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## Providing a Release Valve: The U.S.-China Experience with the WTO Dispute Settlement System

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— Note —

PROVIDING A RELEASE VALVE:  
THE U.S.-CHINA EXPERIENCE WITH  
THE WTO DISPUTE SETTLEMENT  
SYSTEM

## ABSTRACT

Ever-expanding global trade relations have spawned highly contentious disputes between the United States and the People's Republic of China, two of the world's most powerful economic juggernauts. These trade frictions have sparked an increased utilization of the World Trade Organization's (WTO) dispute settlement system. Has the WTO become a forum for proxy trade battles to play out between the United States and China? Or does the increase in trade disputes portend a more serious deterioration of economic relations that could devolve into an outright trade war?

This Note addresses this trend toward resorting to WTO dispute settlement through the lens of the legal, cultural, and social aspects of the Sino-American trade relationship. The discussion demonstrates that both the United States and China exhibit a willingness to comply with WTO rulings for myriad reasons. These reasons are presented using a framework that analyzes the impact of the institutional structure of the WTO's dispute settlement system and the indirect benefits accrued through participation. While the WTO dispute settlement system provides both countries with a mechanism for resolving contentious trade issues, this Note attempts to advance a practical discourse about responsible management of WTO litigation. The United States and China have much to gain from the usage of the WTO's dispute settlement system to resolve trade frictions and would do well to maintain such an advantageous system.

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INTRODUCTION

The sounds of saber rattling seem to emanate from the delicate relationship between the United States and China. Observers<sup>1</sup> and media<sup>2</sup> alike have proclaimed the possibility of a trade war looming on the horizon. While trade frictions between Washington and Beijing occur in nearly every facet of the relationship,<sup>3</sup> the latest trends in World Trade Organization (WTO) litigation have garnered intense scrutiny. In recent years, both countries have initiated an increasingly higher volume of cases against one other. While many view this trend as a harbinger of a potential trade war, this Note will present an alternative interpretation of this trend in U.S.-Chinese WTO litigation. The litigation-intensive focus between the United States and China within the WTO’s Dispute Settlement Body (DSB) evidences the efficacy of the institution and the willingness of both countries to utilize the DSB as a viable trade-friction intermediary.

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1. See, e.g., *Protectionism Risks Provoking Global Trade War*, 63 INT’L BAR NEWS 51 (2009) [hereinafter *Protectionism Provoking Trade War*].

2. See, e.g., Richard Blackden, *Trade War Fears After Obama Attack on China*, TELEGRAPH, Sept. 18, 2012, at B1; Kathy Chu, *Possible Trade Dispute Looms*, USA TODAY, Jan. 9, 2012, at 5B.

3. See Robert D. Hormats, Under Secretary for Economic Growth, Energy, and the Environment, Remarks at the Hopkins-Nanjing Center: The Future of U.S.-China Economic Relations (Dec. 6, 2012) (transcript available at <http://www.state.gov/e/rls/rmk/2012/201631.htm>) (discussing the various trade frictions that exist between the United States and China).

Part I analyzes the role of international dispute settlement in general, specifically those systems predicated on a rule orientation. This Part then introduces the process and operation of the DSB, the unique historical context of China's accession to the WTO, and the early interactions between the United States and the People's Republic in the DSB. Part I provides the necessary framework within which to analyze the relational developments between the two parties in the DSB as a rule-oriented international dispute settlement system.

Part II addresses the argument that U.S. and Chinese decisions to resort to increased WTO litigation foreshadow the onset of a trade war. The components of the DSB that make it both a suitable forum for resolving contentious U.S.-Sino disputes are presented in Part III. These components will be analyzed through the characteristics that induce both China and the United States to utilize the DSB as a legal forum. Parts III.A and III.B introduce the direct institutional benefits and indirect benefits, respectively, that members are able to accrue. The accuracy of this Note's contention is demonstrated in Part III.C, which analyzes two DSB cases between the United States and China: *U.S.—Poultry*<sup>4</sup> and *China—Intellectual Property Rights*.<sup>5</sup> These cases illustrate the willingness of both countries to submit important issues to the DSB. Furthermore, Part III.C discusses the importance of compliance by the losing parties and the implications of compliance as acceptance of the DSB's legitimacy. Part III.D addresses the alternative mechanisms for resolving trade disputes that ultimately can be less appealing than engaging the DSB. Part IV identifies several limitations on this Note's contention as to the long-term ability of the DSB to mitigate U.S.-Sino trade frictions.

