China_Text.pdf [https://perma.cc/S8K6-EECK] [hereinafter USCTA]. This decision is referred to as "Phase I" because there are outstanding issues that were not resolved in this agreement. Among the most difficult and contentious issues is the U.S. claim that China gives favorable treatment to its state-owned enterprises (SOEs) in the form of financial subsidies and preferential government regulation. This favorable treatment for China's SOEs creates competitive disadvantages for U.S. companies. These issues have been reserved for Phase II of the negotiations, which are ongoing in 2020. *See* Jessica Bursztynsky, *Trump Trade Advisor Peter Navarro Lists What the US Wants from China in 'Phase Two' Trade Deal*, CNBC (Jan. 16, 2020), https://www.cnbc.com/2020/01/16/peter-navarro-lists-us-demands-from-china-in-phase-two-trade-deal.html.

4. USCTA, *supra* note 3, art. 6.2. The commitments are detailed; China must make the purchase in the following specific sectors: "manufactured goods, agricultural goods, energy products, and services" and the purchases must exceed required baselines. *Id.*

5. USCTA, *supra* note 3, chs. 1–2 ("Intellectual Property" and "Technology Transfer").

on U.S. goods.[6] Although the United States hailed the agreement as a triumph,[7] the USCTA dispute resolution provisions are controversial and path breaking and could foreshadow how all future trade disputes between the United States and its trading partners will be resolved.[8] The USCTA also induces China to become complicit in a U.S. scheme to further undermine the World Trade Organization (WTO) and hasten its demise.[9]

The two nations reached this trade agreement only one month after the WTO lurched into a crisis on December 10, 2020.[10] Due to the Trump Administration's refusal to approve new members to replace retiring members on the WTO's Appellate Body, the number of persons on the Appellate Body fell below the number needed to convene a quorum.[11] As a result, the Appellate Body became unable to hear appeals from WTO panels, which serve as trial courts for international trade disputes.[12] The most important consequence of the paralysis of the Appellate Body is that obligations under WTO agreements have become effectively unenforceable.[13] The United States initiated this unprecedented attack on the WTO due to its dissatisfaction with the Appellate Body, which had repeatedly ruled

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6. *See* OFF. OF THE U.S. TRADE REPRESENTATIVE, ECONOMIC AND TRADE AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA FACT SHEET (2020), https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/US_China_Agreement_Fact_Sheet.pdf [https://perma.cc/S9CZ-5HM6].

7. *See* Press Release, Off. of the U.S. Trade Rep., United States and China Reach Phase One Trade Agreement (Dec. 13, 2019), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/december/united-states-and-china-reach [https://perma.cc/BUK7-J9K5].

8. *See infra* Part IV.

9. *Id.*

10. *See* Adam Behsudi & Finbarr Bermingham, *The End of World Trade as We Know It*, POLITICO (Nov. 20, 2019), https://www.politico.com/news/2019/11/20/world-trade-end-donald-trump-072257 [https://perma.cc/2JX9-BJFV]; Ken Roberts, *World Trade's Demise Scheduled for Dec. 10*, FORBES (Nov. 27, 2019), https://www.forbes.com/sites/kenroberts/2019/11/27/world-trades-demise-scheduled-for-dec-10/#460e29e32412 [https://perma.cc/LZ5F-RZ4A].

11. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 17.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1125 (1994) [hereinafter DSU]; Tom Miles, *U.S. Blocks WTO Judge Reappointment as Dispute Settlement Crisis Looms*, REUTERS (Aug. 27, 2018), https://www.reuters.com/article/us-usa-trade-wto/u-s-blocks-wto-judge-reappointment-as-disputesettlement-crisis-looms-idUSKCN1LC19O [https://perma.cc/6APN-V3CG].

12. DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL TRADE LAW 84 (3rd ed. 2017) [hereinafter CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW].

13. *See infra* Part III.A.

against the United States in WTO disputes.[14] This blow to the WTO is so severe that its future stands in doubt; the uncertainty and instability now plaguing the WTO could lead to its collapse.[15]

The timing of these two developments—the disabling of the WTO and the completion of the USCTA—is not coincidental. These two events are part of a larger plan to undermine and usurp the role of the WTO in dispute resolution in international trade, a plan to which China has now become an accomplice.[16] The United States' plan is to displace the WTO and install itself as the final arbiter of trade disputes with China on all trade issues involving WTO law.[17] This brazen move against the WTO is in clear breach of the United States' legal obligations as part of the WTO,[18] but violations of WTO law are of little concern to the United States.[19] Using the USCTA as a template, the United States will likely expand this arrangement by inducing other nations to enter into trade agreements that would make them complicit in violating WTO law. Future trade agreements could allow the United States to usurp the WTO in the dispute resolution sphere and render the WTO irrelevant. This article will set forth and explain the United States' plan by emphasizing the following major points.

First, the dispute resolution mechanism in the USCTA is a major break from previous trade agreements agreed to by the United States prior to the Trump Administration. Under prior practice, the United States submitted disputes to an independent and neutral arbitration body which had the full power to rule against the United States.[20] In trade disputes under previous free trade agreements that also involved WTO law, the complainant was given the option of submitting the dispute to the WTO or to this arbitration body included in the trade agreement.[21] Under the USCTA, however, the dispute resolution mechanism is not a neutral mechanism but is instead a procedure that allows the United States to make unilateral determinations that its rights under the USCTA or the WTO agreements have been

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14. Daniel C.K. Chow, *U.S. Trade Infallibility and the Crisis of the World Trade Organization*, MICH. ST. L REV. (forthcoming 2020) (manuscript at 19–26) (copy on file with the Michigan State Law Review).

15. *See infra* Part III.A.

16. *Id.*

17. *Id.*

18. *Id.*

19. Daniel C.K. Chow, *United States Unilateralism and the World Trade Organization*, 37 B.U. INT'L L.J. 1, 18 (2019) (noting that the Trump Administration asserts the right to impose trade sanctions in violation of WTO law).

20. *See infra* Part II.A.

21. *See infra* Part II.B.

breached.[22] The United States is also given the unilateral right to impose trade sanctions against China,[23] but China is prohibited from retaliating against the United States. China's only recourse is to withdraw from the USCTA entirely.[24]

Second, the new dispute resolution mechanism in the USCTA needs to be understood as the second step in a deliberate U.S. plan to displace the WTO dispute settlement system with one that is under the complete control of the United States. The new dispute resolution mechanism of the USCTA not only allows the United States to enforce USCTA obligations against China but purports to allow the United States to enforce WTO obligations against China as well.[25] Through its recent actions, the United States has delivered an incisive two-step blow to the WTO: first, paralyze the WTO dispute settlement system so that it can no longer enforce WTO obligations; second, install a substitute mechanism in the form of the USCTA that will allow the United States complete control to resolve USCTA and WTO disputes involving China. The second step—the United States' assertion of power to decide WTO rights and obligations—is a clear violation of one of the fundamental rules of the WTO, the principle that prohibits unilateralism.[26] This principle holds that only the WTO has the jurisdiction to decide issues of WTO law; its members, including the United States and China, must defer to and comply with decisions issued by the WTO.[27] If the United States can rule on WTO rights directly, then the WTO becomes irrelevant and the United States becomes ascendant in the resolution of its international trade disputes.

Third, China has been induced by the United States to become complicit in violating its WTO obligations. China's main obligation to purchase $200 billion of goods and services from the United States is in violation of the WTO Most Favored National (MFN) principle, a venerable principle of international trade enshrined in the General Agreement on Tariffs and Trade (GATT) Article I.[28] This often misunderstood principle is sometimes taken as a principle of favoritism,

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22. *See infra* Part III.B.

23. *See infra* Part III.C.

24. *See infra* Part III.B.

25. *See infra* Part III.C.

26. *Id.*

27. *Id.*

28. *See* General Agreement on Tariffs and Trade art. I, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 (1947) [hereinafter GATT]. The MFN principle set forth in Article I holds that if a WTO member provides a trade benefit to another country, the WTO

but it is actually a principle of non-discrimination.[29] The MFN principle not only prohibits discrimination *against* WTO members but also discrimination *in favor* of any member;[30] in this case, China is in breach of the MFN principle if it extends special privileges and benefits under the USCTA to only one member, the United States. For China's other major trading partners, such as the European Union, the favoritism extended to the United States causes immediate and tangible harm. If China must purchase $200 billion worth of goods and services from the United States, then the EU and other nations will lose the opportunity to compete in the open market for hundreds of billions of dollars in sales.[31] While the EU might have challenged the USCTA in the WTO in the past, such a challenge today will be futile. If the EU wins a panel decision, the EU will be unable to enforce the decision due to the paralysis of the WTO dispute settlement system.[32] This is the third step in the U.S. design: first, paralyze the WTO; second, create a parallel dispute resolution mechanism; and third, engage in WTO-inconsistent conduct that cannot be challenged. As explained below, such a plan is highly effective to further U.S. interests, but comes at the expense of U.S. trading partners and the multilateral trading system.

While many WTO observers cite the paralysis of the Appellate Body as creating a "life-or-death" crisis for the WTO,[33] proponents of the WTO dispute settlement system must also realize that the

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member must immediately and unconditionally extend the same trade benefit to all other WTO members. For a fuller discussion of the MFN principle, see *infra* Part IV.

29. Chow & Schoenbaum, International Trade Law, *supra* note 12, at 149. Under the MFN principle, if country A, a WTO member, extends a benefit to country B, then country A must immediately and unconditionally extend the same benefit to all other WTO members. If country A does not extend the same benefit, then country A is in breach of the MFN principle.

30. *Id.*

31. The EU has become heavily reliant on sales to China since the eruption of the global financial crisis precipitated by the U.S.-China trade war. In addition, sales to China have become even more important because Europe's own markets are sluggish. *See* Stephen Wilmot, *U.S.-China Struggle Puts Europe in an Awkward Bind*, Wall St. J. (June 11, 2020), https://www.wsj.com/articles/u-s-china-struggle-puts-europe-in-an-awkward-bind-11591782112 [https://perma.cc/N77Q-UTRK]. A promise by China to purchase $250 billion of goods and services means that Europe is now foreclosed from even competing for those sales.

