

NOTE

TECHNOLOGY TRANSFER AND CHINA'S WTO COMMITMENTS

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ABSTRACT

When China joined the World Trade Organization (WTO) in 2001, it made a wide range of commitments to protect intellectual property and to treat foreign companies the same as indigenous Chinese companies. Some WTO members, principally the United States (U.S.), have accused China of violating its commitments in order to advance its own technological development. Although much has been written about China's potential violations of various types of intellectual property rights, including patents, trademarks, and copyrights, this Note focuses on China's potential violation of trade secret and know-how aspects of intellectual property rights.

The United States, in its Section 301 report and the 2017 United States Trade Representative (USTR) Report to Congress on China's WTO Compliance, makes several complaints against China. They allege that China forces foreign companies to transfer technology to Chinese companies, for example, as a condition for granting a joint venture agreement; that the Chinese government gives more favorable treatment to Chinese companies than to foreign companies in certain circumstances; that China is using outbound investment to acquire foreign technology; and that China engages in cyber intrusions to steal intellectual property from U.S. companies in order to benefit Chinese companies.

This Note analyzes potential WTO claims against China based on these allegations, as well as possible defenses that China could raise, and finds that there are several possible claims that could be brought against China that are likely to succeed. The Note concludes by analyzing Professor Jennifer Hillman's statements that bringing a WTO case against China would accomplish more than unilateral action by the United States because a WTO case would be more likely to bring about comprehensive fundamental reform in China and restore

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confidence in the WTO. This Note finds that a WTO case would likely increase confidence in the WTO, but that the United States would likely have to accept partial reform from China, because bringing China into full compliance with its commitments would require China to fundamentally reform the basic structure of its government, which is extremely unlikely to happen. However, partial reform is better than no reform. With China in the WTO, there is at least a mechanism for holding China accountable, which would not exist if China was no longer a member. In the end, this partial reform may be the best outcome that can be expected.

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I. INTRODUCTION

The People's Republic of China has a rich tradition of scientific discovery and invention. It is home to what is popularly known as the Four Great Inventions of papermaking, printing, gunpowder, and the compass.¹ However despite its rich tradition of invention, China has historically had very few laws protecting intellectual property (IP) rights. Instead it has traditionally viewed IP as a societal good rather than the more Western view of IP as a right that can be claimed and protected by the owner.² This traditional view of IP has recently come into conflict with the rest of the world. When China joined the World Trade Organization (WTO) in 2001, it made a wide range of commitments to protect IP and to treat foreign companies the same as indigenous

1. Luke Shen-Tien Chi, *China's Education Reforms and Strive for Innovation*, CHINA DAILY (Aug. 24, 2018), <http://www.chinadaily.com.cn/a/201808/24/WS5b7fb080a310add14f387a5b.html>.

2. William P. Lane, *Trapped in China's Shadow? Intellectual Property Protection in Post-WTO-Accession Russia*, 36 B.C. INT'L & COMP. L. REV. 183, 201-02 (2013).

Chinese companies.³ Some WTO members, principally the United States (U.S.), have accused China of violating its commitments in order to advance its own technological development.⁴ Although WTO members have raised issues with China for many years, these views became widely known when the Trump administration published the 2017 USTR Report to Congress on China's WTO Compliance⁵ and the Section 301 Report.⁶ These reports accuse China of unfair trade practices in dealing with transfers of technology from U.S. companies to Chinese companies. Among other things, China is accused of forced transfers of technology as part of joint venture (JV) agreements between U.S. companies and their Chinese partners, along with outright theft of U.S. technology.

Despite the accusations, until recently,⁷ no cases have been brought to the WTO Dispute Settlement Body (DSB) against China for its technology transfer rules and practices. This paper explores the possibility of bringing such a case against China at the WTO and the likelihood of success of such a claim. Part II of this article will provide an overview of what constitutes technology transfer as well as a brief history of China's intellectual property laws. Part III will describe China's WTO commitments by examining both the relevant WTO rules and China's specific commitments from its Protocol of Accession. It will also explore what China did

3. Ling-Ling He & Razeen Sappideen, *Reflections on China's WTO Accession Commitments and Their Observance*, 43 J. WORLD TRADE 847, 852 (2009); see World Trade Organization, *Accession of the People's Republic of China*, Ministerial Decision of 10 November 2001, pt. I (3), at 14, WTO Doc. WT/L/432 (2001); see also Working Party on Accession of China, *Report on Working Party on the Accession of China*, ¶ 256, WTO Doc. WT/ACC/CHN/49 (Oct. 1, 2001).

4. See generally U.S. TRADE REP., REPORT ON FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974 (Mar. 2018), <https://ustr.gov/sites/default/files/Section%20301%20FINAL.PDF>

5. U.S. TRADE REP., 2017 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE (Jan. 2018), <https://ustr.gov/sites/default/files/Press/Reports/China%202017%20WTO%20Report.pdf>.

6. U.S. TRADE REP., 2017 SPECIAL 301 REPORT, <https://ustr.gov/sites/default/files/301/2017%20Special%20301%20Report%20FINAL.PDF>.

7. WORLD TRADE ORG., CHINA – CERTAIN MEASURES ON THE TRANSFER OF TECHNOLOGY: REQUEST FOR CONSULTATIONS BY THE EUROPEAN UNION, WTO Doc. WT/DS549/1 (June 6, 2018), [https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=\(%20@Symbol=%20\(wt/ds549/1%20\)\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(%20@Symbol=%20(wt/ds549/1%20))&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#). The European Union (EU) filed a request for consultation before the WTO claiming that China has been discriminating against foreign companies while applying different measures to them than it does to Chinese companies. It states that China imposes heavier duties on international companies regarding the import of technology. Furthermore, the complaint brings examples of the administrative rules that China has been using to induce the transfer of foreign technology to China, which is not in compliance with China's WTO commitments.

to fulfill its WTO commitments, including its laws and regulations regarding technology transfers, as well as its enforcement mechanisms. This part will show that, although China initially committed to free-market principles, it has since set up institutions to maintain state control over key economic sectors. Part IV will discuss the accusations the United States has leveled against China with regards to technology transfers. Part V will discuss possible claims based on these complaints against China under the WTO rules. Part VI concludes the analysis with a discussion of the likelihood of success of such claims, and a discussion of the likelihood that a successful claim against China at the WTO would cause China to change its practices. It concludes that a successful WTO case would likely cause China to change some, but not all, of its offending practices.

Technology and innovation are vitally important to companies and countries around the world. The pace of innovation in today's economy is to some degree unprecedented.⁸ China is actively working towards becoming a leader in technology and is well-poised to succeed. Its leaders have publicly committed to this national goal. President Xi Jinping stated in his speech in 2017 that by 2035 China will be the world's leader in innovation.⁹ Chinese leaders may not see it in their interest to comply with international trading norms. However, this is a short-sighted view. It is not farfetched to see that China will eventually shift from becoming a leading importer to a leading exporter of technology. When this happens, China will have an even greater interest in ensuring that international trade is conducted on a level playing field. Thus, it is not only in the United States' interest to ensure that trade in IP is conducted fairly. In the long run, it is in China's interest as well.

II. TECHNOLOGY TRANSFER

A. *What Is Technology Transfer?*

Intellectual property generally refers to a set of rights that protects commercially valuable human ideas.¹⁰ It includes copyright, patent

8. See, e.g., John Schwarz, *How to Survive the Rising Tide of Tech Change*, FORBES, (Mar. 5, 2018), <https://www.forbes.com/sites/forbestechcouncil/2018/03/05/how-to-survive-the-rising-tide-of-tech-change/#44fa18c1486e>; LYNN ST. AMOUR, THE INTERNET: AN UNPRECEDENTED AND UNPARALLELED PLATFORM FOR INNOVATION AND CHANGE, Ch. 10, THE GLOBAL INNOVATION INDEX 2012, https://www.wipo.int/edocs/pubdocs/en/wipo_pub_gii_2012-chapter10.pdf.

9. Xinhua, *Xi's Jinping's Report at 19th CPC National Congress*, CHINA DAILY, (Nov. 4, 2017, 6:07 PM), http://www.chinadaily.com.cn/china/19thcpcnationalcongress/2017-11/04/content_34115212.htm; see also NICHOLAS R. LARDY, THE STATE STRIKES BACK: THE END OF ECONOMIC REFORM IN CHINA? 18-21 (2019).

10. SANQIANG QU, INTELLECTUAL PROPERTY LAW IN CHINA 1 (2012).

rights, trademark, and trade secrets.¹¹ The WTO's Trade-Related Aspects of Intellectual Property Rights (TRIPS), which is the WTO agreement on intellectual property, defines intellectual property to include patents, layout designs of integrated circuits, new plant varieties, know-how, industrial designs, copyrights, and software rights, along with trademarks, trade names, and geographical indications.¹² Although much has been written about China's potential violations of various types of IP rights, including patents, trademarks, and copyrights,¹³ this paper focuses on trade secret and know-how aspects of intellectual property rights.

Technology transfers can be defined as "the granting of access by an owner of technology or information usually protected by statutory intellectual property rights to a separate party."¹⁴ Technology transfers are an important part of today's economy. The value of many multinational companies such as Intel, IBM, Oracle, Apple, and Microsoft are based on the IP they have developed. Multinational companies must transfer technology abroad for a variety of reasons including contract manufacturing, setting up offices or other entities abroad, or acquisition of companies through joint ventures or subsidiaries.¹⁵ Companies transfer IP by first obtaining a patent, trademark, or copyright for the intellectual property in their home country and then drafting a contract either to assign the intellectual property rights or to create a license agreement.¹⁶ China's views on intellectual property protection, and the rules surrounding technology transfers in particular, have evolved over the years.

11. *Id.*

12. TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Part I-II, 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 Agreement].