Finally, this Note presents some concluding suggestions about the future of the DSB as a viable mechanism for addressing burgeoning trade frictions between Beijing and Washington. This Part further reiterates the necessity of altering the discourse on U.S.-China WTO litigation from one of trade-war implications to one geared toward the responsible management of the DSB as a trade-friction intermediary, providing a beneficial legal forum for venting frustrations.

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4. Panel Report, *United States—Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R (Sept. 29, 2010) [hereinafter *U.S.—Poultry*].
  5. Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R (Jan. 26, 2009) [hereinafter *China—Intellectual Property Rights*].

## I. CONTEXT AND HISTORICAL PERSPECTIVE

### A. *Rule-Oriented Dispute Settlement in the International System*

While a discussion of the entirety of the vast body of international dispute settlement is beyond the scope of this Note, it is important to examine certain aspects pertaining to the operation of the WTO's dispute settlement mechanism in order to understand the broader role of the DSB within the international system. International dispute settlement takes myriad forms including negotiations,<sup>6</sup> good offices, mediation, conciliation, arbitration,<sup>7</sup> judicial settlement by permanent courts, and resort to regional agencies or arrangements.<sup>8</sup> Unlike domestic courts, international dispute settlement uniquely involves the interaction of states as the frequent actors. International dispute settlement mechanisms are structured upon various theoretical foundations—including power-oriented structures and rule-oriented structures—under which the members interact.<sup>9</sup> A power-oriented structure is reliant on an “explicit or implicit reference to [a state’s] relative power and ‘bargaining chips.’”<sup>10</sup> International dispute settlement based on power-orientation is characterized by “unilateral retortions [sic] and reprisals,” which run the risk of provoking retaliatory countermeasures.<sup>11</sup> Such a structure differs immensely when juxtaposed with a rule-oriented system that is predicated on the “enforcement of rules that were previously agreed by both parties.”<sup>12</sup> Within a rule-oriented structure, dispute settlement operates as the mechanism for enforcing the previously agreed upon rules between the various states.<sup>13</sup> Although the power-oriented structure of international dispute settlement provides for an interesting discourse, this Note will focus on the proliferation of rule orientation as a viable international dispute settlement mechanism, specifically with regard to the WTO's dispute settlement system.

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6. Negotiation between parties to the dispute is the basis of the consultations stage of the WTO dispute settlement system. Under this framework, the parties are obligated to engage in consultation request and provide “sympathetic consideration” to the other member’s concerns. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU]. For a discussion of the value of negotiation as a beneficial, and perhaps more desirable, dispute settlement mechanism within the WTO, see Amelia Porges, *Settling WTO Disputes: What Do Litigation Models Tell Us?*, 19 OHIO ST. J. ON DISP. RESOL. 141 (2003).
  7. For a discussion of the role of arbitration within the DSB, see Yasuei Taniguchi, *The WTO Dispute Settlement as Seen by a Proceduralist*, 42 CORNELL INT’L L.J. 1, 10-12 (2009).
  8. Ernst-Ulrich Petersmann, *Dispute Settlement in International Economic Law—Lessons for Strengthening International Dispute Settlement in Non-Economic Areas*, 2 J. INT’L ECON. L. 189, 195 (1999) [hereinafter Petersmann, *Dispute Settlement in International Economic Law*]. The

A rule-oriented structure provides all members of the system with a plethora of benefits that induce acceptance and a willingness to resort to dispute settlement in order to preserve expected benefits from the rules. For one, the existence of a viable dispute settlement system bolsters the value of the commitments made within an international agreement

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Dispute Settlement Understanding contains a number of the available forms of international dispute settlement to be utilized at various stages of the dispute process. The DSU provides at various instances for “bilateral and multilateral consultations (Article 4), good offices (Articles 5, 24), conciliation (Articles 5, 24), mediation (Articles 5, 24), . . . and international arbitration (Article 25).” *Id.* at 209. The DSU further provides a legalized dispute settlement mechanism that operates as a quasi-judicial structure involving panel and appellate review procedures. Ernst-Ulrich Petersmann, *Justice as Conflict Resolution: Proliferation, Fragmentation, and Decentralization of Dispute Settlement in International Trade*, 27 U. PA. J. INT’L ECON. L. 273, 302, 309 (2006) [hereinafter Petersmann, *Justice as Conflict Resolution*]. Although the DSB contains a variety of dispute settlement mechanisms, this Note focuses on the quasi-judicial structure encapsulated in panel and Appellate Body determinations.