32. *See infra* Part III.A.

33. *E.g.*, Keith Johnson, *How Trump May Finally Kill the WTO*, Foreign Pol'y (Dec. 9, 2019), https://foreignpolicy.com/2019/12/09/trump-may-kill-wto-finally-appellate-body-world-trade-organization/ [https://perma.cc/VN37-9BPV]; Li Qiaoyi, *Life-or-Death Moment for WTO Brings China's Participation, Contributions to the Fore*, Glob. Times (Dec. 10, 2019), https://www.globaltimes.cn/content/1173020.shtml [https://perma.cc/762M-4KMY].

USCTA and future trade agreements represent further attacks. This attack comes in the form of a unilateral decision making process and in the creation of a special benefit that breaches one of the foundational WTO principles of anti-discrimination.[34] As the United States will likely use the USCTA as a template for future trade agreements, the WTO system will likely continue to suffer further harm with each new U.S. trade agreement.[35] At some point, WTO members could lose the political will to revive the Appellate Body and save the WTO dispute settlement system.[36] The WTO members that seek to salvage the WTO dispute settlement system must appreciate the urgency of the present crisis and the need for expeditious action before the decline of the WTO becomes irreversible.

It would be a mistake to believe that U.S. antagonism toward the WTO started and will end with the Trump Administration and that changing administrations or political parties could reverse this course. President Barack Obama took the first step to block new appointments to the Appellate Body;[37] the Trump Administration merely maintained this intransigence. Robert Lighthizer, a well-

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34. *See infra* Part IV.

35. The United States has adopted unilateralism as one of the central tenets of its trade policy. *See* Daniel C.K. Chow, *United States Unilateralism and the World Trade Organization*, 37 B.U. INT'L L.J. 1, 5–11 (2019). The U.S. approach suggests that the type of unilateral dispute resolution mechanism in the USCTA will be also featured in future U.S. trade agreements.

36. History shows that once the momentum with the WTO membership for a major change is lost, it may be unrecoverable. For example, the WTO fought to create a Multilateral Agreement on Investment (MAI) that would be on par with the WTO agreements on goods, services, and intellectual property. A major effort was made in the 1990s to draft such an agreement, but the process of assigning the drafting of the MAI to the Organization of Economic Cooperation and Development (OECD), a group of advanced industrialized countries with headquarters in Paris, proved to be fatal. Many developing countries viewed the OECD with suspicion as a rich nations' club that would not represent their interests in the MAI. Developing countries were also given observer status in the OECD for the MAI negotiations but were not allowed to participate. These actions were viewed as highly offensive by developing nation members of the WTO; they refused to support the MAI, and it failed. Although there have been efforts to revive a negotiation for an agreement on investment, the momentum for the agreement seems to have past, and it now appears that no such agreement will be reached, at least in the near future. *See* DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS 395–96 (3d ed. 2015) [hereinafter CHOW & SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS].

37. On May 12, 2016, the Obama Administration made the initial decision to block the reappointment of South Korean national Seung Wha Chang to the Appellate Body, reducing the number of remaining appellate judges to three. *See* Manfred Elsig et al., *The U.S. Is Causing a Major Controversy in the World Trade Organization*, WASH. POST (June 6, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/06/06/the-u-s-is-trying-to-block-the-reappointment-of-a-wto-judge-here-are-3-things-to-know/ [https://perma.cc/BVT2-73GM].

known China and WTO skeptic, was approved by an overwhelming majority in the Senate to serve as the current United States Trade Representative—the top U.S. trade official and the chief architect of U.S. trade policy.[38] At the moment, the factions in U.S. politics, although contentious in many areas, appear to be united in their hostility towards China and the WTO.[39]

It would also be a mistake to believe that the United States rejects the WTO completely. To the contrary, the United States has expressed support for the WTO,[40] but this support exists only when the WTO acts in favor of U.S. interests.[41] When the WTO supports U.S.

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38. *On the Nomination (Confirmation Robert Lighthizer, of Florida, to be United States Trade Representative)*, U.S. SENATE (May 11, 2017), https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=115&session=1&vote=00127 [https://perma.cc/44T5-YPXG]; Andrew Restuccia & Megan Cassella, *'Ideological Soulmates': How a China Skeptic Sold Trump on a Trade War*, POLITICO (Dec. 26, 2018), https://www.politico.com/story/2018/12/26/trump-lighthizer-china-trade-war-1075221 [https://perma.cc/P6A5-74VZ].

39. *See* Kenneth Rapoza, *Nancy Pelosi Just Protected the WTO From Trump, Other Democrats*, FORBES (June 25, 2020), https://www.forbes.com/sites/kenrapoza/2020/06/25/nancy-pelosi-just-protected-the-wto-from-trump-other-democrats/?sh=7cd2425f5684 [https://perma.cc/96TP-7SM9]; Keith Johnson, *U.S. Effort to Depart WTO Gathers Momentum*, FOREIGN POL'Y (May 27, 2020), https://foreignpolicy.com/2020/05/27/world-trade-organization-united-states-departure-china [https://perma.cc/JQY8-QFLM]; *see also, e.g.*, Lori Wallach, *The World Trade Organization Is Dying. What Should Replace It?*, N.Y. TIMES (Nov. 28, 2019), https://www.nytimes.com/2019/11/28/opinion/seattle-world-trade-organization.html [https://perma.cc/SDX6-CZWM]; Karen J. Alter, *Time for a World Trade Organization 2.0*, WALL ST. J. (Sept. 15, 2019), https://www.wsj.com/articles/time-for-a-world-trade-organization-2-0-11568577021 [https://perma.cc/KE9Q-WPZG].

40. *See e.g.*, Press Release, Off. of the U.S. Trade Rep., The United States and the World Trade Organization (Dec. 2011), https://ustr.gov/about-us/policy-offices/press-office/blog/2011/december/united-states-and-world-trade-organization [https://perma.cc/PJ4S-AFFP] ("The United States is an original member of the WTO and a steadfast supporter of the rules-based multilateral trading system that it governs.").

41. In 2003, the WTO rejected a U.S. statute that paid funds collected through tariffs for subsidies and dumped to the affected U.S. industries. The WTO found the U.S. statute to be illegal under the WTO Anti-Dumping Agreement and the WTO Agreement on Subsidies and Countervailing Measures. *See United States—Continued Dumping and Subsidy Offset Act of 2000*, WTO Doc. WT/DS217/AB/R (adopted on Jan. 16, 2003). In its 2018 Trade Policy Agenda, the USTR cited this case, among others, as an example of the WTO "adding to or diminishing rights and obligations under the WTO agreement." *See* OFF. OF THE U.S. TRADE REPRESENTATIVE, 2018 TRADE POLICY AGENDA AND 2017 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM 22, 24 (2018), https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20FINAL.PDF [https://perma.cc/3862-SCGW]. Art. 3(2) of the DSU specifically states that "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements." DSU, *supra* note 11, art. 3. The United States finds the actions by the WTO Appellate Body to be a form of judicial activism. *See, e.g.*, Press Release, Off. of the U.S. Trade Rep., United States Wins

interests, the United States will boast of the results and treat the WTO with esteem.[42] When the WTO acts against U.S. interests, the United States responds with criticism and rejection of the results.[43]

This Article will proceed as follows. Part II discusses dispute resolution in all recent U.S. free trade agreements entered into prior to the Trump Administration. Part II also explains how U.S. intransigence led to the paralysis of the Appellate Body and rendered all WTO obligations unenforceable at the choice of the offending party in any WTO dispute. Part III explains the dispute resolution mechanism of the USCTA. Part IV explains how the United States has induced China to violate one of the key principles of the WTO in committing to purchase $200 billion in goods and services only from the United States. Part V concludes with some observations about

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Victory in Rare Earths Dispute with China: WTO Report Finds China's Export Restraints Breach WTO Rules (Mar. 26, 2014), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/March/US-wins-victory-in-rare-earths-dispute-with-China [https://perma.cc/DH4E-TZNS] ("We hope this will discourage further breaches of WTO rules that hurt American manufacturers.").

42. The United States' view of the WTO as an instrumentality to be praised when promoting U.S. interests and criticized when not is part of a general U.S. approach to the WTO. *See* Chow, *supra* note *<CITE* _Ref55160561">. An example is the key U.S. victory in the long running dispute between the United States and the European Union over the legality of subsidies provided by both to their respective aircraft industries. *See* Ana Swanson, *U.S. to Tax European Aircraft, Agriculture and Other Goods*, N.Y. TIMES (Oct. 2, 2019), https://www.nytimes.com/2019/10/02/us/politics/airbus-tariffs-wto.html [https://perma.cc/XD2F-4SDP]. This dispute began in the WTO in 2004. After four panel and appellate reports, the dispute resulted in a key U.S. victory on October 2, 2019. Press Release, Off. of the U.S. Trade Rep., U.S. Wins $7.5 Billion Award in Airbus Subsidies Case (Oct. 2, 2019), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/october/us-wins-75-billion-award-airbus [https://perma.cc/2GK5-UUGV]. A WTO panel authorized the United States to impose $7.5 billion in tariffs against the EU for illegal subsidies provided to Airbus, a European aircraft company. *Id.* On its government website, the USTR boasted, "The United States has won the largest arbitration award in [WTO] history. . .Today's decision demonstrates that massive EU corporate welfare has cost American aerospace companies hundreds of billions of dollars in lost revenue. . .Finally, after 15 years of litigation, the WTO has confirmed that the United States is entitled to impose countermeasures in response to the EU's illegal subsidies." *Id.*

43. *See* OFF. OF THE U.S. TRADE REPRESENTATIVE, 2018 TRADE POLICY AGENDA, *supra* note 41, at 24. ("Over time, U.S. concerns have increasingly focused on the Appellate Body's disregard for the rules as set by WTO Members. Successive Administrations and the Congress have voiced those concerns, and the United States called for WTO adjudicators to follow their role as laid out in the DSU. But the problem has been growing worse, and not better."). For a list of specific cases cited by the USTR, see *id.* at 23–24. *See, e.g.*, Press Release, Off. of the U.S. Trade Rep., Statement on WTO Appellate Report on China Countervailing Duties (July 16, 2019), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/july/statement-wto-appellate-report-china [https://perma.cc/CS84-36DG].

the urgency of the need to salvage the WTO dispute settlement system and to save the WTO itself.