13. See Ozue Vivian Adaeze, *The Effect of China's WTO Accession on its Intellectual Property Law*, 4(4) Q.J. OF CHINESE STUD., 52-63; Weighou Zhou, *Pirates Behind an Ajar Door, and an Ocean Away: US-China WTO Disputes, Intellectual Property Protection, and Market Access*, 25 TEMP. INT'L & COMP. L. J. 139 (2011); Bryan Mercurio, *The Protection and Enforcement of Intellectual Property In China since Accession to the WTO: Progress and Retreat*, CHINA PERSPECTIVES (2012), <https://journals.openedition.org/chinaperspectives/5795>.

14. Daniel C.K. Chow, *A Comparison of EU and China Competition Laws that Apply to Technology Transfer Agreements*, 9 I/S: J. L. & POL'Y FOR INFO. SOC'Y 497, 498 (2014).

15. *Id.* at 501-502.

16. *Id.* at 502-503. An assignment is the complete transfer of ownership rights. A license is a right to use intellectual property without transferring ownership.

B. *History of China Regarding Technology Transfers*

China has historically been an insular country, closed to trade, and self-sufficient.¹⁷ For most of the past 2000 years it maintained a policy of self-isolation. “China was perhaps the original go-it-alone nation, insular and purportedly self-contained and self-sufficient.”¹⁸ Then in 1840–1842 the Opium Wars forced China to open up its market to the outside world in a way that favored foreigners.¹⁹ This less-than-favorable situation was China’s first modern taste of being a player in international trade, and likely colored its views of the advantages of international trade up to modern times.

In 1949 the Communists, led by Mao Zedong, took over and isolated China from the world once again. In the 1950s, China transitioned from an economy based on private ownership to one based on public ownership under Chairman Mao’s centrally planned socialist system, which resulted in the abolishment of many written laws in favor of administrative orders and economic plans.²⁰ This was accompanied by harsh sanctions imposed by the West.²¹ During this time, foreign trade laws, along with China’s general economic development, were well behind those of other nations.²²

While China was in the process of a Communist takeover and implementation of a centrally planned economy, the rest of the world was headed in the opposite direction. World War II and the Great Depression had shown the rest of the world the perils of political and economic isolationism.²³ The post-World War II world saw the creation of several multilateral institutions to deal with global economic problems, among them the General Agreement on Tariffs and Trade (GATT).²⁴ The ultimate success of GATT made it clear that no country could afford to go at it alone.²⁵ It was in this context that China slowly began opening up to the world. The Chinese government began to see the importance of international trade to China’s economic

17. He & Sappideen, *supra* note 3, at 847.

18. *Id.* at 848.

19. *Id.*; see also Austin Ramzy, *How Britain Went to War with China over Opium*, NEW YORK TIMES (Jul. 3, 2018), <https://www.nytimes.com/2018/07/03/world/asia/opium-war-book-china-britain.html> (“It began what China calls the ‘Century of Humiliation’ when foreign powers forced weak Chinese governments to cede territory and sign unequal treaties.”).

20. He & Sappideen, *supra* note 3, at 849.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

development and embarked on a policy to liberalize and modernize the economy. In 1978, China enacted a wide range of laws on foreign trade and investment, as part of China's shift towards "socialist modernization."²⁶ The 1980s saw further liberalization and reform.²⁷

During this time China began looking to reengage with multilateral trade organizations. China saw WTO membership as part of its large-scale economic reform agenda.²⁸ In 1986, China formally submitted a request to resume its status as a party to the GATT Agreement.²⁹ China met with the GATT members several times; however, after the events at Tiananmen Square in 1989, progress on China's membership stalled.³⁰ Discussions resumed a year and a half later, and in 1995, China formally submitted its application to join the WTO, which concluded in 2001.³¹ Thus, it took an extraordinary fifteen years of negotiations for China to become a WTO member.³²

China's IP laws followed a path that is analogous to China's broader economic path and relationship to the rest of the world regarding international trade. Before opening up to the world in the late 1700s and early 1800s, China did not have any IP laws.³³ Intellectual property laws were imported into China from the West during the Qing dynasty, essentially at gunpoint.³⁴ Over the next 200 years, China gradually strengthened its rules on IP protection. The 1980s saw a new round of IP protection brought on by rapid developments in science and technology and as part of China's strategy of modernizing its economy.³⁵ China modernized many of its laws during this time including patent, trademark, and copyright laws, and established a criminal law for IP

26. *Id.* at 850.

27. HARISH KAPUR, *THE END OF AN ISOLATION: CHINA AFTER MAO 3* (M. Nijhoff Pub. 1985) ("Premier Zhao Ziyang declared that his country would never again shut her doors to the outside world.").

28. He & Sappideen, *supra* note 3, at 850; *see also* U.S. TRADE REP., 2017 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE, *supra* note 5, at 6.

29. TERRENCE P. STEWART & PATRICK J. McDONOUGH, *ACCESSION OF THE PEOPLE'S REPUBLIC OF CHINA TO THE WORLD TRADE ORGANIZATION 2* (2002) (China had joined GATT in 1947 but withdrew its membership in 1950).

30. *Id.* at 3.

31. *Id.* at 4.

32. He & Sappideen, *supra* note 3, at 850, 852.

33. SANQIANG QU, *supra* note 10, at 48.

34. *Id.* at 48-49 ("The early practices of China's introduction of Western notions of intellectual property were merely "learning the law at gunpoint").

35. *Id.*; *see* He & Sappideen, *supra* note 3, at 850. Between 1979 and 1986 China drew up over 300 laws and regulations, half of which were related to foreign trade.

rights.³⁶ This trend, together with other reforms made in particular by Chinese Premier Zhu Rongji³⁷ culminated in China's negotiations to join the WTO and eventual acceptance of international IP norms as part of its agreement to join the Agreement on TRIPS.³⁸

III. WORLD TRADE ORGANIZATION

A. *The WTO Obligations Regarding Technology Transfers*

The WTO was established during the Uruguay Round as a result of negotiations that lasted from 1986 to 1994.³⁹ China's WTO commitments, and its actions subsequent to making those commitments, must be viewed in light of the overall goals of the WTO. The philosophy underpinning the WTO is that trade among nations benefits everyone, and each country should exploit the comparative advantages it has in the market in order to achieve the greatest economic benefit.⁴⁰ In order to accomplish this, the WTO attempts to create a fairer trading system based on open-market policies.⁴¹ The major goals of the WTO are to lower trade barriers,⁴² encourage reciprocal concessions among members,⁴³ provide remedies for violations,⁴⁴ and create transparency.⁴⁵

In order to accomplish these goals, the WTO Agreement has several parts. It consists of the WTO Charter plus Annex I that provides multi-lateral agreements on different areas of trade, including agriculture, textiles, trade-related investment measures, and anti-dumping and countervailing duties. Annex IA incorporates the provisions of GATT 1947. Annex 1C has the TRIPS agreement that codifies international

36. He & Sappideen, *supra* note 3, at 859.

37. LARDY, *supra* note 9, at 16. Premier Zhu Rongji enacted policies that made it easier for China to join the WTO including downsizing and restructuring state-owned enterprises and opening the economy to external competition.

38. He & Sappideen, *supra* note 3, at 859.

39. WORLD TRADE ORGANIZATION, WTO IN BRIEF, https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr01_e.htm (last visited Nov. 19, 2018).

40. He & Sappideen, *supra* note 3, at 851.

41. U.S. TRADE REP., 2017 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE, *supra* note 5, at 2.

42. *See, e.g.*, General Agreement on Tariffs and Trade, art. II, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]; *see* World Trade Organization, GATT, https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm (last visited Nov. 19, 2018).

43. *Id.*; *see, e.g.*, Art. I and III, (Most-Favored-Nation Treatment).

44. *Id.*; *see, e.g.*, annex 2.

45. U.S. TRADE REP., 2017 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE, *supra* note 5, at 2.

intellectual property rights commitments. Annex 2 establishes the Dispute Settlement Body (DSB) for resolving disputes among members.⁴⁶

Importantly in the context of China's agreements, all WTO members commit to National Treatment and Most Favored Nation (MFN) principles when they join the WTO. The MFN principle is contained in Article I of the GATT Agreement and states that any advantage granted with respect to certain products must be granted unconditionally to like products from other member states.⁴⁷ Thus, MFN status establishes the principle that WTO members cannot discriminate among members in their national practice and must instead treat all WTO members the same.⁴⁸ Article III of GATT establishes the National Treatment principle and prohibits differentiating between domestic and imported products through laws, regulations, and taxation.⁴⁹ Thus, WTO members must treat domestic and foreign products the same.

Also important in the context of China is Article XXIII of GATT. Article XXIII states that a country can bring an action to the DSB of the WTO where there has been a "nullification or impairment" of benefits.⁵⁰ Article XXIII further defines a nullification or impairment to mean two things. First is the Violation Clause, which states that a member can bring a cause of action for a member's failure to carry out its obligation under the WTO agreements.⁵¹ Second is the Non-Violation Clause, which allows a country to bring a cause of action even when there is no violation of a particular article, but the country's rights have nonetheless been nullified or impaired.⁵² This part can be invoked, for example, when one country upsets the reasonable expectations of another country.⁵³

The TRIPS Agreement is the major WTO agreement regarding IP protection. WTO's GATT predecessor was largely silent on IP

46. See WORLD TRADE ORGANIZATION, DISPUTE SETTLEMENT BODY, https://www.wto.org/english/tratop_e/dispu_e/dispu_body_e.htm (last visited Jun. 8, 2019) (for a complete list of WTO rules).

47. Lane, *supra* note 2, at 191.

48. GATT, *supra* note 42, art. I; see World Trade Organization, GATT, https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm (last visited June 13, 2019).

49. *Id.* at art. III.

50. *Id.* at art. XXIII.

51. U.S. Tools to Address Chinese Market Distortions: Hearing before the U.S.-China Econ. And Rev. Sec. Comm'n, 10 (2018) [hereinafter *Hearing*] (testimony of Jennifer Hillman, Professor from practice, Georgetown University Law Center).