9. See J. G. MERRILLS, *INTERNATIONAL DISPUTE SETTLEMENT* 235–36 (4th ed. 2005) (discussing the switch from the General Agreement on Tariffs and Trade (GATT) system of dispute settlement to the WTO dispute settlement as being termed a switch from a “power-oriented” approach to a “rule-oriented” approach); Petersmann, *Dispute Settlement in International Economic Law*, *supra* note 8, at 193–95 (citing JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 109 (2d ed. 1997)).
10. Petersmann, *Dispute Settlement in International Economic Law*, *supra* note 8, at 194. Petersmann discusses the United Nations’ dispute settlement system as a prime example of a power-oriented structure. *Id.* at 190–91.
11. *Id.* at 194.
12. *Id.* The WTO system was founded as a rule-based organization wherein all members agreed upon accession to be bound by all covered agreements and the compulsory jurisdiction of the DSB. As such, the theoretical foundation of the DSB’s dispute settlement system is centered on a rule-based orientation.
13. *Id.* Petersmann’s hypothesis concerning the efficacy of a rule-oriented structure relies on three factors: (1) the applicable substantive rules; (2) the availability of a legal dispute settlement system that induces both usage of the system and compliance with outcomes; and (3) the legal limitation of a member’s ability to resort to alternative dispute resolution methods. *Id.* at 197–98. Applying these factors to the DSB, it is clear that the WTO structure exhibits strong attributes of all three factors. First, the substantive rules related to the DSB are the covered agreements that compose the foundation of the WTO. Second, the panel determinations and appellate review induce members to utilize the DSB and to comply with adverse rulings. See discussion *infra* Part III.A. Finally, the DSU contains provisions requiring members to utilize the DSB as recourse for WTO disputes. DSU, *supra* note 6, art. 23.

through an assurance of the agreement's enforcement.<sup>14</sup> Credible commitments in turn promote stability and consistency within the international order, particularly within the international economic system.<sup>15</sup> In addition, the basis for the system provides states with an incentive, and in some systems a requirement,<sup>16</sup> to utilize the dispute settlement system rather than resort to potentially more deleterious alternative dispute settlement measures.<sup>17</sup> With pre-determined rules instead of power politics as the foundation of the system, states are provided an opportunity to raise disputes from a position of equality.<sup>18</sup> As such, rule-oriented international dispute settlement mitigates the power dynamics that can often damage international relations between states and the associated international organizations. The rule-based structure "helps to prevent the detrimental effects of unresolved international trade conflicts and to mitigate the imbalances between stronger and weaker players by having their disputes settled on the basis of rules rather than having power determine the outcome."<sup>19</sup> Furthermore, dispute settlement within the context of a comprehensive international organization provides a forum in which members can effectively negotiate and resolve discrepancies. The forum benefits the parties through a reduction in both transaction costs and asymmetric information.<sup>20</sup> Finally, under rule-oriented structures, dispute settlement mechanisms can provide the

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14. WTO & INTERNATIONAL ECONOMIC LAW 128 (Sun Fa Bai et al. eds., 2008).
  15. See, e.g., Michael P. Ryan, *Knowledge, Legitimacy, Efficiency and the Institutionalization of Dispute Settlement Procedures at the World Trade Organization and the World Intellectual Property Organization*, 22 NW. J. INT'L L. & BUS. 389, 394 (2002) ("Markets demand credible, enforceable commitments to function properly.").
  16. Within the WTO system, member states are obligated under the DSU to utilize the dispute settlement system for resolving disputes involving the covered agreements. DSU, *supra* note 6, art. 23.
  17. See XUESHEN ZHANG & GARY D. PATTERSON, LEGAL RULES OF THE WORLD TRADE ORGANIZATION 361 (English ed. 2008) ("The objective of these rules and procedures [is] to avoid unilateral actions that could destabilize[] and disrupt international trade, which could lead to inconsistency among nations in terms of trade policy and cause uncertainty in private transactions regarding international trade.").
  18. See, e.g., Petersmann, *Justice as Conflict Resolution*, *supra* note 8, at 359 ("The rule-oriented WTO dispute settlement system clearly mitigates power disparities in international relations and helps governments limit power politics inside their countries (e.g., by limiting protectionist abuses of trade policy discretion in favor of rent-seeking interest groups by requiring independent judicial remedies inside countries like China that did not have such legal institutions prior to WTO membership).").
  19. WTO & INTERNATIONAL ECONOMIC LAW, *supra* note 14, at 128.
  20. Ryan, *supra* note 15, at 395.