## II. Dispute Resolution in Trade Agreements Prior to the Trump Administration

### A. *Bilateral Trade Agreements Under the WTO*

The WTO creates a comprehensive legal regime that governs most trade between member nations, including the United States and China. Trade in goods and services are governed by GATT[44] and the General Agreement on Trade in Services (GATS),[45] respectively. Trade in technology or intellectual property is governed by the Agreement on Trade Related Intellectual Property Rights (TRIPS).[46] The WTO agreements provide for a required level of trade obligations, but WTO members are free to enter into their own additional trade agreements so long as the agreements are consistent with their WTO obligations. Trade agreements between members that qualify as free trade agreements (i.e. agreements that eliminate tariffs on substantially all bilateral trade) receive special protections under Article XXIV:5 of the GATT because these agreements further promote free trade.[47] Parties to a free trade agreement are not required to extend the benefits of the agreement to all other WTO members under the Most Favored Nation principle, one of the foundational principles of the GATT and the WTO.[48] Since joining the WTO, the United States

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44. GATT, *supra* note 28.

45. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994).

46. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS].

47. GATT, *supra* note 28, art. XXIV ¶ 4 ("The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements.").

48. Free trade agreements are viewed as an exception to the MFN principle, which would otherwise require the members of such an agreement to extend benefits to all other WTO members. GATT Article XXIV:5 provides in relevant part: "Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area." *Id.* art. XXIV:5. This clause has been interpreted to create an exception to the MFN principle allowing members of a free trade agreement to allow free trade among themselves without having to extend the same treatment to all other members of the WTO. *See* Chow & Schoenbaum, International Trade Law, *supra* note 12, at 161–62. If the parties to a free trade agreement were required by the MFN principle to extend duty-free treatment to all other WTO members, free trade agreements would become impossible. *Id.*

has entered into numerous free trade agreements, both on a bilateral and multilateral basis, within the framework of the WTO.[49]

Dispute settlement under the WTO and under all U.S. trade agreements prior to the Trump Administration consistently followed one model. The WTO Dispute Settlement Understanding (DSU) creates a formal model of dispute settlement that applies to all disputes that cannot be resolved by negotiation and voluntary agreement.[50] A complainant files a case with the Dispute Settlement Body (DSB), composed of the entire WTO membership,[51] which convenes a WTO panel that functions like a trial court.[52] The panel is composed of persons who serve as independent and impartial arbitrators without regard to their national affiliations.[53] Decisions by the panel are subject to appeal to the WTO Appellate Body,[54] which functions like a high court of international trade. Appellate Body judges are persons of recognized authority who serve in their private capacities and not as representatives of any nation.[55]

Panel decisions that are not appealed and decisions of the Appellate Body are then open to adoption by the DSB.[56] Once adopted, the

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49. *Free Trade Agreements*, OFF. OF THE U.S. TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/free-trade-agreements [https://perma.cc/5FVP-PGXV].

50. DSU, *supra* note 11, art. 3.7. The parties should first attempt to resolve their disputes by consultations. *Id.* art. 4. The next step is mediation. *Id.* art. 5. If the disputes cannot be resolved by these means, the next step is formal dispute settlement. *Id.* art. 6.

51. CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 12, at 84.

52. *See* DSU, *supra* note 11, arts. 6, 11.

53. *Id.* art. 8.1–2.

54. *Id.* art. 17.1.

55. *Id.* art. 17.3.

56. *See id.* art. 16.4. The WTO often hears cases involving challenges brought by WTO members to the enforcement of U.S. trade laws. *See, e.g.*, Appellate Body Report, *United States—Measures Relating to Zeroing and Sunset Reviews*, ¶ 146, WTO Doc. WT/DS/2322/AB/R (adopted Jan. 9, 2007) (rejecting the U.S. practice of "zeroing" in the imposition of anti-dumping duties); Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, ¶¶ 446–50, WTO Doc. WT/DS248/AB/R (adopted Nov. 10, 2003) (rejecting certain U.S. safeguards as inconsistent with WTO obligations); Appellate Body Report, *United States—Anti-Dumping Act of 1916*, ¶ 137, WTO Doc. WT/DS136/AB/R (adopted Aug. 28, 2000) (finding that the U.S. Anti-Dumping Act of 1916 to be inconsistent with WTO obligations). When the panel or Appellate Body report is sent to the DSB, the DSB must adopt the report of the panel or Appellate Body unless the DSB decides by consensus not to adopt the report. *See* DSU, *supra* note 11, arts. 16.4 (panel reports), 17.14 (Appellate Body reports). The DSB decides by consensus not to adopt the report when every member of the DSB (the entire WTO membership) decides not to adopt the report. If one member decides to adopt the report, a consensus is not achieved and the report must be adopted. Thus, as a practical matter, all reports that reach the DSB will almost certainly be adopted and it would take an extraordinary course of events for adoption to fail. To date, every report that has reached the DSB has been adopted.

decisions enter into legal effect.[57] If the losing party does not voluntarily comply with the decision, the WTO can authorize the use of trade remedies.[58] The DSU allows for trade remedies in the form of payment of compensation by the offending member to the aggrieved member;[59] where compensation does not induce compliance, the DSB can authorize the aggrieved member to impose countermeasures or trade sanctions against the offending member.[60] The use of trade sanctions is not intended to punish the offending member but to pressure it to cease its transgressions and fully comply with its WTO obligations.[61] Both compensation and countermeasures are viewed as temporary measures that are intended to achieve compliance with the recommendations of the WTO report. Only complete compliance will fully repair the damage to international trade caused by the transgression.

### B. *Typical Dispute Resolution Provisions in U.S. Free Trade Agreements*

Dispute resolution in U.S. free trade agreements completed prior to the Trump Administration is exemplified by the Korea Free Trade Agreement (KORUS), which entered into force on March 15, 2012.[62] Under KORUS, the countries established a Joint Commission staffed by representatives of both countries and co-chaired by the United States Trade Representative and the Minister for Korea.[63] Among

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57. *Id.* art. 17.4.

58. *Id.* art. 22.2.

59. *Id.* Compensation does not consist of a direct monetary payment by the offending member to the aggrieved member. Rather, the offending member will provide additional trade concessions. For example, the offending member could reduce existing tariffs on certain goods from the aggrieved member. The lower tariffs should result in the sale of a greater volume of imports from the aggrieved member, which receives more revenue and is thereby compensated. *See* CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 12, at 87.

60. DSU, *supra* note 11, art. 22.2.

61. *See id.* art. 22.8.

62. Free Trade Agreement Between the United States of America and the Republic of Korea, S. Korea-U.S., June 30, 2007, https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text (as of Jan. 1, 2019) [https://perma.cc/MC8Y-467Y] [hereinafter KORUS]. This site contains the full text of all of the United States' free trade agreements. *Free Trade Agreements*, *supra* note 49. All 20 recent U.S. free trade agreements have a similar dispute resolution mechanism to that set forth in KORUS. *See id.*

63. *Id.* art. 22.2:1.

other duties, the Joint Commission exists to supervise the administration of KORUS[64] and resolve disputes concerning its interpretation and application.[65] When a dispute arises, the parties should seek to resolve it amicably through cooperation and consultations.[66] When such efforts fail, the parties can choose to engage in formal dispute settlement.[67]

At this point, KORUS gives the parties a choice of forum.[68] If the dispute concerns a matter that arises under both the WTO and KORUS, the complainant can choose to bring the action in either forum.[69] Once a forum is chosen, it becomes the exclusive forum for the resolution of that dispute.[70] A single dispute can implicate both the law of the WTO agreements and KORUS because KORUS incorporates many of the provisions of the WTO. For example, KORUS Article 2.2 explicitly incorporates the National Treatment principle set forth in GATT Article III.[71] The National Treatment principle is a rule of non-discrimination that forbids Korea from discriminating against U.S. goods in favor of like Korean goods.[72] For example, if Korea were to impose a retail tax on imported beef from the United States but exempt like domestic beef from the same tax or subject it to a lower tax, this scheme would violate the National Treatment Principle contained in GATT Article III and as incorporated in KORUS Article 2.2. In this case, the United States could choose to bring a case challenging the tax before the WTO or the KORUS Joint Commission. If the United States decided to proceed in the WTO, then the dispute would follow the WTO procedures outlined in the previous section of this Article.

If the United States decided to proceed under KORUS, it would ask the Joint Commission to convene a panel consisting of three arbitrators,[73] the same number as in WTO panels. The list of panelists includes nationals of each nation proposed by each party.[74] Each party has the ability to choose one panelist[75] and agree to the chair.[76]

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64. *Id.* art. 22.2:2(a).
65. *Id.* art. 22.2:2(d).
66. *Id.* art. 22.3.
67. *Id.* art. 22.8.
68. KORUS, *supra* note 62, art. 22.6:1.
69. *Id.* art. 22.6:1.
70. *Id.* art. 22.6:2.
71. *See* GATT, *supra* note 28, art. III:1.
72. KORUS, *supra* note 62, arts. 22.2:1, 22.4(b).
73. *Id.* art. 22.9.9:2(a).
74. *Id.* art. 22.9.9:3.
75. *Id.* art. 22.9.9:2(b).
76. *Id.* art. 22.9.9:2(d).