52. *Id.*

53. *Id.*

protections.⁵⁴ Before the TRIPS Agreement was finalized, there were only a few non-GATT treaties governing IP protection, including the Berne Convention, Paris Convention, and the Treaty on IP with respect to integrated circuits.⁵⁵ TRIPS was the WTO's effort to include IP law within its purview. Articles 3 and 4 of TRIPS guarantee MFN and national treatment for IP.⁵⁶ Article 8 states that members can take measures not contrary to their other commitments in order to protect public health and promote the public interest.⁵⁷ Article 39 says that all countries must prevent information lawfully within their control from being disclosed or used by others without their consent.⁵⁸ Article 63 deals with transparency in laws and regulations and requires all countries to publish laws and regulations in a location that is easily accessible to other members.⁵⁹ Part I of the Agreement defines the scope of rights that must be given to IP holders and lays out rules for seven different categories of IP.⁶⁰ Part III imposes a duty to adopt certain levels of IP protection.⁶¹

In order to join the WTO, countries must notify WTO members of their desire to become a member and then work through a series of Working Party negotiations with members on its terms of accession.⁶² These negotiations establish specific commitments that the country must make in order to become a member. Once the Protocol of Accession is agreed to, the country becomes a full WTO member.⁶³ The Protocol of Accession has the force of law.⁶⁴ Thus, as part of the process

54. Lane, *supra* note 2, at 190.

55. *Id.* For an overview of each of these treaties, see SANQIANG QU, *supra* note 10.

56. TRIPS, *supra* note 12, art. 3-4.

57. Lawrence A. Kogan, *Commercial High Technology Innovations Face Uncertain Future Amid Emerging BRICS Compulsory Licensing and IT Interoperability Frameworks*, 13 SAN DIEGO INT'L L.J. 201, 255 (2011).

58. Hearing, *supra* note 51, at 5-6.

59. Kogan, *supra* note 57, at 291.

60. TRIPS, *supra* note 12, pt. I; *see also* TRIPS, *supra* note 12, at pt. II (The seven categories are: 1. copyrights and related rights; 2. trademarks; 3. geographical indications; 4. industrial design; 5. patents; 6. layout-design (Topographies) of integrated circuit; and 7. protection of undisclosed information).

61. *Id.* at pt. III (Enforcement of Intellectual Property Rights).

62. For a full explanation of the steps China took to become a WTO member see STEWART ET AL., *supra* note 29, at 1-5.

63. *See* World Trade Organization, *Accessions: China*, https://www.wto.org/english/thewto_e/acc_e/a1_chine_e.htm (last visited Jun. 8, 2019) (for a full list of documents for China's WTO Accession).

64. CHING CHEONG & CHING HUNG YEE, *HANDBOOK ON CHINA'S WTO ACCESSION AND ITS IMPACTS 3* (World Scientific Publishing 2003) ("Its annexes contain primarily schedules of specific commitments made by China for submission to the WTO").

for becoming a WTO member, China made specific commitments that it is legally bound to comply with.

B. *China's WTO Commitments for Technology*

China's negotiations for becoming a WTO member were difficult. Many WTO members, including the United States, saw many advantages to China becoming a WTO member.⁶⁵ China was a large trading partner, and establishing rules and norms was seen as beneficial. In addition, some felt that it would help to move China towards a more open-market economy where it would be forced to follow established rules and be more transparent.⁶⁶ It was also precisely for this reason that China's negotiations took so long. At the time, China was still essentially a centrally planned economy and establishing China's commitments in a multilateral trading system designed to promote an open market was no easy task.⁶⁷ For this reason, China was required to make more commitments than most in order to become a WTO member.⁶⁸

China made commitments in many different areas. These agreements undoubtedly reflect concerns that WTO members had about China's various trade practices at the time of negotiations. First, China made several agreements to open up its markets to foreign competition. It agreed to reduce tariffs on industrial goods and sustain the reductions against future increases,⁶⁹ and it agreed to provide market access to some service sectors previously closed, such as finance, telecommunications and insurance.⁷⁰ Second, China made many commitments in the way that it would administer its law. It agreed to apply the WTO rules uniformly across its territory, including special economic areas.⁷¹ It also agreed

65. U.S. TRADE REP., REPORT ON FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974, *supra* note 4, at 4-5; Hearing, *supra* note 51, at 10; Wu, *The "China, Inc." Challenge to the Global Trade Environment*, 57.2 HARV. INT'L L.J. 261 (Spring 2016).

66. See Hearing, *supra* note 51, at 9; Wu, *supra* note 65; U.S. TRADE REP., REPORT ON FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974, *supra* note 4.

67. He & Sappideen, *supra* note 3, at 850.

68. STEWART ET AL., *supra* note 29, at 11-12 (Most countries Protocols of Accession are three pages, "by contrast, China's accession document, WT/L/432, runs 103 pages.").

69. He & Sappideen, *supra* note 3, at 852; Working Party on Accession of China, *supra* note 3.

70. He & Sappideen, *supra* note 3, at 852; Working Party on Accession of China, *supra* note 3.

71. Accession of the People's Republic of China, *supra* note 3, at art. 2(A), at 2-3.

that it would maintain independent and impartial tribunals to review administrative actions and judicial decisions.⁷²

Third, China made commitments to transparency in its laws, regulations, and processes. It committed to publishing laws, regulations and other measures affecting rights under the WTO rules, including TRIPS, before they are implemented and enforced, and that it would not enforce any regulation or law that is not published.⁷³ The Working Party Report also requires China to designate an official journal where these laws and regulations would be published in a manner that is readily available to individuals and enterprises, and requires that China provide the public an opportunity to comment on new rules before they are implemented, unless the rule involves national security.⁷⁴ The 2017 USTR Report on China's WTO Compliance further claims that this requires China to publish all trade-related laws and regulations in a single official journal, and to provide timely translations of its trade laws to other WTO members.⁷⁵

Finally, China made several commitments regarding equal treatment of foreign and domestic Chinese firms. The Working Party Report affirms China's commitment to applying national treatment and MFN principles to IP protection.⁷⁶ China agreed to repeal all laws and regulations inconsistent with these provisions.⁷⁷ China also agreed that any foreigner would be treated on the basis of reciprocity.⁷⁸ This could be interpreted to mean that China must provide, for example, U.S. firms, the same treatment that the United States government provides Chinese firms.⁷⁹ Finally, China agreed that a decision to allow an import or investment cannot be conditioned upon whether domestic suppliers exist; performance requirements of any kind, such as local content; offsets; transfer of technology; export performance; or conduct of research and development in China.⁸⁰ This is a more specific

72. *Id.* at art. 2(D), at 4.

73. *Id.* at art. 2(C), at 3-4 (“China undertakes that only those laws, regulations, and other measures pertaining to or affecting trade in goods, services, TRIPS or the control of foreign exchange that are published and readily available to other WTO members, individuals and enterprises, shall be enforced.”).

74. *Id.*

75. U.S. TRADE REP., 2017 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE, *supra* note 5, at 24.

76. Working Party on Accession of China, *supra* note 3, at 53.

77. *Id.*

78. *Id.*

79. *See* Hearing, *supra* note 51, at 9.

80. Accession of the People's Republic of China, *supra* note 3, sec. 7(3), at 5.

requirement to provide National Treatment to foreign firms operating in China.⁸¹ Although China enacted and repealed many laws around the time it joined the WTO, the United States alleges that China has failed to meet many of these commitments.

C. *China's Compliance with its Commitments*

When China became a WTO member, it adopted, repealed or revised more than 2,000 laws in order to meet its commitments.⁸² However, since the initial rush to meet its commitments, the United States government has argued in both the 2017 USTR Report to Congress on China's WTO Compliance and in the Section 301 Report that China has reversed some of those commitments and moved away from a more open-market economic model to a more state-planned and managed economy.⁸³ Some have argued that China has created a unique system that was not anticipated and does not fit into the WTO model.⁸⁴ The United States went so far as to say that these changes show that it was a mistake to allow China to join the WTO,⁸⁵ although this view has been criticized.⁸⁶ It is these changes that are at the heart of the complaints from the United States and others about China's non-compliance with its WTO commitments.

At about the time of its accession to the WTO, China made a range of changes to its laws in order to meet its WTO commitments. In the area of IP, China took several steps to meet its commitments. It overhauled its copyright, patent, and trademark laws, and strengthened its IP

81. Hearing, *supra* note 51, at 9.

82. He & Sappideen, *supra* note 3, at 853 ("From the end of 1999 to end of 2005, the Central Government enacted, adopted, revised, or repealed more than 2,000 pieces of laws, administrative regulations, and department rules covering trade in goods, services, IPR, and transparency and uniformity in application of trade measures.").

83. U.S. TRADE REP., 2017 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE, *supra* note 5, at 7; U.S. TRADE REP., REPORT ON FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974, *supra* note 4, at 63; XIANFA art. 7 (1982) (China) ("The state-owned economy, that is, the socialist economy with ownership by the whole people, is the leading force in the national economy. The state ensures the consolidation and growth of the state-owned economy.").

84. Wu, *supra* note 65, at 292.

85. U.S. TRADE REP., 2017 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE, *supra* note 5, at 2.

86. See, e.g., Philip Levy, *Was Letting China into the WTO a Mistake?*, FOREIGN AFFAIRS (Apr. 2, 2018), <https://www.foreignaffairs.com/articles/china/2018-04-02/was-letting-china-wto-mistake>; Shawn Donnan, *U.S. Says China's WTO Membership was a Mistake*, FINANCIAL TIMES (Jan. 19, 2018) <https://www.ft.com/content/edb346ec-fd3a-11e7-9b32-d7d59aace167>.

enforcement mechanisms.⁸⁷ It made significant changes to its Foreign Trade Law to meet its national treatment and MFN status commitments.⁸⁸ For example, before becoming a WTO member, China had a law requiring foreign companies to obtain a license in order to import into China.⁸⁹ This left potential importers at the discretion of the approving official as to whether to grant the license.⁹⁰ In 2004, China replaced this system with a registration requirement that gives, at least on paper, automatic approval.⁹¹ It also created an automatic import and export licensing system that allowed some goods to be traded freely, and published the list of eligible commodities.⁹² China revised its tax laws so that foreign and domestic companies were taxed the same way,⁹³ and removed domestic market preferences for some goods.⁹⁴ In 2005, the government issued an opinion saying that market access barriers should be removed.⁹⁵ Indeed, in the initial period after China became a WTO member, there was optimism among WTO members, including the United States, that China was on its way to meeting its commitments and becoming a more open-market economy.⁹⁶

The United States government alleges that this initial push for China to meet its commitments was short-lived. In 2003, a new regime took over⁹⁷ in China and began undoing some of the initial reforms made, giving more of a role to the state in the economy, and creating policies to limit market access while giving government resources and support to domestic industries.⁹⁸ In 2006, China issued *China's National Medium- and Long-Term Program for Science and Technology Development (2006–2020)*,⁹⁹ which identified eleven key sectors for technology

87. He & Sappideen, *supra* note 3, at 859-60. China first revised its patent law in 2001, followed by its copyright and trademark laws.