benefit of clarifying the rules and obligations enumerated under the various covered agreements.<sup>21</sup> Clarification of the rules through dispute settlement offers a consistency and clarity throughout the international order by removing ambiguities and uncertainties pertaining to the agreed rights and obligations.

*B. Role of the Dispute Settlement Body*

The DSB stands as one of the achievements of the Uruguay Round of Negotiations in 1995 that resulted in the creation of the World Trade Organization.<sup>22</sup> The DSB was designed to remedy a number of the weaknesses<sup>23</sup> and failures of its predecessor, the General Agreement on Tariffs and Trade's (GATT) dispute settlement system.<sup>24</sup> The efficacy of the GATT dispute settlement system was

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21. See Petersmann, *Justice as Conflict Resolution*, *supra* note 8, at 359 (noting the growing influence of such clarifications over multilateral WTO negotiations); Wei Zhuang, *An Empirical Study of China's Participation in the WTO Dispute Settlement Mechanism: 2001–2010*, 4 LAW & DEV. REV. 217, 218 (2011) (describing participation in the DSB as “essential for shaping the interpretation and application of WTO law over time”). Although the DSB is not predicated on a formalized common law approach, “Appellate Body and panel reliance on and citation of past WTO jurisprudence suggest WTO law’s common law orientation.” *Id.*
  22. MERRILLS, *supra* note 9, at 211-12, 233; see also Chi Manjiao, *China's Participation in WTO Dispute Settlement over the Past Decade: Experiences and Impacts*, 15 J. INT'L ECON. L. 29, 29 (2012) (internal quotation marks omitted) (calling the DSB the “the jewel of the crown of the World Trade Organization”); Matthew Kennedy, *China's Role in WTO Dispute Settlement*, 11 WORLD TRADE REV. 555, 555 (2012) (discussing the importance of the DSB as a “major contributor to the WTO’s success”).
  23. For an example of the differences between the GATT and WTO treatment of the same trade remedy measure see generally Mostafa Beshkar, *Trade Skirmishes Safeguards: A Theory of the WTO Dispute Settlement Process*, 82 J. INT'L ECON. 35 (2010) (discussing the evolution of members’ utilization of the safeguard mechanism between GATT Article XIX and the WTO Agreement on Safeguards).
  24. MERRILLS, *supra* note 9, at 214; see also Leah Granger, *Explaining the Broad-Based Support for WTO Adjudication*, 24 BERKELEY J. INT'L L. 521, 524 (2006) (“The failures of the GATT dispute settlement system set the stage for countries to later support the WTO’s stronger rule-based system.”); Donald McRae, *Measuring the Effectiveness of the WTO Dispute Settlement System*, 3 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 1, 4 (2008) (“Dispute settlement under the WTO is compulsory, cannot be blocked, has a defined timeline and a more fully articulated process, and includes an appellate process, making it different in many important respects from the old GATT process.”). *But see generally* Kim Van der Borgh, *Justice for All in the Dispute Settlement System of the World Trade Organization?*, 39 GA. J. INT'L & COMP. L. 787 (2011) (highlighting the shortcomings of the DSB with regard to



frustrated by the consensus requirement for decision making. This allowed nations whose measures were challenged to constructively block the establishment of a panel or the implementation of an adverse ruling.<sup>25</sup> The flaws inherent in the GATT system prompted the desire for change when forming the WTO. Positive change was accomplished through an adherence to binding panel and Appellate Body determinations whose adoption requirement was changed to reverse consensus.<sup>26</sup> This transformation in decision-making requirements greatly diminished the role of politics within international trade dispute settlement in favor of a rule-oriented, legal forum. At the center of the WTO's newly created dispute settlement system is the Dispute Settlement Body, entrusted with the responsibility of resolving trade disputes under the WTO covered agreements.<sup>27</sup>