If the parties cannot agree on the chair, then lots are drawn among persons on a contingent list that are not nationals of either party.[77] Thus, a typical panel will consist of one panelist of U.S. nationality, one of Korean nationality, and a chair who is a national of a third country. All panelists are required to be independent and objective and cannot take instructions from either party.[78]

The panel issues a preliminary report that is subject to comments by the parties.[79] If the parties submit comments, the panel considers them and issues a final report.[80] This procedure mirrors the WTO process in which a preliminary report of the panel receives comments from the parties before the issuance of a final report.[81]

If an offending party fails to comply with the recommendations of the report, then the aggrieved party is allowed to seek compensation.[82] If the parties are unable to agree on compensation, then the aggrieved party is allowed to request the KORUS panel to authorize retaliation.[83] These procedures are also based on similar procedures established under the WTO.

As this discussion indicates, KORUS, and, in fact, all bilateral free trade agreements entered by the United States prior to the Trump Administration, contain similar dispute settlement processes also modeled after that of the WTO. Currently, according to the Office of the United States Trade Representative, there are 20 such FTAs.[84]

This model of WTO-based adjudication was also followed by the United States in its multilateral trade agreements (i.e., those involving multiple trading partners). Under the recently adopted United States Mexico Canada Agreement (USMCA), the parties retained the basic features of the prior dispute resolution provisions of the North

77. *Id.* art. 22.9.9:2(e).
78. *Id.* art. 22.9.9:4(c).
79. *See id.* arts. 22.11:1, 22.11:3.
80. *Id.* art. 22.11:4.
81. DSU, *supra* note 11, art. 15.2.
82. KORUS, *supra* note 62, art. 22.13:1.
83. *Id.* art. 22.13:3.
84. *See Free Trade Agreements*, *supra* note 49.

American Free Trade Agreement (NAFTA) that the USMCA replaced.[85] NAFTA applied the model of an independent arbitration tribunal with a choice of forum between the WTO and USMCA for disputes that involve both treaties.[86]

### C. *Bilateral Investment Treaties*

Aside from FTAs, which fall within the WTO framework, the United States also frequently enters in bilateral investment treaties (BITs), which govern investment trade. Both sets of treaties are necessary for the United States to expand trade opportunities. BITs govern foreign direct investment (FDI) between U.S. entities and foreign nations.[87] FDI refers to the investment of capital by a U.S. entity in a foreign country in order to acquire a lasting ownership interest in a foreign business entity.[88] A typical example of FDI is when a U.S. parent company establishes a corporate subsidiary in a foreign country.[89] The U.S parent invests capital in order to establish a company under the domestic laws of the foreign nation.[90] By complying with capital and legal requirements of the foreign nation, the U.S. parent acquires a lasting ownership interest as well as managerial control of the foreign subsidiary.[91]

For historical reasons, FDI is not governed by the WTO.[92] This leaves a gap in the coverage of the WTO agreements, as FDI is one of the principal channels of trade in the modern global economy.[93] Reflecting this lack of WTO coverage, the dispute settlement processes in U.S. bilateral investment treaties differ significantly from those in

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85. *Compare* United States Mexico Canada Agreement ch. 31, Nov. 30, 2018, 134 Stat. 11, 57 I.L.M. 1152, *with* North American Free Trade Agreement ch. 20, Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M 605. For an overview of dispute settlement under NAFTA, see CHOW & SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS, *supra* note 36, at 39–40.

86. *See* CHOW & SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS, *supra* note 36 at 39–40.

87. *Id.* at 362–64.

88. *Id.* at 350.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 397–98.

93. *Id.* at 14. There are four principal channels of trade: goods, services, intellectual property, and foreign direct investment. The other three channels are governed by a general WTO agreement: GATT covering goods, GATS covering services, and TRIPS covering intellectual property or technology. Only FDI is not governed by a general agreement under the WTO. Efforts by the WTO to negotiate a general agreement on investment failed due to political reasons. *Id.* at 397–98.

U.S. free trade agreements.[94] Unlike the WTO and U.S. FTAs that resolve disputes between nations, current U.S. BITs allow the foreign investor, usually a private entity, to bring an action directly against the foreign nation where the investment occurs before an arbitration tribunal established under the FTA.[95] For example, if Argentina were to expropriate the assets of a U.S. subsidiary in Buenos Aires, the U.S. parent corporation can directly sue the government of Argentina in an arbitration panel established under the U.S.-Argentina BIT.[96]

Under all modern U.S. BITs, the complainant is allowed to bring a case under the auspices of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.[97] This Convention, commonly known as ICSID, established the International Centre for Settlement of Investment Disputes (also known as ICSID) as part of the World Bank, located in Washington, D.C.[98] An ICSID arbitration panel consists of up to four persons who decide disputes.[99] ICSID decisions are final and not subject to appeal.[100] All members of ICSID have a treaty obligation to accept and enforce ICSID awards.[101]

At present, the United States has 42 BITs with separate countries, each with a dispute settlement mechanism allowing for arbitration under ICSID.[102] Currently, the U.S. State Department maintains a model BIT that serves as a template for all future BITs between the U.S. and trading partners.[103] The model BIT requires dispute settlement through ICSID arbitration as discussed above.[104]

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94. *Id.* at 362–66.

95. *Id.*

96. *See, e.g.*, Lanco Int'l, Inc. v. Argentine Republic, ICSID Case No. ARB/97/6, Preliminary Decision, 40 I.L.M. 457–58 (Dec. 8, 1998) (U.S. company sued Argentina for breach of a concession agreement to build a port terminal in Buenos Aires).

97. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159.

98. *Id.* art. 1:1.

99. *Id.* art. 13:1.

100. *Id.* art. 53:1.

101. *Id.* art. 54:1.

102. *See Trade Compliance Center*, U.S. Dep't of Com., https://tcc.export.gov/Trade_Agreements/Bilateral_Investment_Treaties/index.asp [ https://perma.cc/CSX2-UJ4D].

103. Off. of the U.S. Trade Representative, U.S. Model Bilateral Investment Treaty (2012), https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf [https://perma.cc/6F8T-LP2B].

104. *Id.* at 27.

## III. A New Approach to Dispute Resolution in the USCTA

The USCTA upsets this existing approach to dispute resolution and is intended to establish a new paradigm. To understand the USCTA approach, however, it is first necessary to view the USCTA as part of a larger plan by the United States to disrupt the dispute settlement system of the WTO and to replace it with a system under full U.S. control. The USCTA can be understood as the second step in this process.

### A. *Paralysis of the WTO*

The WTO dispute settlement system careened into a crisis on December 10, 2019.[105] The roots of the crisis can be traced to U.S. dissatisfaction with a series of Appellate Body decisions against the United States that began soon after the inception of the WTO in 1995. Of these decisions, some of the most notable are those that: (1) held important U.S. statutes to be in violation of WTO law and required the United States to repeal or revise such statutes;[106] (2) rejected the United States' enforcement of federal trade law remedies to sanction unfair trade practices harming U.S. industries;[107] and (3) ruled in favor of China in cases brought by the United States even though China had failed to follow through on its WTO commitment to dismantle its state-led economy in favor of free market reforms.[108]

To the United States, these decisions by the Appellate Body betrayed a basic understanding between the United States and the WTO that was essential to garnering U.S. executive support and congressional approval for the WTO in the first place. This agreement

105. *See supra* notes 10–11 and accompanying text.

106. *See* Appellate Body Report, *United States—Anti-Dumping Act of 1916*, ¶ 137, WTO Doc. WT/DS136/AB/R, (adopted on Sept. 26, 2000), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/136ABR.pdf&Open=true [https://perma.cc/5RZ6-EHUZ] (rejecting U.S. anti-dumping statute in place since the early twentieth century).

107. *See* Appellate Body Report, *United States—Measures Relating to Zeroing and Sunset Reviews*, ¶ 146, WTO Doc. WT/DS/322/AB/R (adopted on Jan. 23, 2007), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/322ABR.pdf&Open=true [https://perma.cc/9DQ3-TT2F] (rejecting the longstanding U.S. practice of "zeroing" in U.S. anti-dumping investigations and imposition of anti-dumping duties).

108. *See* Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights,* ¶¶ 7.609–7.617, 7.669, WTO Doc. WT/DS362/R, (adopted on Jan. 26, 2009), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/362R-00.pdf&Open=true [https://perma.cc/A8QM-84VG] [hereinafter China Measures Report] (rejecting claim by the United States that China's criminal thresholds in PRC Criminal Law was inconsistent with Art. 61 of the WTO Agreement on Trade Related Intellectual Property Rights).

was that the WTO could not alter U.S. rights and obligations as set forth in the WTO agreements. According to the United States:

> The core provision of the DSU was the express legal requirement that the WTO, through its dispute settlement findings and recommendations, could not add to or diminish the rights or obligations of the United States . . . under the WTO agreements. This requirement was so critical that it was included not once, but twice in the text of the DSU, once in Article 3 as a specific direction to the WTO's Dispute Settlement Body in adopting its recommendations, and once in Article 19 as a specific direction to WTO panels and the Appellate Body in setting out their findings and recommendations to be adopted by the DSB. The Clinton Administration and Congress both made clear that this language was essential to winning American support for the DSU.[109]

This express limitation on the power of the WTO was to ensure that the WTO adopted a judicial approach to dispute settlement that was strictly circumscribed by the text of the WTO agreements:

> [I]t has been the longstanding position of the United States that panels and the Appellate Body are required to apply the rules of the WTO agreements in a manner that adheres strictly to the text of those agreements, as negotiated and agreed by its Members.[110]

According to the United States, despite these clear parameters, the WTO has repeatedly engaged in "judicial activism"[111] by inventing new rights and obligations in its rulings against the United States. According to the United States, these decisions were made outside the expressly limited authority of the WTO and were unlawful, so the United States had no obligation to follow them.