88. *Id.* at 859.

89. *Id.* at 854.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 858.

94. *Id.*

95. *Id.*

96. U.S. TRADE REP., 2017 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE, *supra* note 5, at 2.

97. *China Profile – Timeline*, BBC (July 29, 2019), at <https://www.bbc.com/news/world-asia-pacific-13017882> (“March - National People’s Congress elects Hu Jintao as president. He replaces Jiang Zemin, who steps down after 10 years in the post.”).

98. U.S. TRADE REP., 2017 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE, *supra* note 5, at 6.

99. *The Nat'l Medium and Long-Term Program for Science and Technology Dev. (2006–2020)*, THE STATE COUNCIL, THE PRC, https://www.itu.int/en/ITU-D/Cybersecurity/Documents/National_Strategies_Repository/China_2006.pdf.

development, and a strategy for achieving development, which included civil-military integration, prioritizing certain industries for development, absorbing foreign technology, and promoting domestic Chinese enterprises over foreign enterprises.¹⁰⁰

The United States government stated that this was the Chinese government's blueprint for state planners to ensure that China's policies favor Chinese companies over foreign companies.¹⁰¹ Following this, the Chinese government created a series of policy reports outlining a strategy for the government to collaborate with Chinese companies to acquire foreign companies, disseminate the technology to Chinese companies that can use it, develop products using the technology, and then work towards improving the technology.¹⁰² In 2010, China issued the *State Council's Decision on Accelerating the Cultivation and Development of Strategic Emerging Industry*,¹⁰³ which announced a new strategy to spur innovation in seven strategic high-technology sectors.¹⁰⁴

In 2013, there was another change in Chinese leadership, and Xi Jinping became President.¹⁰⁵ The new leaders stated that they wanted a more market-driven economy,¹⁰⁶ but, the United States government

100. U.S. TRADE REP., REPORT ON FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974, *supra* note 4, at 11; *see also* LARDY, *supra* note 9, at 17 (In 2007, "the Ministry of Finance issued a policy on 'indigenous innovation' restricting government purchase of certain products to those developed by domestic enterprises.").

101. U.S. TRADE REP., 2017 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE, *supra* note 5, at 6.

102. U.S. TRADE REP., REPORT ON FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974, *supra* note 4, at 11-12 (the report calls this strategy IDAR (Introduce, Digest, Absorb, Re-innovate)).

103. *State Council's Decision on Accelerating the Cultivation and Dev. of Strategic Emerging Industry* (Oct. 10, 2010), STATE COUNCIL, <https://chinaenergyportal.org/wp-content/uploads/2017/01/Development-Strategic-Emerging-Industries.pdf>.

104. U.S. TRADE REP., 2017 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE, *supra* note 5, at 49; U.S. TRADE REP., REPORT ON FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974, *supra* note 4, at 13. The sectors are energy efficient environmental technologies, next generation information technology, biotechnology, high-end equipment manufacturing, new energy, new materials and NEVs.

105. *China Profile – Timeline*, BBC (July 29, 2019), <https://www.bbc.com/news/world-asia-pacific-13017882>. (In March of 2013 "Xi Jinping takes over as president, completing the once-in-a-decade transfer of power to a new generation of leaders. He launches an efficiency and anti-corruption drive").

106. Kevin Yao & Ben Blanchard, *China Unveils Boldest Reforms in Decades, Shows Xi in Command*, REUTERS (Nov. 15, 2013), <https://www.reuters.com/article/us-china-reform/china-unveils-boldest-reforms-in-decades-shows-xi-in-command-idUSBRE9AE0BL20131115> ("A document released by

alleged that China did the opposite, continuing to increase the State's role in the economy.¹⁰⁷ President Xi embarked on a program of displacing the market-oriented economy with state-led industrial policies, including increasing the role of state-owned enterprises in the economy.¹⁰⁸ In addition, China took several other steps during this time period to increase government control over the economy. In May 2014, the Chinese government announced it would create a "Cybersecurity Review Regime" focused on ensuring that technology in China is "secure and controllable."¹⁰⁹ In June 2014, they issued an *Integrated Circuit Promotion Guideline* that called for aggressive government subsidizing of the integrated circuit industry.¹¹⁰ In 2015, China issued a plan called *Made in China 2025*,¹¹¹ which provides a detailed strategy for the government to assist domestic companies in replacing foreign technology with Chinese technology in ten key areas, with the goal of ensuring that Chinese companies become world leaders in those technologies.¹¹² Finally, in November 2016, China implemented a Cybersecurity Law that appears to favor Chinese information technology producers over foreign producers in some cases.¹¹³ It imposes some local content requirements and domestic research and development requirements, and requires disclosure of IP and source code to the government in some cases.¹¹⁴

IV. COMPLAINTS AGAINST CHINA

The United States government has raised concerns about four general practices of the Chinese government and provides specifics about

the Communist Party following a four-day conclave of its senior leaders promised land and residence registration reforms needed to boost China's urban population and allow its transition to a western-style services- and consumption-driven economy").

107. U.S. TRADE REP., 2017 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE, *supra* note 5, at 7.

108. LARDY, *supra* note 9, at 18 ("China in effect doubled down on the indigenous innovation initiative launched under President Hu.").

109. *Id.* at 12.

110. *Id.* at 48.

111. STATE COUNCIL, MADE IN CHINA 2025 (Jul. 7, 2015), <http://www.cittadellascienza.it/cina/wp-content/uploads/2017/02/IoT-ONE-Made-in-China-2025.pdf>.

112. U.S. TRADE REP., 2017 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE, *supra* note 5, at 48. The ten technologies are advanced information technology, automated machine tools and robotics, aviation and spaceflight, maritime engineering equipment and high-tech vessels, advanced railroad equipment, NEVs, power equipment, farm machinery, new materials, biopharmaceuticals, and advanced medical products.

113. *Id.* at 66.

114. *Id.*

how the Chinese government is conducting each practice. Some of these are reflected in the laws mentioned above. However, some practices appear to be carried out informally by the Chinese government through unwritten rules and procedures. In fact, the Section 301 Report relies heavily on confidential industry surveys for many of its allegations.¹¹⁵ The four areas involving the United States government's complaints against China are forced technology transfers, discriminatory license restrictions, the use of outbound investment to acquire foreign technology, and miscellaneous acts, policies, and procedures that require further investigation.¹¹⁶

First, the United States government alleges that China forces foreign companies to transfer IP. The United States stated that the Chinese government uses foreign ownership restrictions such as formal and informal JV requirements to require or pressure technology transfers from the United States and other foreign companies.¹¹⁷ In some cases, foreign companies cannot operate in certain sectors without a Chinese partner, and in some cases, the Chinese entity must be the controlling partner.¹¹⁸ The United States stated that China uses vaguely-worded laws that give Chinese officials great discretion in how to apply the rules, and that Chinese officials often give their decisions verbally and not in writing.¹¹⁹ Sometimes, Chinese government officials condition investment approval on a company transferring technology, conducting research in China, or using local content.¹²⁰ Chinese government officials also allegedly pressure foreign companies seeking to participate in standards-setting processes to license their technology or IP on unfavorable terms, and Chinese government officials often pursue unique national standards where international standards already exist.¹²¹ In fact, the United States government has complained that China's laws are not transparent because they are not publishing all of their laws and regulations in an official journal.¹²² In addition to direct pressure from the Chinese government, the United States government

115. U.S. TRADE REP., REPORT ON FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974, *supra* note 4, at 18, 21-22.

116. *Id.* at 19.

117. *Id.*

118. *Id.* at 21-35. The report provides details of specific practices of the Chinese government.

119. U.S. TRADE REP., 2017 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE, *supra* note 5, at 85.

120. *Id.* at 3.

121. *Id.* at 15.

122. *Id.* at 23.

alleges that companies are often indirectly pressured by the Chinese government to transfer technology. The United States government also alleges that the Chinese government sometimes gets companies to make demands for sensitive information from a foreign company instead of having it come directly from the government.¹²³ For example, some companies reported receiving demands to transfer technology from a Chinese company, which they understood to have originated from the government.¹²⁴

Second, the United States government alleges that China has discriminatory licensing policies and that U.S. firms that want to license technology in China must often do so on non-market terms. For example, the United States government has stated that foreign firms must indemnify Chinese firms against risks for technology transfers, and that this indemnification cannot be negotiated.¹²⁵ China also has a law that says that all improvements made to IP belong to the party making the improvement, and this also cannot be negotiated.¹²⁶ There are also rules stating that any technology transfers must improve existing products and provide a social benefit.¹²⁷ This allegedly allows Chinese government officials to require foreign companies to transfer valuable IP they might otherwise be disinclined to transfer.¹²⁸

Third, the United States government alleges that China is using outbound investment to acquire foreign technology. The Chinese government directs the systematic investment in and acquisition of U.S. companies in order to obtain IP in areas that the state planners have stated are important.¹²⁹ China has a “Going Out” strategy that

123. U.S. TRADE REP., REPORT ON FINDINGS OF THE INVESTIGATION INTO CHINA’S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974, *supra* note 4, at 18, 20.

124. *Id.* (explaining that the companies believe this because “business decisions [in China] are very much influenced by the public policy objectives pursued by the State and the CCP.”); *see also id.* at 42 (detailing how Chinese businesses sometimes require an “expert panel” review of a transaction. That expert panel often includes government officials, and often demand sensitive details about the foreign company’s operations.).