As an organ of the WTO, the DSB is designed to “provid[e] security and predictability to the multilateral trading system” and to “preserve the rights and obligations of Members.”<sup>28</sup> The WTO implements a formalized dispute settlement structure to enforce and promote these enumerated goals.<sup>29</sup> Unlike the previous GATT regime,

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developing countries); Sean P. Feeney, *The Dispute Settlement Understanding of the WTO Agreement: An Inadequate Mechanism for the Resolution of International Trade Disputes*, 2 PEPP. DISP. RESOL. L.J. 99, 114 (2002) (examining “major problems” that still exist in the DSU); *see also* Ryan, *supra* note 15, at 404 (“[A] growing number of scholars and other observers opine that decision-making at the organization is undemocratic and call into question the legitimacy of the WTO laws which underlie dispute settlement decisions.”).

25. MERRILLS, *supra* note 9, at 214 (“An obvious weakness of the panel procedure was that since both setting up a panel and the adoption of its report required consensus in the GATT Council, it was possible for a state whose actions were challenged to block effective action.”); John D. Greenwald & Lynn Fischer Fox, *The WTO's Emphasis on Adjudicated Dispute Settlement May Be More Drag Than Lift*, 24 ARIZ. J. INT'L & COMP. L. 133, 133–34 (2007) (noting that panel decisions under the GATT system did not have the “force of a binding legal decision”).
26. DSU, *supra* note 6, art. 16.4 (establishing that the panel report will be accepted unless the ruling is appealed or “the DSB decides by consensus not to adopt the report”); *see also* MERRILLS, *supra* note 9, at 214 (noting that the changes made with the WTO system “effectively remove[d] the political check on panel procedures”).
27. *See* MERRILLS, *supra* note 9, at 234 (noting the importance of the DSB as being “political[ly] responsib[le] for integrating the dispute settlement system and ensuring its effectiveness”).
28. DSU, *supra* note 6, art. 3.2.
29. *See* JEANNE J. GRIMMETT, CONG. RESEARCH SERV., RS20088, DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: AN OVERVIEW 3–5 (2006) (providing an overview of the steps involved in a dispute before the DSB). *See generally* Marian Ladner & Ogbo Ossai, *Dispute*

the WTO dispute settlement system is compulsory for all WTO members.<sup>30</sup> This commitment conveys the willingness of all members to bind themselves in advance to the adjudicatory powers of the DSB.<sup>31</sup> The system is designed to compel losing respondents to bring any offending measure(s) into conformity with WTO obligations rather than to render punitive damages.<sup>32</sup> One innovative feature of the DSB is the Appellate Body, which allows the losing party to appeal an adverse judgment from the panel determination.<sup>33</sup> Other features include the framework of process deadlines and compliance-monitoring mechanisms that generate an “integrated dispute settlement” whereby the same rules apply to all disputes leveled under the covered agreements, unless specifically provided for under an agreement.<sup>34</sup> The DSB’s adjudicatory process is an essential element of the WTO system, maintaining and promoting the organization’s goal of “develop[ing] an integrated, more viable and durable multilateral trading system.”<sup>35</sup> In doing so, the DSB occupies a unique legal position within the international community as its utilization provides a novel legalized structure with which to protect the concessions and expected benefits of all members.

C. *China’s Accession to the WTO*

The process of negotiating China’s membership in the WTO was long and arduous.<sup>36</sup> In negotiating its accession, China made a number

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*Settlement in the World Trade Organization*, 20 INT’L L. PRACTICUM 15–16 (2007) (discussing the process for dispute settlement: consultation, panel, appeal, and implementation).

30. See Manjiao, *supra* note 22, at 29 (noting the “binding force” of DSB decisions due to the threat of sanctions); see also Zhuang, *supra* note 21, at 218 (citing the DSB’s “exclusive and compulsory jurisdiction on matters arising under WTO agreements” as a source of its “unique power as an international dispute settlement body”). Additionally, for a discussion of the GATT mechanism for initiating and resolving disputes, see MERRILLS, *supra* note 9, at 213–14.
31. See MERRILLS, *supra* note 9, at 234 (“Though styled an ‘understanding’, the DSU is an integral part of the WTO Agreement and according to Article 2(2) legally binding.”).
32. Ladner & Ossai, *supra* note 29, at 17. For additional discussion of the lack of punitive damages in the DSB’s remedies, see *infra* note 77 and accompanying text.
33. Granger, *supra* note 24, at 523; see also *infra* notes 79–85 and accompanying text.
34. GRIMMETT, *supra* note 29, at 2.
35. Marrakesh Agreement Establishing the World Trade Organization, pmbi., Apr. 15, 1994, 108 Stat. 4809, 1867 U.N.T.S. 154, 155 (1994).
36. Many observers recognize the difficulties of China’s path to WTO membership but submit that, despite these issues, China’s ultimate