U.S. criticism of the WTO led to an unprecedented decision by the Obama Administration on May 12, 2016 to block the appointment

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109. Off. of the U.S. Trade Representative, 2017 Trade Policy Agenda and 2016 Annual Report of the President of the United States on the Trade Agreements Program 2 (2017), https://ustr.gov/sites/default/files/files/reports/2017/AnnualReport/AnnualReport2017.pdf [https://perma.cc/2R4V-Y26X] (internal citations omitted).

110. Off. of the U.S. Trade Representative, Report on the Appellate Body of the World Trade Organization B-3 (2020), https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf [https://perma.cc/72BA-A98Q].

111. Off. of the U.S. Trade Representative, 2018 Trade Policy Agenda and 2017 Annual Report of the President of the United States on the Trade Agreements Program 2, 28 (2018), https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20FINAL.PDF [https://perma.cc/3862-SCGW].

of new members to the Appellate Body.[112] Persons are appointed by the WTO to the Appellate Body for a maximum of two four-year terms and require unanimous consent of all WTO members;[113] new persons must be appointed to replace retiring members to maintain the minimum number of three panelists necessary to hear an appeal. This intransigence continued under the Trump Administration. On December 10, 2019, the members of the Appellate Body fell below the number necessary to constitute a quorum.[114] As a result, the Appellate Body is no longer able to convene and discharge its responsibilities.

Although the Appellate Body is now unable to convene, parties are still able to exercise the right to appeal from panel decisions. Article 16.4 of the DSU states:

> If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal.[115]

The DSB cannot adopt the panel decision until the appeal is completed, and a decision cannot be enforced until it has been adopted by the DSB.[116] Panel decisions that are not appealed are not affected by the paralysis of the Appellate Body. The DSB can adopt these decisions, which can be given full legal effect and enforced through compensation or retaliation, as previously discussed.

Panel decisions that are appealed, however, become suspended indefinitely in legal limbo. Until the appeal is completed, the decision cannot be adopted by the DSB, and the appeal cannot be completed because the Appellate Body is unable to convene.[117] As a result, any member that is dissatisfied with a panel decision can file an appeal to suspend the decision and freeze the entire dispute settlement process

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112. *See supra* notes 35–36 and accompanying text.

113. DSU, *supra* note 11, art. 17.2.

114. *See supra* notes 10–11 and accompanying text.

115. DSU, *supra* note 11, art.16.4.

116. Reports by the panel that are not appealed are open for adoption by the DSB, *id.* art. 16, and reports by the Appellate Body are open for adoption by the DSB, *id.* art. 14. Only after adoption by the DSB are these reports eligible for the various enforcement measures authorized by the DSU, such as surveillance, *id.* art. 21, compensation, *id.* art. 22, and suspension of concessions (the WTO's term for retaliation), *id.* Reports that have not been adopted by the DSB do not qualify for any of these measures.

117. DSU art. 16.4 states that "[i]f a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until the completion of the appeal." A party can still file an appeal to the decommissioned Appellate Body but the Appellate Body cannot complete the appeal because it is unable to convene. As a result, the filing of the appeal launches the report into an indefinite period of suspension.

in mid-stream. So long as the decisions remain suspended, they cannot be adopted by the DSB and cannot be enforced. In essence, obligations under the WTO agreements are now unenforceable. A WTO member can violate a WTO obligation knowing that if it is later found by a panel to be in breach, it can render the decision unenforceable by filing an appeal that paralyzes the entire dispute settlement process. One former WTO official stated that every WTO dispute could become a "mini-trade war," as nations may take matters into their own hands by using unauthorized trade sanctions followed by countermeasures since they know the WTO is powerless to enforce its decisions.[118]

## B. *Dispute Resolution Arrangement Under the U.S.-China Trade Agreement*

This brief review of U.S. dispute settlement under the WTO, under the FTAs concluded before the Trump Administration, and under all BITs, indicates that under these treaty regimes the United States is subject to a dispute settlement process that requires the use of independent and neutral arbitration tribunals. These tribunals have the ability and authority to render decisions against the United States. With the USCTA, the United States has departed radically from this longstanding practice.

The USCTA requires the parties to establish a "Bilateral Evaluation and Dispute Resolution Arrangement"[119] (the Arrangement) to implement the agreement and to resolve disputes.[120] The Arrangement is to be headed by a Deputy United States Trade Representative and a designated Vice Minister under the Vice Premier of China.[121] A party commences a dispute resolution case by filing an appeal with the office of Bilateral Evaluation and Dispute Resolution

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118. Jennifer A. Hillman, *How to Make the Trade War Even Worse*, N.Y. TIMES (Dec. 17, 2018), https://www.nytimes.com/2018/12/17/opinion/trade-war-china-wto.html [https://perma.cc/Z9ZY-HU2K]. Although WTO decisions are now unenforceable, up to the present, no nation has appealed a panel decision for the purpose of suspending it and rendering it unenforceable. Such an action could hasten the collapse of the WTO and members of the WTO are instead currently enmeshed in trying to find a way out of the current impasse and crisis. *See* Bryce Baschuk, *Who will Lead the WTO and Help it Avoid Collapse?*, WASH. POST (June 29, 2020), https://www.washingtonpost.com/business/who-will-lead-the-wto-and-help-it-avoid-collapse/2020/06/24/1bf2976c-b641-11ea-9a1d-d3db1cbe07ce_story.html [https://perma.cc/S38K-VVME].

119. USCTA, *supra* note 3, art. 7.1:1.

120. *Id.*

121. *Id.* art. 7.2:2(a).

of the party complained against.[122] Designated officials from both sides will attempt to resolve the dispute through negotiation.[123] If it cannot be resolved at lower levels, the dispute is referred to the Deputy USTR and Vice Minister and then finally to the USTR and the designated Vice Premier of China.[124]

Article 7.4:4(b) of the USCTA details the procedure followed from this point:

> If the concerns of the Complaining Party are not resolved at a meeting between the United States Trade Representative and the designated Vice Premier of the People's Republic of China, the Parties shall engage in expedited consultations on the response to the damages or losses incurred by the Complaining Party. If the Parties reach consensus on a response, the response shall be implemented.

The key part of this Article then allows the United States to exercise a unilateral right to enforce its demands:

> If the Parties do not reach consensus on a response, the Complaining Party may resort to taking action . . . , including by suspending an obligation under this Agreement or by adopting a remedial measure in a proportionate way that it considers appropriate . . . . If the Party Complained Against considers that the action by the Complaining Party pursuant to this subparagraph was taken in good faith, the Party Complained Against may not adopt a counter-response, or otherwise challenge such action. If the Party Complained Against considers that the action of the Complaining Party was taken in bad faith, the remedy is to withdraw from this Agreement by providing written notice of withdrawal to the Complaining Party.[125]

As this provision makes clear, in any dispute where the United States does not achieve the result that it desires, the United States has the unilateral right to impose trade sanctions on China. The USCTA eschews the use of independent dispute resolution tribunals and instead creates a mechanism that permits unilateral trade retaliation. Although the USCTA dispute resolution provisions are adopted in neutral terms—allowing both parties to use unilateral measures—in practice, the United States will most likely be the party making use of trade retaliation. The United States drafted the USCTA to impose major obligations on China[126] and designed it to allow the

122. *Id.* art. 7.4:1
123. *Id.* art. 7.4:4(a)
124. *Id.*
125. USCTA, *supra* note 3, art. 7.4:4(b).
126. *See generally id.*

United States to avoid the use of the WTO dispute settlement mechanism if a grievance arises. In case of a grievance, the United States has the right to impose trade sanctions without China's consent and over its objections.[127] In the words of Robert Lighthizer, the United States Trade Representative, "The only arbitrator I trust is myself."[128]

Unlike KORUS and other U.S. free trade agreements, the USCTA does not permit for a choice of forum in dispute settlement.[129] KORUS allows a complainant to bring a case under either KORUS or the WTO when a case involves conduct that simultaneously violates KORUS and the WTO.[130] The USCTA, by contrast, requires all disputes to be resolved internally, including those that involve simultaneous violations of WTO obligations.[131]

### C. *Legality of the U.S.-China Trade Agreement Dispute Settlement Mechanism*

While the United States has touted the USCTA as a breakthrough accomplishment, it presents several problematic elements. As a matter of international law, the USCTA dispute settlement provisions violate WTO law; and while the United States flaunts its disregard of the WTO, the United States had now drawn China into the trap of violating its own WTO commitments.

#### 1. *The WTO Prohibition Against Unilateralism*

The WTO has established procedures for dispute settlement under the Dispute Settlement Understanding (DSU) that govern the use of the WTO dispute settlement system.[132] Article 23 of the DSU prohibits the unilateral determination by a WTO member that its rights under the WTO agreements have been violated by another WTO member; such a determination can only be made by the WTO. Article 23 states in relevant part:

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127. *Id.* art. 7.4:4(b).

128. Bob Davis, *U.S.-China Deal Could Upend the Way Nations Settle Disputes*, WALL ST. J. (Jan. 16, 2020), https://www.wsj.com/articles/u-s-china-deal-could-upend-the-way-nations-settle-disputes-11579211598 [https://perma.cc/J4KB-LDUN].

129. Although the United States has made no public statement explaining this change in approach, but the explanation appears to lie in the United States' recent adoption of a policy of unilateralism as a key tenet of U.S. trade policy. *See* Daniel. C.K. Chow, *United States Unilateralism and the WTO*, 37 B.U. INT'L L. J. 1, 5–11 (2019).

130. KORUS, *supra* note 67, art. 22.6:1.

131. For a discussion of how the USCTA encompasses WTO obligations, see *infra* Part III.C.2.

132. *See generally* DSU, *supra* note 11.

> Members shall . . . not make a determination to the effect that a violation has occurred . . . except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding . . . .[133]

Article 23 recognizes that some members, such as the United States and the European Union, have their own internal legal and administrative systems and that such systems may be called upon to act when a WTO violation has occurred.[134] Article 23 requires all members to wait for the WTO to first make such a finding and to base any national findings on the WTO decision.[135] This requirement preserves the integrity of the WTO dispute settlement system. Allowing WTO members to unilaterally make determinations that their rights under WTO agreements have been violated would undermine the WTO dispute settlement system and usurp its power.