125. *Id.* at 51.

126. *Id.* at 52-53; ADMINISTRATION OF THE PRC: REGULATIONS ON TECH. IMPORT AND EXPORT, art. 27 <http://www.wipo.int/edocs/lexdocs/laws/en/cn/cn125en.pdf>. (“Within the term of validity of a contract for technology import, an achievement made in improving the technology concerned belongs to the party making the improvement.”) (last visited Nov. 21, 2018).

127. U.S. TRADE REP., REPORT ON FINDINGS OF THE INVESTIGATION INTO CHINA’S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974, *supra* note 4, at 18, 20.

128. *Id.*

129. *Id.* at 65.

encourages companies to go out and invest abroad and calls on the government to facilitate this.¹³⁰

Finally, the United States government alleges that China engages in unauthorized cyber intrusions in order to steal IP from foreign companies off of their networks. The United States government claims to have evidence that the Chinese government provides competitive intelligence that it gets from cyber intrusions to companies both through formal processes and through classified communication systems.¹³¹ For example, the United States recently indicted three Chinese hackers for allegedly conspiring to steal sensitive internal documents from a U.S. company's computer system.¹³² More recently, the United States indicted Chinese and Taiwanese firms for stealing trade secrets from U.S. semiconductor company Micron.¹³³ Although it is difficult to prove direct Chinese government involvement in cyber intrusions, many commenters believe there is ample evidence that China is stealing IP from companies to benefit its indigenous industries.¹³⁴ At the same time, the United States alleges that many such claims go unreported because companies that report cyber intrusions by the Chinese government are likely to suffer reputational harm and are unlikely to obtain redress in Chinese courts.¹³⁵

V. ANALYSIS OF POSSIBLE CLAIMS AGAINST CHINA

Some scholars, such as current professor at Georgetown University Law Center and former Appellate Body member Jennifer

130. *See id.* at 67-96 (detailing Chinese practices with outbound investment).

131. *See id.* at 164-71.

132. Hearing, *supra* note 51, at 1; *see also* United States v. Wang Dong et al., (W.D.PA May 1, 2014).

133. *See* Alan Rappeport, *Justice Department Charges Chinese Company with Espionage*, N.Y. TIMES (Nov. 1, 2018), <https://www.nytimes.com/2018/11/01/us/politics/chinese-company-espionage-charges.html>; Sarah N. Lynch, *U.S. Indicts Chinese, Taiwan Firms for Targeting Micron Trade Secrets*, REUTERS (Nov. 1, 2018), <https://www.reuters.com/article/us-usa-justice-china-espionage/us-indicts-chinese-taiwan-firms-for-targeting-micron-trade-secrets-idUSKCN1N65R2>.

134. *See* Hearing, *supra* note 51, at 5-6 (stating that there is "little doubt that China has engaged in series theft of U.S. intellectual property rights, trade secrets in particular"); *see also* Center for Strategic & International Studies, <https://www.csis.org/programs/cybersecurity-and-governance/technology-policy-program/other-projects-cybersecurity> (showing the number of cyber incidents originating in China); APT1: EXPOSING ONE OF CHINA'S CYBER ESPIONAGE UNITS, <https://www.fireeye.com/content/dam/fireeye-www/services/pdfs/mandiant-apt1-report.pdf> (providing proof of Chinese government involvement in cyber intrusions).

135. U.S. TRADE REP., 2017 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE, *supra* note 5, at 115.

Hillman,¹³⁶ have argued that the United States should bring a case against China to the WTO instead of attempting to change China's behavior through the imposition of unilateral penalties.¹³⁷ Professor Hillman argues that a WTO case would be the preferable route for three reasons: (1) it is the best way to bring about fundamental reform in China; (2) it would restore confidence in the WTO as a mechanism for addressing unfair trade practices; and (3) it would make it less likely that the United States would accept half-measures from China to address the issues it raised.¹³⁸ This section will analyze the possible claims against China. The next section will discuss the likelihood that such a claim will accomplish these goals.

Based on the complaints from the United States government, there are several possible claims that the United States could bring against China.¹³⁹ There are claims against China's commitments made in the Working Party Report¹⁴⁰ and in China's Protocols of Accession¹⁴¹ as well as claims against specific GATT and TRIPS articles. In particular, the United States could bring a claim against China under the national treatment and MFN provisions in GATT Articles I and III¹⁴² and TRIPS Articles 3 and 4.¹⁴³ This section will also examine a possible claim under GATT Article XXIII.1(b),¹⁴⁴ although the WTO Ministerial Conference has agreed that Art. XXIII.1(b) claims do not apply to TRIPS violations.¹⁴⁵ Finally, this section will also examine China's possible defenses, including TRIPS Articles 7 and 8,¹⁴⁶ which set out objectives and principles that WTO members must follow when implementing

136. Jennifer Hillman is a Professor from practice at the Georgetown University Law Center. She is a former member of the WTO Appellate Body and also served as a Commissioner at the U.S. International Trade Commission (ITC) and as General Counsel in the Office of the U.S. Trade Representative.

137. Hearing, *supra* note 51, at 13.

138. *Id.* at 2.

139. *See* WORLD TRADE ORG., CHINA – CERTAIN MEASURES ON THE TRANSFER OF TECHNOLOGY: REQUEST FOR CONSULTATIONS BY THE EUROPEAN UNION, *supra* note 7. The E.U. request for consultation cited some, but not all of these provisions, and included claims of violations of patent rights that are outside the scope of this Note.

140. Working Party on Accession of China, *supra* note 3, at 53.

141. Accession of the People's Republic of China, *supra* note 3.

142. *See* World Trade Organization, *GATT*, art. I & III, https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm (last visited June 13, 2019).

143. TRIPS Agreement, *supra* note 12, art. 3-4.

144. *See* World Trade Organization, *GATT*, Art. XXIII 1(b), https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm (last visited June 13, 2019).

145. Ministerial Decision, *TRIPS Non-Violation and Situation Complaints*, WT/L/1033 (December 13, 2017).

146. TRIPS Agreement, *supra* note 12, art. 7-8.

commitments, as well as GATT Article XXI,¹⁴⁷ which provides an important national security exception.

There are two provisions in its Working Party Report and Protocol of Accession that the DSB would likely find China is violating. In the Working Party Report, China agreed that it would not condition any rights for importing or investing on any performance requirements, including the transfer of technology.¹⁴⁸ Although there are no DSB reports interpreting these provisions, a plain reading of the provision would conclude that the Chinese government cannot require foreign importers or inventors to undertake certain actions as a condition of authorizing import or investment. The provision emphasizes that this includes requiring technology transfers as a condition for importing and investing.¹⁴⁹ China's JV and foreign ownership restrictions seem to clearly violate these provisions. As mentioned above, the Chinese government in some cases requires foreign companies to use a local partner, and sometimes a local controlling partner, as a condition of investment or import.¹⁵⁰ There are also reports of Chinese government officials conditioning investment approval on transferring technology, conducting research in China, or using local content.¹⁵¹ These practices clearly violate China's commitments in the Protocols of Accession.¹⁵²

In addition, China agreed that it would maintain independent and impartial tribunals to review administrative actions and judicial decisions.¹⁵³ The non-impartiality of China's judicial system is well-known

147. See World Trade Organization, *GATT*, art. XXI, https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm (last visited June 13, 2019).

148. Working Party on Accession of China, *supra* note 3, at 53.

149. *Id.*

150. Przemyslaw Kowalski, Daniel Rabaioli, Sebastian Vallejo, *Int'l Tech. Transfer Measures in an Interconnected World: Lessons and Policy Implications*, OECD, TAD/TC/WP(2017)1/FINAL, 2017 43-45 & 130-1 ("In particular, making FDI in technology-related sectors conditional upon joint ventures . . . or requiring direct transfer of technology to the local partner . . . are not found in most of the countries."); see also U.S. TRADE REP., REPORT ON FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974, *supra* note 4, at 44; see *id.* at 21-35 (providing details of specific practices of the Chinese government).

151. U.S. TRADE REP., 2017 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE, *supra* note 5, at 11.

152. Working Party on Accession of China, *supra* note 3, at 39; see also Hearing, *supra* note 51, at 3.

153. Accession of the People's Republic of China, *supra* note 3, art. 2(D), at 4.

and well-documented.¹⁵⁴ However, specifically in the context of technology transfers, there are several practices of the Chinese government that the DSB is likely to find as violating this commitment. First, in the context of cyber intrusions, companies have not sought redress for cyber theft of IP that originated in China.¹⁵⁵ This is allegedly at least partly because companies do not think their issues will be resolved satisfactorily by Chinese courts.¹⁵⁶ Other companies have complained that they are not able to have their complaints addressed when Chinese government officials impose JV ownership or technology transfer requirements on foreign companies.¹⁵⁷ The Chinese government would likely argue that its courts are independent on paper. However, as explained in more detail below, the DSB has recognized unwritten practices as a sufficient basis for a claim.¹⁵⁸ China's well-documented judicial constraints, as well as the volume of anecdotal evidence, likely are sufficient for the DSB to find that China is violating this commitment.

The DSB is also likely to find that China is violating TRIPS Articles 39, 40, and 41.¹⁵⁹ Article 39 requires members to protect information against unauthorized disclosure in "a manner contrary to honest commercial practice."¹⁶⁰ "A manner contrary to honest commercial practice" is defined as including the acquisition of undisclosed information by third parties who knew or should have known that they were acting contrary to commercial practices.¹⁶¹ Article 41 requires members to

154. Jayshree Bajoria, *Access to Justice in China*, COUNCIL ON FOREIGN RELATIONS (Mar. 17, 2008), <https://www.cfr.org/backgroundunder/access-justice-china>; U.S. DEP'T OF STATE, 2017 HUMAN RIGHTS REPORT ON CHINA (INCLUDES TIBET, HONG KONG, AND MACAU), <https://www.state.gov/documents/organization/277317.pdf> (last visited Nov. 19, 2018).