of unique concessions on issues of trade in both goods and services that far exceeded the obligations of other WTO members.<sup>37</sup> Despite the myriad unique obligations in China's Accession Protocol, China still viewed WTO membership as a vital component of its long-term

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accession to the organization is beneficial for every member of the WTO. *See, e.g.*, Wenhua Ji & Cui Huang, *China's Experience in Dealing with WTO Dispute Settlement: A Chinese Perspective*, 45 J. WORLD TRADE 1, 1 (2011) (alteration in original) (noting that although the Chinese accession to the WTO was the result of fifteen years of "tough negotiations," China's membership is "an important step towards making the WTO a truly world organization"). *But see, e.g.*, Xiaohui Wu, *No Longer Outside, Not Yet Equal: Rethinking China's Membership in the World Trade Organization*, 10 CHINESE J. INT'L L. 227, 232, 269 (2011) (emphasis added) (viewing China's accession process as the result of "protracted and tortuous negotiations" in which "China was pressed to accept exceptionally [unfavorable], non-reciprocal and asymmetric terms of membership" that warrant a reexamination of China's membership status in the WTO). China's accession also sparked mixed sentiments about the impact of China on the WTO and the DSB, in particular. *See generally* Peter K. Yu et al., *China and the WTO: Progress, Perils, and Prospects*, 17 COLUM. J. ASIAN L. 1 (2003), for a panel discussion that "reflect[s]" on China's accession to the WTO and "explore[s] its ramifications."

37. Two primary burdensome concessions revolve around Articles 15 and 16 of the Protocol on the Accession of the People's Republic of China. Article 15 allows other WTO members to utilize nonmarket-economy methodologies when conducting antidumping investigations under certain conditions for goods originating in China. World Trade Org., *Protocol on the Accession of the People's Republic of China*, pt. 1, § 15, at 8-9, WT/L/432 (Nov. 10, 2001) [hereinafter China Accession Protocol], available at [www.wto.org](http://www.wto.org). Article 16 creates a unique transitional safeguard mechanism only applicable to Chinese goods. *Id.* pt. 1, § 16, at 9-10; *see also* Manjiao, *supra* note 22, at 35 (noting the wide range of WTO-plus obligations China accepted including "commitments concerning transparency, judicial review, uniform administration, national treatment, foreign investment, market economy, and transitional review"); Henry Gao, *Elephant in the Room: Challenges of Integrating China into the WTO System*, 6 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 137, 147-51 (2011) ("The Mismatch between the China-specific Provisions and the Normal WTO Framework"); Chad P. Bown, *U.S.-China Trade Conflicts and the Future of the WTO*, 33 FLETCHER F. WORLD AFF. 27, 33 (2009) ("As a price of China's accession, the membership demanded that Beijing take on many more policy commitments than had traditionally been required of other acceding countries . . . ."); Julia Ya Qin, "WTO-Plus" Obligations and Their Implications for the World Trade Organization Legal System, 37 J. WORLD TRADE 483 (2003) (discussing the unique concessions contained within China's Accession Protocol, as well as the Report of the Working Party on the Accession of China, and the potential long-term impact of incorporating WTO-plus obligations in accession protocols).

economic prosperity.<sup>38</sup> China even accepted the mandatory jurisdiction of the DSB—a monumental step in Beijing’s affirmation of the role of the international system.<sup>39</sup> China joined the “club of rule-abiding countries”<sup>40</sup> as it was instituting extensive measures to bring its economy into conformity with accession obligations.<sup>41</sup> Throughout China’s negotiations, the United States consistently advocated for China’s membership in the WTO.<sup>42</sup> The United States had a particular interest in bringing China into a rule-oriented, formalized system that allowed for compulsory adjudication of trade frictions and violations of economic commitments.<sup>43</sup> Despite the difficult accession negotiations, both China and the United States recognized the long-term benefits of WTO membership for the People’s Republic.<sup>44</sup>