In *United States—Sections 301-310 of the Trade Act of 1974*,[136] the EU challenged Sections 301–310 of the Trade Act of 1974[137] on the grounds that they mandated that the USTR make a unilateral determination as to whether another WTO member violated U.S. rights under the WTO.[138] To address the argument that the United States acted unilaterally, Section 303(a)[139] requires the USTR to file an action with the WTO against the offending nation at the same time that it initiates a Section 301 investigation of that nation under U.S. law.[140] The problem that the EU identified was that the Section 301 investigation was required to reach a conclusion before the WTO action.[141]

Under Section 304, the USTR is required to make a finding of whether a WTO member has violated U.S. rights under the WTO within 18 months after the initiation of an investigation.[142] Under DSU procedures, a WTO tribunal has 19 and ½ months to reach a

133. *Id.* art. 23:2(a).
134. *See id.* art. 23:2(a)–(c).
135. *See id.*
136. Panel Report, *United States—Sections 301–310 of the Trade Acts of 1974*, WTO Doc. WT/DS152/R (adopted Jan. 27, 2009) [hereinafter Section 301 Panel Report].
137. 19 U.S.C. §§ 2411–20 (2018).
138. Section 301 Panel Report, *supra* note 136, ¶ 3.1.
139. 19 U.S.C. § 2413(a) (2018).
140. Section 301 Panel Report, *supra* note 136, ¶ 4.24.
141. *Id.* ¶ 7.29.
142. Section 301 Panel Report, *supra* note 141, ¶ 2.15.

decision.[143] Assuming that the United States initiates an investigation under U.S. law and files a complaint in the WTO at the same time, the United States might reach a decision before the WTO.[144] The EU argued that this procedure under U.S. law violated the prohibition against unilateral decisions by WTO members that their WTO rights had been violated.[145] The WTO panel found that "the statutory language of Section 304 . . . must be considered presumptively to be inconsistent with the obligations in Article 23.2(a)"[146] of the DSU set forth earlier above.

In its defense, the United States submitted a Statement of Administrative Action (SAA) submitted by the President and subject to congressional approval.[147] Accepting the U.S. claim that the SAA was legally binding, the panel noted that the SAA required the USTR "to base any section 301 determination that there has been a violation or denial of U.S. rights . . . on the panel or Appellate Body findings adopted by the DSB."[148] The panel found that Section 304 was consistent with the WTO because the "discretion created by the statutory language permitting a determination of inconsistency prior to exhaustion of DSU proceedings has effectively been curtailed."[149] The critical finding by the panel was that the USTR was required to wait until a WTO decision had been reached and then base any 304 determination on the WTO decision.[150] This allowed the panel to find that Section 304 did not authorize unilateral U.S. decisions concerning its WTO rights.[151] This decision amounted to a victory for the United States because it found that Section 301 was consistent with the WTO. The EU did not appeal the decision.

#### 2. *The USCTA as a Means to Enforce China's WTO Obligations*

DSU Article 23.2 and *U.S.–Section 301* establish a clear rule that WTO members cannot rule on WTO rights and obligation but must await a decision by the WTO and base any national decisions or actions on the prior WTO determination. The USCTA violates this proscription in at least three different ways. The USCTA allows the

143. *Id.* ¶ 7.29.
144. *Id.* ¶ 7.31(b).
145. *Id.* ¶ 7.186.
146. *Id.* ¶ 7.96.
147. *Id.* ¶ 7.109
148. Section 301 Panel Report, *supra* note 141, ¶ 7.109
149. *Id.* ¶ 7.112.
150. *Id.* ¶¶ 7.131–7.136.
151. *Id.*

United States to: (1) reverse WTO decisions decided against the United States in favor of China; (2) enforce WTO decisions and treaty obligations through the USCTA in order to bypass enforcement through the WTO; and (3) potentially enforce China's obligations under WTO treaties through the use of broadly worded USCTA clauses.

a. *Using the USCTA to Reverse WTO Decisions*

The USCTA reversed a result from the panel's report in *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*,[152] one of the most important cases brought by the United States to challenge various aspects of People's Republic of China (PRC) laws dealing with counterfeit products. Although both countries were victorious on various aspects of the case, overall, China succeeded on the most important issues in the case.[153]

One aspect of the case concerned the disposition of counterfeit products seized by PRC customs authorities. The United States argued that PRC laws were in violation of WTO laws that required PRC customs to have the authority to destroy infringing goods or dispose of them outside the channels of commerce.[154] The United States was concerned that unless counterfeit goods were destroyed, the goods could re-enter the open market for sale to consumers.[155] Article 27 of the Regulations on Customs Protection of Intellectual Property Rights allowed PRC authorities to donate the counterfeit goods to social public welfare institutions, to sell the goods to the brand owner, or to sell the goods at a public auction after eradicating the infringing trademark.[156] The United States argued that PRC law allowed authorities to destroy the goods only after finding that none of these other channels were available.[157] The United States feared these other channels could result in the counterfeit goods re-entering the market.[158] The social welfare institution could resell the counterfeit goods on the open market, and the persons purchasing the goods at a public auction, which might include the original counterfeiter or its affiliates, could reaffix the infringing trademark and resell them on the open market.

152. China Measures Report, *supra* note 108.
153. *See generally id.* ¶¶ 8.1–8.5.
154. TRIPS, *supra* note 46, arts. 46 & 59.
155. China Measures Report, *supra* note 152, ¶ 7.197
156. *Id.* ¶ 7.193
157. *Id.* ¶ 7.197
158. *Id.*

Despite the U.S. concerns, however, the WTO Appellate Body upheld Article 27 of the PRC Customs Regulations, ruling in favor of China.[159] The WTO Appellate Body held that PRC authorities were not required to exhaust these channels before destroying the goods, but had the discretion to destroy the goods at any time.[160] This ruling left open the possibility that PRC authorities could also, at their discretion, donate the goods to charities or sell them in a public auction after eradicating the infringing trademark. Article 1.20 of the USCTA reverses this result by providing that counterfeit goods seized by customs authorities "shall be destroyed, except in exceptional circumstances."[161] This treaty obligation created by the USCTA both changes the result in *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights* and overturns PRC domestic law by superseding Article 27.

Under the WTO, parties that lose a case at the panel can appeal the decision to the Appellate Body. Once the Appellate Body decides a case there is no avenue to change the result other than by filing a new case or by seeking an amendment or interpretation of the law by the General Council or the Ministerial Conference, bodies representing the entire WTO membership.[162] Here, however, the United States has been able to change the result of an unfavorable decision outside the channels of the WTO by imposing a binding treaty obligation on China that is enforceable by trade sanctions.

b. *Using the USCTA to Enforce WTO Decisions, WTO Treaty Obligations, and WTO Agreements*

Annex 14 of the USCTA provides as follows:

> China shall ensure that, from December 31, 2019, its TRQ [tariff rate quota] measures for wheat, rice, and corn are in conformity with the Panel Report in *China-Tariff Rate Quotas for Certain Agricultural Products* and the WTO agreements, including China's commitments under the Protocol on the Accession of the People's Republic of China to the WTO and China's Schedule CLII, Part I, Section 1(B).[163]

This provision of the USCTA permits the United States to use a mechanism outside of the WTO to enforce a WTO panel decision

159. China Measures Report, *supra* note 152, ¶ 7.395.
160. *Id.* ¶¶ 7.197, 7.395.
161. USCTA, *supra* note 3, art. 1.20(a).
162. *See* Marrakesh Agreement Establishing the World Trade Organization art. IX:2, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994).
163. USCTA, *supra* note 3, annex 14.

against China. Under *China—Tariff Rate Quotas for Certain Agricultural Products,* China is required maintain certain tariff rate quotas on its imports of certain commodities;[164] if China fails to meet these requirements, then, under the DSU, the United States can first seek compensation from China.[165] If the parties cannot agree on compensation, the United States can seek authorization from the DSB to suspend trade concessions (i.e., to impose trade sanctions on China in order to induce compliance).[166] If the parties disagree on whether China is in compliance with the panel's decision, the United States will need to bring an action under DSU Article 21.5 with the original panel in order to determine whether China is in compliance.[167] If the compliance panel finds China to be in breach, the United States can then ask the WTO to authorize retaliation. At this point, China can appeal the decision to the Appellate Body.

By contrast, under the USCTA, the United States can unilaterally decide that China is not in compliance with the decision, and the United States does not need authorization to impose trade sanctions. The United States has the absolute and unilateral right to do so.[168] These actions by the United States are designed to bypass the WTO and allow the United States to directly and unilaterally enforce WTO decisions in its favor.

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164. *See generally* Panel Report, *China—Tariff Rate Quotas for Certain Agricultural Products*, WTO Doc. WT/DS517/R (adopted Apr. 18, 2019). A tariff rate quota (TRQ) is tariff that sets one tariff for imports up to the limit of the quota (called the in quota rate) and then a different and higher rate for all imports above the limit (called the out of quota rate). For example, a TRQ could set a tariff of 2% ad valorem for the first 100,000 tons of sugar and then a tariff of 10% for all sugar imports over 100,000 tons. *See* CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 12, at 200. An ad valorem tariff expresses the tariff as a percentage of the value of the goods. *Id.*

165. DSU, *supra* note 11, art. 22.2.

166. *Id.*

167. *Id.* art. 21.5.

168. USCTA, *supra* note 3, art 7.4:4(b). Under Article 7.4:4(b), if the United States and China do not reach a consensus on how to resolve a dispute, the United States "may resort to *taking action based on facts provided during the consultations,* including by suspending an obligation under this Agreement or by adopting a *remedial measure* in a proportionate way." *Id.* (emphasis added). Article 7.4:4(b) provides for a general resort to "actions based on the facts, including . . . *remedial* measures." *Id.* (emphasis added). Remedial measures under the WTO includes the suspensions of concessions, i.e. suspension of bound tariff rates for China and the imposition of a higher, punitive rates. *Id.* Article 22 ("Compensation and Suspension of Concessions") of the WTO Dispute Settlement Understanding, which sets forth in detail the type of remedial measures available, including compensation and the suspension of concessions. The WTO eschews the more adversarial term "retaliation" and uses the more neutral sounding "suspension of concessions" instead.