155. U.S. TRADE REP., REPORT ON FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974, *supra* note 4.

156. *Id.*

157. U.S. TRADE REP., 2017 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE, *supra* note 5, at 141.

158. Appellate Body Report, *Argentina – Measures Affecting the Importation of Goods* 87-88, 106 WTO Doc. WT/DS438/AB/R, WT/DS444/AB/R, WT/DS445/AB/R (Jan. 15, 2015) ("Nonetheless, we recall that, pursuant to Art. X:1, all trade-related measures, including unwritten measures, constituting "[l]aws, regulations, judicial decisions and administrative rulings of general application" that are made effective by a Member and that pertain to the subject-matters identified in the first sentence of Article X:1 "shall be published promptly in such a manner as to enable governments and traders to become acquainted with them").

159. Hearing, *supra* note 51, at 5-6; TRIPS, *supra* note 12, art. 39-41.

160. TRIPS, *supra* note 12, art. 39. Art. 39(2) ("Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent.").

161. *Id.* at sec. 7-8 n. 10.

have enforcement mechanisms in place to prevent IP infringement.¹⁶² Although there are no DSB reports linking this provision to cyber intrusions, it is clear that China's alleged cyber intrusions and theft of IP would violate these provisions. China has made no secret of the fact that the government is complicit in helping Chinese companies acquire foreign IP in order to benefit China.¹⁶³ And, as explained above, China's participation in cyber theft of trade secrets is well known and documented.¹⁶⁴ China would likely argue that the cyber intrusions are being done by rogue hackers within its territory and are not condoned by the government.¹⁶⁵ Indeed, deniability is one characteristic of cyber intrusions that make them an attractive foreign policy mechanism.¹⁶⁶ However, there is ample evidence in the record that some of the intrusions are state-sponsored.¹⁶⁷ And even if it would be difficult to prove state involvement, the sheer volume of cyber intrusions originating in China would indicate that China's enforcement mechanisms are inadequate.¹⁶⁸ Thus, the DSB is likely to find that China's cyber intrusions and theft of IP violate these provisions.

The DSB is also likely to find that China is violating TRIPS Article 63 regarding transparency. Article 63 requires China to publish laws and

162. *Id.* art. 41(1) ("Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.").

163. *See, e.g.*, STATE COUNCIL: MADE IN CHINA 2025 (Jul. 7, 2015), <http://www.cittadellascienza.it/cina/wp-content/uploads/2017/02/IoT-ONE-Made-in-China-2025.pdf>. (stating one of China's goals is to "[a]ccelerate technology development of service supporting research and design, technology transfer, innovation incubation, IPR and technology consultation.").

164. Jayshree Bajoria, *Access to Justice in China*, COUNCIL ON FOREIGN RELATIONS (Mar. 17, 2008), <https://www.cfr.org/backgroundunder/access-justice-china>; U.S. DEP'T OF STATE, 2017 HUMAN RIGHTS REPORT ON CHINA (INCLUDES TIBET, HONG KONG, AND MACAU), at <https://www.state.gov/documents/organization/277317.pdf> (last visited Nov. 19, 2018).

165. *See* Simon Denyer, *China calls U.S. Hacking Accusations 'irresponsible and unscientific'*, WASH. POST (Jun. 5, 2015), <https://www.washingtonpost.com>; *see* *China Denies Trump's Hacking Accusation*, CBC (Aug. 289, 2018), <https://www.cbc.ca/news/world/china-trump-tweet-clinton-emails-1.4802933> ("We are firmly opposed to all forms of cyberattacks and espionage," foreign ministry spokeswoman Hua Chunying said.").

166. *See, e.g.*, Tarah Wheeler, *In Cyberwar, There are no Rules*, FOREIGN POLICY (Sept. 12, 2018), <https://foreignpolicy.com/2018/09/12/in-cyberwar-there-are-no-rules-cybersecurity-war-defense/>.

167. *See Significant Cyber Incidents*, CENTER FOR STRATEGY & INT'L STUDIES, <https://www.csis.org/programs/cybersecurity-and-governance/technology-policy-program/other-projects-cybersecurity> (last visited June 16, 2019).

168. *Id.*

regulations affecting rights under TRIPS or, if publication is not practical, they must be available to governments and right holders for review.¹⁶⁹ China made additional commitments in its Working Party Report to designate an official journal where rules are to be published and to not implement or enforce any rules until they are published.¹⁷⁰ The 2017 USTR Report on China's WTO Compliance further claims that this requires China to publish all trade-related laws and regulations in a single official journal, and to provide timely translations of its trade laws to other WTO members.¹⁷¹ There are a variety of practices that the United States has complained about that violate these provisions. The United States government alleges that China uses vaguely worded laws that give Chinese officials a lot of discretion in how to apply rules.¹⁷² Sometimes the Chinese government applies indirect pressure on foreign companies by getting Chinese companies to make demands on their behalf.¹⁷³ Sometimes Chinese government officials use this discretion to require foreign companies to agree to certain demands such as technology transfers, conducting research in China, or using local content.¹⁷⁴ These requirements are informal procedures, rather than transparent laws that can be reviewed by right-holders.¹⁷⁵ In addition, informal unwritten rules and indirect demands make review by an independent judiciary¹⁷⁶ difficult and make it more difficult to enforce IP rights.¹⁷⁷

It is true that proving the application of informal unwritten policies and procedures can be difficult. China would likely argue that it should be judged based on its written laws. However, the DSB has recognized that unwritten rules can be challenged by WTO members.¹⁷⁸ Article 3.3

169. TRIPS, *supra* note 12, art. 63.

170. *Id.* Accession of the People's Republic of China, *supra* note 3, art. 2(C), at 3-4 ("China undertakes that only those laws, regulations, and other measures pertaining to or affecting trade in goods, services, TRIPS or the control of foreign exchange that are published and readily available to other WTO members, individuals and enterprises, shall be enforced.")

171. U.S. TRADE REP., 2017 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE, *supra* note 5, at 23.

172. *Id.* at 85.

173. U.S. TRADE REP., REPORT ON FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974, *supra* note 4, at 20.

174. U.S. TRADE REP., 2017 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE, *supra* note 5, at 3.

175. TRIPS, *supra* note 12, art. 63.

176. Accession of the People's Republic of China, *supra* note 3, pt. I, sec. 2(D).

177. TRIPS, *supra* note 12, pt. III.

178. WT/DS438/AB/R, WT/DS444/AB/R, WT/DS445/AB/R at 87-88, 106.

of the Dispute Settlement Procedure states that the DSB can review “measures taken by another member.”¹⁷⁹ A measure includes “any act or omission attributable to a WTO member.”¹⁸⁰ This appears to allow WTO members to look beyond the written law to actual practice and unwritten procedures. Thus, the DSB is likely to consider unwritten measures in assessing a violation.

In addition to the more obvious violations, the United States could bring a claim of violation of the national treatment and MFN provisions of GATT and TRIPS. The MFN principle contained in Article I of the GATT agreement and Article 4 of TRIPS prohibits discrimination among members in their national practices.¹⁸¹ For example, the WTO Appellate Body in 2002 held that a U.S. law prohibiting someone from registering a trademark related to certain assets confiscated by the Cuban government without the original owner’s consent violated TRIPS Article 4 because the measure only applied to original owners who were Cuban nationals and not to non-Cuban original owners.¹⁸²

Article III of GATT and Article 3 of TRIPS establish the national treatment principles and prohibit differentiating between domestic and imported products through laws, regulations and taxation.¹⁸³ This principle establishes “equality of opportunities for imported products in respect of the application of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products.”¹⁸⁴ Even if a rule or regulation formally complies with national treatment principles, the DSB will look at how they are actually applied.¹⁸⁵ China further committed in the Working Party Report to treat foreigners on the basis of reciprocity.¹⁸⁶ This means that China is obligated to treat foreign companies in China the

179. World Trade Organization, *WTO Bodies involved in the dispute settlement process*, 3.3, https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c3s3p1_e.htm.

180. Appellate Body Report, *Argentina – Measures Affecting the Importation of Goods* 85, WTO Doc. WT/DS438/AB/R, WT/DS444/AB/R, WT/DS445/AB/R (Jan. 15, 2015).

181. Lane, *supra* note 2, at 191; TRIPS, *supra* note 12, art. 4.

182. Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WTO Doc. WT/DS176/AB/R (Feb. 01, 2002).

183. See World Trade Organization, *GATT*, Art. III, https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm (last visited June 13, 2019).

184. *Id.*

185. Report of the Appellate Body, *Korea – Various Measures on Beef*, WTO Doc. WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11, 2000) (“[a] formal difference in treatment between imported and like domestic products is thus neither necessary, nor sufficient, to show a violation of Article III:4”).

186. Working Party on Accession of China, *supra* note 3, at 39.

same way that a Chinese company would be treated in its country.¹⁸⁷

A claim that China is violating its MFN obligations may be difficult to win. The MFN obligation requires China to treat all countries' products the same. The question is therefore whether China is applying discriminatory practices to all WTO members or just to some of them. There is nothing in the USTR Report that explicitly calls out any of China's practices that violates TRIPS Article 4 or states that the United States is being treated differently from other countries.¹⁸⁸ A case could be made that China's cyber intrusions violate MFN principles because the intrusions result in differential treatment of some countries. However, proving that China is targeting some countries with cyber intrusions and not others would be difficult.

A claim that China is violating the national treatment provision would likely be more successful. The national treatment provision establishes that China cannot discriminate against foreign companies in China for reasons unrelated to national security or other public policy considerations.¹⁸⁹ However, the United States government alleges that China is doing exactly that. First, it has, at least in practice, different requirements for foreign firms to invest in China than for Chinese firms, including the forced technology transfer requirements mentioned above.¹⁹⁰ It also has different rules for foreign companies investing in China than it does for Chinese companies, such as indemnification rules and rules stating that domestic Chinese companies are owners of any improvements they make to IP acquired from foreign firms.¹⁹¹ China could argue that it is imposing these provisions for national security or public policy reasons.¹⁹² For example, it has rules

187. Hearing, *supra* note 51, at 4.

188. U.S. TRADE REP., 2017 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE, *supra* note 5, at 47-48 (The report only states that China agreed to repeal laws inconsistent with its MFN obligation but does not cite any current practice).