Not only does the USCTA allow the United States to use means outside of the WTO to enforce WTO cases, the United States can also use the USCTA to enforce China's WTO treaty obligations. In its Protocol of Accession,[169] negotiated with the United States,[170] China made numerous legal commitments as a condition of its accession to the WTO.[171] The Protocol of Accession is a legally binding WTO instrument creating enforceable rights and obligations.[172] Prior to the USCTA, if the United States believed that China was in violation of the Protocol, the United States would have to bring an action with a WTO panel. The same would be true if China failed to fulfill its commitments under its Schedule CLII, which is part of China's Tariff Schedule—an agreement that was negotiated with all other WTO members to apply to all tariffs on goods imposed by China and then filed with the WTO as an appendix to GATT.[173] In both cases, a WTO panel would have to rule that China was in breach of the Protocol or its Tariff Schedule before the United States could seek relief in the form of compensation or retaliation, and China would be entitled to appeal any decision by a panel to the Appellate Body.[174] Under the USCTA, however, the United States can unilaterally determine that its rights have been breached under these WTO instruments and impose trade sanctions on China.[175]

The USCTA also allows the United States to enforce specific provisions of WTO agreements. For example, Annex 17 of the USCTA provides that:

> The Parties shall not implement food safety regulations, or require actions of the other Party's regulatory authorities, that

169. Accession of the People's Republic of China, WTO Doc. WT/L/432 (Nov. 10, 2001) [hereinafter China Protocol of Accession].

170. In theory, all WTO members must agree on a protocol of accession with the proposed new member, but the United States took the lead in the negotiations with China. *See* Marco Bronckers, *The Special Safeguards Clause in WTO Trade Relations with China: (How) Will It Work?*, *in* WTO AND EAST ASIA: NEW PERSPS. 39 (Mitsuo Matsushita & Dukgeun Ahn eds., 2004) (citing Fabio Spadi, *Discriminatory Safeguards in the Light of the Admission of the People's Republic of China to the World Trade Organization*, 5 J. ECON. INT'L L. 421 (2002); Scott Anderson & Christian Lau, *Hedging Hopes with Fears in China's Accession to the World Trade Organization: The Transitional Special-Product Safeguard for Chinese Exports*, 5 J. WORLD INTELL. PROP. 405 (2002)).

171. *See e.g.*, China Protocol of Accession, *supra* note 169, pt. II.1.

172. *Id.* pt. I.

173. Ministerial Conference, *Report of the Working Party on the Accession of China*, WTO Doc. WT/MIN(01)/3/Add.2, Addendum, Schedule CLII (Nov. 10, 2001).

174. As set forth earlier, the Appellate Body is now unable to convene due to a lack of sufficient members. *See supra* notes 10–13 and accompanying text.

175. USCTA, *supra* note 3, art. 7.4:4(b).

> are not science- or risk-based and shall only apply such regulations and require such actions to the extent necessary to protect human life or health.[176]

The requirement that food safety regulations must be based on scientific evidence is set forth in Articles 2 and 3 of the WTO Sanitary and Phyto-Sanitary Agreement (SPS Agreement) dealing with food safety.[177] Article 5 of the SPS Agreement requires that such regulations must also be based on a risk assessment.[178] Under Article 2:1 of the SPS Agreement, all food safety regulations must be "necessary for the protection of human, animal or plant life or health."[179] Yet, the United States specifically included these obligations in the USCTA in an effort to avoid the WTO dispute settlement system and directly enforce these obligations through the unilateral procedure established in the USCTA.

These procedures under the USCTA violate DSU Article 22.3,[180] as the United States has usurped the power of the WTO to make determinations that China has violated its WTO obligations. Instead, the United States has established its own forum where it has the absolute power to make unilateral determinations that its rights under China's Protocol of Accession, China's Tariff Schedule, or the SPS Agreement have been breached. Other provisions of the USCTA, too numerous to discuss in this Article, present other opportunities for the United States to unilaterally rule on issues of WTO law.[181]

#### c. *Use of Broadly Worded USCTA Provisions to Enforce WTO Obligations*

The USCTA includes several broadly worded provisions that could be used by the United States as a basis for enforcing a wide array of WTO treaty obligations. For example, Article 1.2 provides:

> The Parties shall ensure fair, adequate, and effective protection and enforcement of intellectual property rights. Each Party shall ensure fair and equitable market access to persons of the other Party that rely upon intellectual property protection.[182]

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176. *Id.* annex 17.

177. Agreement on the Application of Sanitary and Phytosanitary Measures, arts. 2 & 3, Apr. 15, 1994, 1867 U.N.T.S. 493 (1994).

178. *Id.* art 5.

179. *Id.* art 2:1.1.

180. *See supra* note 133 and accompanying text.

181. A reading of the USCTA shows that there are numerous areas of overlap between the USCTA and the WTO agreements. Each area of overlap represents a case to which both the WTO agreements and the USCTA apply. In each of these cases, WTO obligations can be enforced through the USCTA.

182. USCTA, *supra* note 3, art. 1.2.

One can envision how the United States can use this provision to proceed under the USCTA if the United States determined that China interfered with its ability to enforce its intellectual property rights. For example, suppose that the United States determined that China breached TRIPS Article 21 by imposing compulsory requirements on U.S. brand owners who sought to license their trademark rights. Rather than bringing an action in the WTO that could take over a year to resolve and that it could lose, the United States could bring an action under Article 1.2 before the USCTA, where it can be assured that the dispute will be resolved quickly and in its favor.

Article 7.6 of the USCTA, entitled "Miscellaneous," is a catchall provision, which states that "[t]he Parties affirm their existing rights and obligations with respect to each other under the WTO Agreement and other agreements to which the Parties are party."[183] It is no coincidence that this provision is found in Chapter 7 on dispute resolution; its location expresses the view of the United States that these are issues subject to the USCTA's dispute resolution mechanism. Under this broadly worded provision, the United States left open the possibility that it could seek to enforce *any* obligation under any of the WTO agreements—GATT, GATS, or TRIPS—and all of their corollary agreements. Should the United States find that any WTO obligation has been breached, the United States could argue that China has failed to comply with Article 7.6 and pursue unilateral action under the USCTA.

## IV. Inducing China to Violate the WTO and Further Erode the WTO System

Faced with yet another round of crippling tariff increases by the United States, China agreed to the USCTA two days before the increases were scheduled to take effect.[184] By agreeing to the USCTA, China has become complicit in a U.S. scheme that violates key WTO provisions and further erodes the WTO system. This is the third step in the U.S. plan to displace the WTO.

Not only does the USCTA violate the key principle against unilateralism, but it also violates another foundational principle of the WTO: the Most Favored Nation principle enshrined in Article I of the

183. *Id.* art. 7.6.

184. China agreed to the USCTA on Dec. 13, 2019, just two days before the United States was set to impose a 15 percent tariff on $160 billion of Chinese electronics imports. *See* Dorcas Wong & Alexander Chipman Koty, *The U.S.-China Trade War: A Timeline*, China Briefing (Aug. 25, 2020), https://www.china-briefing.com/news/the-us-china-trade-war-a-timeline [https://perma.cc/4NJE-CMTB].

GATT.[185] The MFN principle provides in relevant part that "any advantage . . . granted by any contracting party to any product originating in . . . any other country shall be accorded immediately and unconditionally to the like product originating in . . . of all other contracting parties."[186] The MFN principle is often misunderstood as calling for preferential treatment,[187] but is actually a principle of non-discrimination.[188] As a principle of non-discrimination, MFN has two different aspects: a WTO member cannot discriminate *against* other members, but it also cannot discriminate *in favor* of other members.[189] The MFN principle calls for equality of treatment; it not only prohibits discrimination but also bans favoritism and special privileges extended to one member and not others.[190]

The prohibition against the granting of special favors has long been established in the history of the GATT and WTO. In the first two decades of the GATT, MFN was a key stumbling block to the

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185. GATT, *supra* note 28, art. I:1.

186. GATT Article I:1 provides:

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

*Id.* The references in Article I:1 to paragraphs 2 and 4 of Article III in the quoted text above refer to the provisions of the National Treatment Principle that apply to internal measures: (1) internal fiscal measures, such as taxes, and (2) internal regulatory measures, which are non-fiscal measures. *See id.* arts. III:2, III:4. GATT Article III sets forth the National Treatment ("NT") Principle, which prohibits nations from discriminating against imports in favor of domestic products. Paragraphs 2 and 4 of Article III make clear that the NT principle applies to internal measures in addition to border measures. Paragraph 2 refers to fiscal measures such as taxes and Paragraph 4 refers to non-fiscal measures such as government regulation. This clarification is important because the NT principle might otherwise be viewed as limited to border measures only (i.e. tariffs applied to imports at the port of entry). The reference in GATT Article I to paragraphs 2 and 4 of Article III makes it clear that the MFN principle also applies not only to border measures but also applies to internal fiscal measures (i.e., taxes) and non-fiscal measures (i.e., government regulation). This definition is broad enough to encompass an internal decision by one nation, China, to solely purchase goods from another nation, the United States.