189. TRIPS Agreement, *supra* note 12, at art. 3.

190. U.S. TRADE REP., REPORT ON FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974, *supra* note 4, at 51.

191. *See* WORLD TRADE ORG., CHINA – CERTAIN MEASURES ON THE TRANSFER OF TECHNOLOGY: REQUEST FOR CONSULTATIONS BY THE EUROPEAN UNION, *supra* note 7, at 1 (“Notably, China imposes mandatory contract terms for contracts concerning the import of technology into China that discriminate against and are less favourable for foreign intellectual property rights holders.”).

192. *See* World Trade Organization, *GATT*, https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm (last visited June. 13, 2019).

that require technology transfers to provide some public benefits.¹⁹³ However, China has made it clear, through multiple policy reports issued over the last ten years or more, that it implemented these policies in order to favor Chinese companies over foreign companies.¹⁹⁴ This is a violation of the basic principles of the WTO of creating a fair and open international trading order.¹⁹⁵

Finally, it is possible that a claim could be brought against China in the future under GATT Article XXIII.1(b). Although Article XXIII.1(b) has never applied to TRIPS, that agreement is up for review in 2019 and could change. Also, as explained in more detail below, an Article XXIII.1(b) claim is important if the United States does not want to accept a partial solution to its complaints. Article XXIII.1(b) is known as the “Non-Violation Clause” and permits a cause of action to be brought by a member state even when there is no claim that a particular provision was violated, but a member believes their rights have nonetheless been impaired.¹⁹⁶ In order to bring a claim under Article XXIII.1(b), a complaining party must establish three elements: first, the complainant must show the application of a measure by a WTO member. Second, it must show a benefit accruing under the measure. And third, it must show nullification or impairment of the benefit as a result of the application of the measure.¹⁹⁷ The term “measure” in this context applies only to policies or actions of the government, not private parties.¹⁹⁸ Nullification or impairment in this context includes “upsetting the competitive relationship” between domestic and imported products.¹⁹⁹ It does not require proof of intent, what matters

193. U.S. TRADE REP., REPORT ON FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974, *supra* note 4, at 50.

194. See, e.g., *The Nat'l Medium and Long-Term Plan for the Dev. of Science and Tech. (2006-2020)*, THE STATE COUNCIL, THE PRC, https://www.itu.int/en/ITU-D/Cybersecurity/Documents/National_Strategies_Repository/China_2006.pdf; STATE COUNCIL: MADE IN CHINA 2025 (Jul. 7, 2015), <http://www.cittadellascienza.it/cina/wp-content/uploads/2017/02/IoT-ONE-Made-in-China-2025.pdf>.

195. Marakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, art. 2.

196. See World Trade Organization, *GATT*, art. XXIII, https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm (last visited June 13, 2019).

197. Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, ¶ 10.41, WTO Doc. WT/DS44/R (adopted Mar. 31, 1998).

198. *Id.* at ¶ 10.52.

199. Report of the Appellate Body, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc. WT/DS400/AB/R, WT/DS401/AB/R (adopted May 22, 2014).

is the impact of the measure.²⁰⁰ In determining impact, the DSB can look at specific measures in the context of larger policies and sets of measures.²⁰¹

Thus, in order to bring an Article XXIII.1 (b) claim the United States would need to show that China is applying its laws and regulations in a way that upset the United States' reasonable expectation when China joined the WTO, that this nullified or impaired an expected benefit.²⁰² The expectations of all WTO members were laid out in the Marrakesh Agreement establishing the WTO.²⁰³ The purpose of the WTO is to establish a fairer and more open multilateral trading system, based on open market principles.²⁰⁴ The philosophy behind the WTO is that trade among nations benefits everyone and that countries exploiting their comparative advantages will lead to a more prosperous world. In order to accomplish this, the WTO worked towards the reduction of trade barriers and opening-up of markets, equal treatment among all trading partners, and use of the dispute settlement process to resolve differences.²⁰⁵ The United States in particular expected China to move to a more open economic model, not to adopt a more state-led economy. At the time of its accession, China's chief WTO negotiator said that China will ensure its practices are in line with TRIPS from the date China joins.²⁰⁶ "It clearly was not contemplated that any member would adopt state-led economic and trade policies instead of market-oriented policies."²⁰⁷

Thus the United States could argue that China nullified or impaired its rights by adopting a state-led economic model instead of moving towards a more-open economic model. Although China started down the path of opening up its economy around the time that it became a WTO member, its actions since then, as detailed above, have moved in

200. WTO Doc. WT/DS44/R, ¶ 10.83-10.88.

201. *Id.*

202. Timothy Brightbill, *Int'l Trade Law and Regulation* 335 (Fall 2018), Georgetown Law Center ("The nullification and impairment clause is necessary to preserve the balance of rights and obligations that WTO members are entitled to expect and observe.").

203. U.S. TRADE REP., 2017 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE, *supra* note 5, at 5.

204. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

205. He & Sappideen, *supra* note 3, at 853.

206. CHING CHEONG & CHING HUNG YEE, *HANDBOOK ON CHINA'S WTO ACCESSION AND ITS IMPACTS* 129 (World Scientific Publishing 2003).

207. U.S. TRADE REP., 2017 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE, *supra* note 5, at 5.

the opposite direction.²⁰⁸ Although it is mostly a theoretical debate for now, because an Article XXIII.1(b) claim cannot be brought under TRIPS,²⁰⁹ it is unclear whether the United States could win such a claim even if such a claim could be brought in the future. Non-violation claims under Article XXIII.1(b) are rare,²¹⁰ and the DSB approaches such claims with caution because claims under this article are alleging violations of rights outside of the negotiated and agreed-upon rules.²¹¹ However, it is clear that China's actions subsequent to it becoming a WTO member were not what other WTO members were reasonably expecting or hoping.

In defense of its practices, China could cite TRIPS Articles 7 and 8,²¹² which set out objectives and principles that WTO members must follow when implementing commitments, as well as GATT Article XXI,²¹³ which provides a national security exception. TRIPS Article 7 states that the protection and enforcement of IP rights should be conducted in a manner "conducive to social and economic welfare."²¹⁴ Article 8 states that members can take measures to protect the public interest in economic and technological development.²¹⁵ These provisions are meant to be a "general goal" that the DSB must keep in mind when examining other provisions.²¹⁶ Article 8 "expresses the intention of drafters of the TRIPS Agreement to preserve the ability of WTO members to pursue certain legitimate societal interests."²¹⁷ Thus, China could argue that it is justified in taking measures to promote its economic and social welfare and promote its own technological and economic development. For example, China has a rule that explicitly states that technology

208. See also Lane, *supra* note 2, at 129 (arguing that China must adopt market-oriented reforms in order to become a full member of the global economy. "China cannot credibly advocate for further globalization, which depends on free and open markets, when its domestic policies continue to move in the opposite direction.")

209. World Trade Organization, *TRIPS Non-Violation and Situation Complaints*, Ministerial Declaration of 13 December 2017, WTO Doc. WT/Min(17)/66 (2017).

210. Hearing, *supra* note 51, at 10.

211. *Id.*

212. TRIPS, *supra* note 12, art. 7-8,

213. See World Trade Organization, *GATT*, art. XXI, https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm (last visited June 13, 2019).

214. TRIPS, *supra* note 12, art. 7.

215. *Id.* art. 8.

216. Panel Report, *Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, ¶ 7.2402, WTO Doc. WTO/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R. (adopted June 28, 2018).

217. *Id.*

transfers must be conducted in a way that promotes social benefit.²¹⁸ Thus, China could argue that its rules meet the general policies and goals of the WTO agreements.

However, the DSB is unlikely to find that these general principles justify China's actions. TRIPS Article 7 states that IP protection must be conducted "to the mutual advantage of producers and users of the technology."²¹⁹ The DSB has interpreted this provision to establish a kind of "good faith principle" that requires members to implement the TRIPS Agreement in good faith and not in a way that abuses the members rights.²²⁰ Thus, the DSB is unlikely to find that this provision allows China to promote its own economic and social welfare at the expense of its WTO obligations. In fact, if the DSB believes the assertions of the United States, it could find that China's lack of transparency²²¹ and the documented cases of it saying one thing and apparently doing another,²²² show a lack of good faith.

Similarly, TRIPS Article 8 does not allow the pursuit of societal interests if those measures violate WTO agreements. Article 8 states explicitly that any measures taken must be consistent with the TRIPS Agreement.²²³ One panel report found that these provisions are meant to allow members to take measures to obtain public policy objectives that are outside of the scope of the WTO agreements.²²⁴ Thus, it could be argued that this provision explicitly prohibits China from adopting measures to promote China's public interest at the expense of foreign IP holders.²²⁵ Thus, the DSB is likely to find that Article 8 does now

218. U.S. TRADE REP., REPORT ON FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974, *supra* note 4, at 50.

219. TRIPS, *supra* note 12, art. 7.

220. Appellate Body Report, *United States—Section 211 Omnibus Appropriations Act of 1998*, ¶ 8.57, WTO Doc. WT/DS176/AB/R (adopted Jan. 2, 2002).

221. U.S. TRADE REP., 2017 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE, *supra* note 5, at 7-8; U.S. TRADE REP., REPORT ON FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974, *supra* note 4, at 21.

222. U.S. TRADE REP., 2017 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE, *supra* note 5, at 7.

223. TRIPS, *supra* note 12, art. 8.

224. Panel Report, *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (Australia)*, ¶ 7.246, WTO Doc. WT/DS290/R (adopted March 15, 2005).

225. Kogan, *supra* note 57, at 293. Kogan argues in a footnote that Art. 8 explicitly prohibits these measures. However, as noted above, the DSB views Art. 8 as a statement of goals. Although meant to be stated as a goal, the implication of Art. 8 is that members cannot take measures to promote social and economic welfare at the expense of their obligations.

allow China to promote its own economic welfare at the expense of its commitments.

GATT Article XXI states that nothing in the WTO agreements prevents a member from taking interests that are necessary for the protection of its "essential security interests." It has largely been left up to each member to determine what is in its "essential security interests." In fact, at one point, the United States argued that each member could decide on its own what is in its essential security interest and that other members had no power to question this judgement.²²⁶ Thus, China could argue that all of the measures it has taken are in its national security interest and are therefore permitted.

This argument is more difficult to overcome because members have such wide discretion to decide what is in their security interest. However, it is unlikely that the DSB would find that this provision justifies all of China's actions. Because of the breadth of violations involved, finding that they are all justified by national security grounds would essentially give China, and potentially other WTO members in the future, a free pass to violate its commitments while hiding behind the national security curtain. Thus, the DSB could conclude that GATT Article XXI was not meant to allow countries to justify measures that have a commercial purpose under the guise of national security.²²⁷ In fact, China has not justified most of its actions on national security grounds. Although it views civil-military integration as a national security function,²²⁸ it mostly stated its goal as becoming a technology leader and helping Chinese companies gain advantages over foreign companies.²²⁹ Thus, the DSB could reasonably find that China cannot use the national security exemption in Article XXI to justify what it has already stated is an economic-based action.

VI. LIKELY IMPACT OF A WTO CLAIM AGAINST CHINA

In response to China's unfair practices regarding technology transfers, the United States has elected to take unilateral action, imposing

226. See GATT Council Meeting Minutes, Aug. 10, 1982 C/M/159, p. 19, <https://docs.wto.org/gattdocs/q/GG/C/MI159.PDF>

227. U.N. SCOR, 2nd Sess., 33d mtg. at 21, U.N. Doc. EPCT/A/PV/33 (Jul. 24, 1947).

228. U.S. TRADE REP., REPORT ON FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974, *supra* note 4, at 11.

229. STATE COUNCIL: MADE IN CHINA 2025 (Jul. 7, 2015), <http://www.cittadellascienza.it/cina/wp-content/uploads/2017/02/IoT-ONE-Made-in-China-2025.pdf>; U.S. TRADE REP., 2017 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE, *supra* note 5, at 48.

tariffs on a wide range of Chinese imports.²³⁰ The tariffs are intended to provide an incentive to China to change its practices.²³¹ According to Professor Hillman, the United States would be more likely to get China to change its practices if it worked together with other countries to bring a case against China. This would potentially accomplish three goals: (1) it would bring about fundamental reform in China, (2) it would restore confidence in the WTO as a mechanism for addressing unfair trade practices, and (3) it would make it less likely that the United States would accept half-measures from China to address the issues it raised.²³² Based on the discussion above, this author believes that a WTO case would only partially accomplish these goals.

It is likely that a WTO case would bring about some fundamental reform in China and restore confidence in the WTO system. There are many basic things that China could reasonably be expected to change to come into compliance with its agreements. For example, it could publish more laws and regulations and make existing practices explicit.²³³ It could give less discretion to local officials to alter technology transfer contracts or require technology transfers.²³⁴ It could alter its JV requirements to eliminate technology transfer requirements.²³⁵ It could alter its laws requiring indemnification of local companies, or requiring companies to agree that technology improvements belong to Chinese companies.²³⁶ It is even possible that China could stop its practice of trying to acquire foreign companies in order to obtain IP.²³⁷ Finally it could decide to stop cyber intrusions and theft of IP from U.S. networks.²³⁸

230. *President Donald J. Trump is Confronting China's Unfair Trade Policies* (May 29, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-confronting-chinas-unfair-trade-policies/>.

231. Jim Tankersley & Keith Bradsher, *Trump Hits China with Tariffs on \$200 Billion in Goods, Escalating Trade War*, N.Y. TIMES (Sept. 18, 2018), <https://www.nytimes.com/2018/09/17/us/politics/trump-china-tariffs-trade.html> (“For months, we have urged China to change these unfair practices, and give fair and reciprocal treatment to American companies,” Mr. Trump said. “We have been very clear about the type of changes that need to be made, and we have given China every opportunity to treat us more fairly.”).

232. Hearing, *supra* note 51, at 2.

233. U.S. TRADE REP., 2017 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE, *supra* note 5; U.S. TRADE REP., REPORT ON FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974, *supra* note 4.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

China may decide that it is more important to remain part of the international system than to continue to carry on these practices. If China were to eliminate these practices, these actions would likely result in fundamental reform in China and restore confidence in the WTO system.

However, some of the allegations against China address the traditionally Chinese ways of doing business and the structure and inner workings of China's government that China is unlikely to change. In fact, an Article XXIII claim, if it were possible, would essentially be a claim against China's state-led economic model. Mark Wu, Professor at Harvard Law School, argues that there are six things that make China's system unique in a way that was not contemplated by the WTO: (1) China's State-Owned Enterprises are controlled by one government entity called State-Owned Assets Supervision and Administration Commission of the State Council ("SASAC"), (2) state control over financial institutions, (3) state control over economic planning, (4) the existence of corporate groups that coordinate their activities with each other, (5) the Communist party also plays a central role in controlling the economy, and (6) even though the state exerts a lot of control, it allows market forces to play out in large parts of the economy.²³⁹ In addition, the deep-rooted Chinese tradition of "guanxi" directly conflicts with the WTO rule-based trading system. "Guanxi" is a term that describes using one's personal connections to facilitate business transactions.²⁴⁰ For example, a businessman wishing to accomplish some task may need to call on a personal favor from someone within his network. Some scholars have argued that this emphasis on personal relationships comes at the expense of the rule of law.²⁴¹

In order to bring China fully within its WTO commitments, China would have to alter its traditional way of doing business and the structure of its government. This would be tantamount to requiring the United States to alter its democratic form of government in order to meet its WTO commitments—which is to say, it is extremely unlikely to happen. If the United States wanted to bring an effective claim against China that would address all of the U.S. complaints, it would need to get the agreement prohibiting Article XXIII.1(b) claims under TRIPS overturned because a broad Article XXIII.1(b) claim is the only claim that would address the structural issues in the Chinese government.

239. Wu, *supra* note 65, at 271.

240. Katie Hope, *Doing Business the Chinese Way*, BBC (Oct. 08, 2014), at <https://www.bbc.com/news/business-29524701>.

241. Peng Wang, *Extra-Legal Protection in China: How Guanxi Distorts China's Legal System and Facilitates the Rise of Unlawful Protectors*, BRIT J. CRIMINOL 809, 811-12 (2014).

Without an Article XXIII.1(b) claim, the rest of the complaints mentioned above would only result in partial solutions.

Thus, it is unlikely that all three of these goals would be accomplished even with a successful DSB ruling. It is possible that China could conduct fundamental reform in response to a DSB ruling, and significant change would likely restore confidence in the ability of the WTO to force members to comply with its commitments. However, it is likely that the United States and other WTO members would have to accept partial measures because a GATT Article XXIII.1(b) claim is currently impossible, and fundamental reform of the Chinese government is unlikely.

VII. CONCLUSION

The dispute between the United States and China has put the WTO into an existential crisis.²⁴² Both the United States and China have called for fundamental reform of the trading system.²⁴³ The United States has said it was a mistake to allow China to join the WTO,²⁴⁴ and one member of the Trump administration argued that a case could now be made for evicting China from the WTO.²⁴⁵ However, it is difficult to see what reforms could be made that would satisfy both the United States and China. Indeed, at the same time China called for fundamental reform of the WTO, it also warned that reform should not be used as a way to restrict China's development and that it would not have others' views forced upon it.²⁴⁶ Thus, the chances of meaningful fundamental reform seem dim.

Professor Hillman is correct that the best way to get China to reform and restore confidence in the WTO system is for the United States to work with other countries to bring a case against China and force it to make fundamental changes.²⁴⁷ The United States' unilateral

242. Danial Galas, *WTO Chief Warns of Worst Crisis in Global Trade Since 1947*, BBC (Nov. 18, 2018), <https://www.bbc.com/news/business-46395379> ("Mr. Azevedo said: 'I would say this is the worst crisis not for the WTO but for the whole multilateral trading system since the GATT [General Agreement on Tariffs and Trade, that preceded the WTO] in 1947.'").

243. Yawen Chen & Joseph Campbell, *China says WTO Faces 'Profound Crisis', Urges Reform*, REUTERS (Nov. 23, 2018), <https://www.reuters.com/article/us-usa-trade-wto-china/china-says-wto-faces-profound-crisis-urges-reform-idUSKCN1NS0PY>.

244. U.S. TRADE REP., 2017 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE, *supra* note 5, at 2.

245. Yawen Chen & Joseph Campbell, *China says WTO Faces 'Profound Crisis', Urges Reform*, REUTERS (Nov. 23, 2018), <https://www.reuters.com/article/us-usa-trade-wto-china/china-says-wto-faces-profound-crisis-urges-reform-idUSKCN1NS0PY>.

246. *Id.*

imposition of tariffs is already causing damage to at least one of the industries it was supposedly trying to protect,²⁴⁸ and China is unlikely to respond positively to U.S. unilateral measures. On the other hand, China would likely comply with many aspects of a WTO ruling brought by a coalition of WTO members, because it has already decided that it is better to be part of the global trading system than to operate outside of it.²⁴⁹ And the United States would likely get China to take measures to level the playing field, although, as this paper has shown, the United States is not likely to get everything it is asking for. In the end, partial reform is better than no reform, and is certainly better than evicting China from the WTO. With China in the WTO, there is at least a mechanism for holding China accountable, which would not exist if China was no longer a member. In the end, this may be the best outcome that can be expected.

247. Hearing, *supra* note 51, at 2.

248. Ana Swanson, *Trade Fight with China Enters Overtime, with Tariffs a Costly Sticking Point*, NEW YORK TIMES (Mar. 17, 2019), <https://www.nytimes.com/2019/03/17/business/trade-war-china-tariffs.html>.

249. He & Sappideen, *supra* note 3, at 849; U.S. TRADE REP., 2017 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE, *supra* note 5, at 6.