187. CHOW & SCHOENBAUM, *supra* note 12, at 149.

188. *Id.*

189. *Id.*

190. *Id.*

integration of developing countries into the GATT.[191] For years, developing countries sought preferential treatment in the GATT to compensate for their lack of economic development, due in large part to domination by developed countries.[192] Developing countries believed that they could not compete in international trade with the far more advanced developed countries without being given some special advantages.[193] The MFN principle stood as a barrier to this preferential treatment because any special advantages given to developing countries would have been required to be immediately and unconditionally accorded to all GATT parties.[194] Only in 1979, when the Enabling Clause—adopted by the entire WTO membership—recognized a permanent waiver of the MFN for developing countries did it become possible to provide special and differential treatment for developing countries under the GATT/WTO.[195] Today, myriad WTO provisions provide developing countries special and differential treatment, but this was made possible only by the explicit and permanent waiver to MFN contained in the Enabling Clause.[196]

Another exception to the MFN principle exists for certain free trade agreements.[197] This exception exists because the GATT recognized that it would not be possible for GATT parties to create a free trade agreement if they then had to extend free trade to all other GATT members.[198] To allow GATT and WTO members to enter into free trade agreements, GATT Article XXIV:5 recognizes an exception to the MFN principle for agreements qualifying as free trade agreements under the GATT.[199]

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191. *See* CHAD P. BROWN, SELF-ENFORCING TRADE: DEVELOPING COUNTRIES AND WTO DISPUTE SETTLEMENT 17, 32–37 (2009).

192. *Id.*

193. *See id.*

194. GATT, *supra* note 28, art. I:1.

195. Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, ¶¶ 1–9, L/4903 (Nov. 28, 1979), GATT BISD (26th Supp.), at 203–205 (1980), https://www.wto.org/english/docs_e/legal_e/tokyo_enabling_e.pdf [https://perma.cc/F9RY-WCX5].

196. *Id. See also Briefing Notes: Special and Differential Treatment*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dda_e/status_e/sdt_e.htm [https://perma.cc/F8Z2-2V9B].

197. *See supra* notes 47–48 and accompanying text.

198. *Id.*

199. GATT, *supra* note 28, art. XXIV:5. *See also* CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 12, at 161–62.

The USCTA is not a free trade agreement within the meaning of Article XXIV. Such agreements must permit zero tariffs for substantially all trade between the two states.[200] The USCTA does not purport to establish zero tariffs for any products or services, and it does not cover substantially all trade between the United States and China and so cannot qualify for this exception.[201] As no exception to the MFN principle exists for the USCTA, China is prohibited from granting a special benefit or privilege to the United States in the form of a commitment to purchase $200 billion in goods and services. China must extend the same benefit or privilege to all other WTO members—which is impossible—or withdraw the benefit from the United States. With respect to the numerous other privileges or benefits extended by China to the United States under the USCTA, such as enhanced protection for U.S. intellectual property rights, under the MFN principle, China must immediately and unconditionally extend the same treatment to all other WTO members.[202]

To see why special preferences are widely regarded as pernicious and detrimental to free trade, one need to look no further than China's commitment under the USCTA to purchase $200 billion of goods and services from the United States.[203] Without the USCTA, China's other major trading partners, such as the EU, would be able to compete on the open market to sell these goods and services to China. After the USCTA, however, these opportunities are closed to the EU and China's other trading partners. China is compelled to purchase all of these goods and services from the United States under the USCTA. The United States enjoys a special trade advantage and the EU and other countries lose the opportunities to compete for hundreds of billions of dollars in sales.

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200. GATT, *supra* note 28, art. XXIV:8(b) ("A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce . . . are eliminated on substantially all the trade between the constituent territories in products originating in such territories.").

201. A review of the USCTA by the author indicated that there is not even one provision that eliminates tariffs on goods traded between the United States and China. *See* USCTA, *supra* note 3, Annex 14.

202. For example, under USCTA Article 1.5:2(a), once a party demonstrates the existence of a trade secret which the defendant had an opportunity to access or disclose, the burden shifts to the defending party to show that it did not misappropriate the trade secret. Under the MFN principle contained in GATT art. I, China must immediately and unconditionally extend the same treatment on trade secrets to all other members of the WTO. China is under a similar obligation under MFN to extend the many and numerous other benefits under the USCTA extended to the United States to all other WTO members or China must withdraw the benefit to the United States.

203. USCTA, *supra* note 3, art. 6.2.

The EU, however, is unlikely to challenge the USCTA in the WTO. Aside from not wanting to anger an ally, a legal challenge would also be futile due to the actions of the United States. If the EU wins its case in the panel stage, the United States can simply file an appeal of the panel decision and suspend its application.[204] This appeal would suspend the panel decision indefinitely.[205]

The tactics employed by the United States allowed it to first disable the WTO dispute settlement system and then induce China to enter into a WTO-inconsistent trade agreement to its benefit and to the detriment of U.S. competitors. No WTO member can successfully challenge the USCTA as in breach of the WTO agreements, however, because the paralysis of the Appellate Body has rendered all WTO obligations unenforceable.

While these tactics may be beneficial to the United States, they could lead to unfortunate developments for the WTO. The USCTA is a further attack on the WTO. If the USCTA serves as a template for future U.S. trade agreements, new U.S. agreements will further erode the WTO system.[206] In addition, once other WTO members realize that they cannot challenge the USCTA for being in breach of the WTO agreements, other members may also decide to engage in WTO-inconsistent conduct to protect their interests. If nations follow the lead of the United States in entering bilateral trade deals with WTO inconsistent provisions, the WTO will collapse or fade into irrelevance, hastening its demise.

## V. Conclusion

Although the United States trumpets China's commitment to purchase $200 billion in U.S. goods and services and to implement new intellectual property protections as the USCTA's main achievements, the most significant and radical new features of the USCTA are its dispute resolution provisions. The USCTA departs from the

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204. *See supra* Part III.A.

205. *Id.*

206. The United States has a longstanding policy of entering into free trade agreements with politically friendly countries to increase trade and engagement. *See* Daniel C.K. Chow & Thomas J. Schoenbaum, International Business Transactions: Problems, Cases, and Materials 49 (4th ed. 2020). As most countries are anxious to trade with the United States, the Trump Administration could demand that new trading partners agree to a unilateral dispute resolution mechanism based on the USCTA. Robert Lighthizer, the USTR, revealed his preference for a unilateral dispute resolution mechanism when he recently remarked, "The only arbitrator I trust is myself." Bob Davis, *U.S.-China Deal Could Upend the Way Nations Settle Disputes*, Wall St. J. (Jan. 16, 2020), https://www.wsj.com/articles/u-s-china-deal-could-upend-the-way-nations-settle-disputes-11579211598 [https://perma.cc/RB4S-DKU7].

practice in all prior U.S. free trade and bilateral investment treaties by rejecting dispute resolution through an independent arbitration tribunal. Instead, the USCTA permits the United States to make unilateral decisions on whether China has violated its USCTA and WTO obligations and on whether to impose trade sanctions.

The USCTA cannot be viewed in isolation but must be understood in the larger context of the U.S. dissatisfaction with the WTO's dispute settlement system that has existed since its inception in 1995. As the first trade agreement signed after the paralysis of the WTO Appellate Body, the USCTA is an ominous portent of the future. With the passage of the USCTA, the United States has indicated it does not intend to fix the defects of the WTO dispute settlement system, but intends to replace it with one under its own control. If the United States intends to use the USCTA as a template for future trade agreements, then the United States has given us a glimpse into its vision of a post-WTO world. In this world, the powers of the WTO are carved up and doled out to powerful nations that enter into preferential trade deals that benefit them in disregard of basic WTO principles and at the expense of other trading partners. The WTO, once the centerpiece of the multilateral trading system, trudges on in a permanently diminished capacity and is reduced to the role of serving to ratify the actions of the United States and other powerful countries. No dissenters can challenge this post-WTO world because the only fully functioning dispute resolution system is in the hands of those nations, like the United States, that benefit from and control this system. Whether this post-WTO world materializes is up to certain key players in the WTO, such as the EU.

The WTO today finds itself gripped in the vise of a life or death dilemma due to the actions of the United States. Led by the EU, the proponents of the WTO are searching for a temporary alternative forum to the WTO Appellate Body.[207] But these nations must realize that the United States is not standing still while WTO nations are debating and formulating responses. Instead, it has already moved onto the next phase of its efforts to dismantle the WTO dispute settlement system. Each new trade agreement that the United States enters into based upon the template in the USCTA represents a further

207. *See* Joseph Lordi, *Appeal by Other Means: the EU and other WTO Members Search for Alternatives to the Organization's Paralyzed Appellate Body*, MICH. J. INT'L L.: MJIL BLOG, http://www.mjilonline.org/appeal-by-other-means-the-european-union-and-other-wto-members-search-for-alternatives-to-the-organizations-paralyzed-appellate-body/ [https://perma.cc/2Y8N-E8VD]. For a discussion of the shortcomings of the EU approach, see Chow, *supra* note 14, at 9–10.

deterioration of the WTO system and enlists another new accomplice in the U.S. plot to dismantle and replace the WTO. The risks of not taking action immediately are that the current situation becomes a permanent state of affairs as nations lose the political will to become embroiled in an acrimonious debate over the future of the Appellate Body.

But tackling this bitter and unpleasant dispute directly and candidly is the only way to salvage the WTO dispute settlement system and to save the WTO itself. The WTO must open a new multilateral negotiation in which all WTO members participate.[208] Such multilateral negotiation, the Uruguay Round, led to the creation of the WTO in 1995 and another full scale multinational negotiation is now needed to save it.[209] In such a negotiation, all aspects of the WTO dispute settlement system should be open for discussion and all WTO countries should participate and must reach a response by consensus.

As the leading proponent for saving the WTO, the EU has the stature to call for commencing this new multilateral negotiation immediately. The EU and the other proponents of the WTO must understand that the paralysis of the WTO Appellate Body by the United States was only its first step; the USCTA represents a second step that further erodes the WTO system and creates the template for additional attacks on the WTO system. The USCTA also indicates that the United States is less interested in repairing the WTO dispute settlement system than in replacing it. The erosion of the WTO dispute settlement system is continuing and each new deterioration of the system makes the repair and survival of the WTO more precarious. The time to act and call for a new multilateral negotiation is *now* before nations lose the political will to act and the decline of the WTO becomes irreversible.

208. *See* Chow, *supra* note 14, at 30.
209. *Id.*