*D. U.S.-China Interaction Within the Dispute Settlement Body*

In order to fully appreciate the recent trends in WTO litigation between Beijing and Washington, it is necessary to examine the dynamic between the two powers during the first five years of China’s WTO membership (2001–06). The initial years were relatively calm in terms of litigation as China became acclimated to the new system.<sup>45</sup> Scholars and observers have posited numerous explanations for

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38. See Pasha L. Hsieh, *China’s Development of International Economic Law and WTO Legal Capacity Building*, 13 J. INT’L ECON. L. 997, 998 (2010) (arguing that China’s dynamic economic growth over the last several decades would not have been possible if not for its accession to the WTO).
39. See Pasha L. Hsieh, *China-United States Trade Negotiations and Disputes: The WTO and Beyond*, 4 ASIAN J. WTO & INT’L HEALTH L. & POL’Y 369, 391 (2009) (“The WTO dispute settlement mechanism is the first and only state-to-state ‘international court’ under which China has consented to mandatory jurisdiction.”); Zhuang, *supra* note 21, at 218 (“[T]he WTO DSB is the only international ‘court’ of compulsory jurisdiction that China has recognized without reservation, and remains the only international judicial body to which China has resorted.”).
40. SUSAN SHIRK, CHINA: FRAGILE SUPERPOWER 132 (2007).
41. See, e.g., KENNETH LIEBERTHAL, GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM 322 (2004) (arguing that China’s transformation of domestic measures is “accelerating [China’s] integration into the international economy”).
42. SHIRK, *supra* note 40, at 25 (going as far as to call the United States the “chief sponsor” of China’s accession).
43. Hsieh, *supra* note 39, at 375.
44. See *infra* notes 111–19 and accompanying text.
45. See Ji & Huang, *supra* note 36, at 2 (calling the early phase when other trading partners did not engage China in DSB litigation a “honeymoon period”).

China's reticence to utilize the DSB including its "non-litigious legal traditions,"<sup>46</sup> a lack of internal legal capacity,<sup>47</sup> and limitations imposed within China's accession protocol.<sup>48</sup> In fact, China did not have to defend itself as a respondent until three years after its accession in 2004<sup>49</sup> and defended against only one other complaint in the first five years.<sup>50</sup> During this period, China brought only one case against the United States.<sup>51</sup> Some believed that the rhetoric emanating from Beijing in 2005 indicated that China would not actively utilize the DSB to resolve trade frictions.<sup>52</sup> Beijing's official stance began to change in 2006 when it proclaimed that China would utilize the WTO and the DSB to properly handle trade frictions.<sup>53</sup>

A juxtaposition of the inactivity during the initial five-year period with interactions since 2006 demonstrates the trend toward an increasing utilization of DSB litigation by both China and the United States.<sup>54</sup> For example, the United States brought thirteen WTO cases

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46. Zhuang, *supra* note 21, at 231 (discussing China's traditional preference to settle dispute through noncontentious means so as not to cause any party a public "loss of face").
  47. Xiaojun Li, *Understanding China's Behavioral Change in the WTO Dispute Settlement System: Power, Capacity, and Normative Constraints in Trade Adjudication*, 52 *ASIAN SURVEY* 1111, 1125 (2012); Zhuang, *supra* note 21, at 231.
  48. Chad P. Bown, *China's WTO Entry: Antidumping, Safeguards, and Dispute Settlement*, in *CHINA'S GROWING ROLE IN WORLD TRADE* 281, 328 (Robert C. Feenstra & Shang-Jin Wei eds., 2010) (citing China's continued designation as a "Non-Market Economy" under China's accession protocol as a contributing factor).
  49. Request for Consultations by the United States, *China—Value-Added Tax on Integrated Circuits*, WT/DS309/1 (Mar. 18, 2004).
  50. Appellate Body Report, *China—Measures Affecting Imports of Automobile Parts*, WT/DS340/AB/R (Dec. 15, 2008).
  51. Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS251/AB/R (Nov. 10, 2003) [hereinafter *U.S.—Steel Safeguards*].
  52. See, e.g., Li, *supra* note 47, at 1132–33 (analyzing comments from Bo Xilai, then Beijing's Minister of Commerce, and the cryptic rhetoric contained within the China's State Council's white paper *China's Peaceful Development Road*).
  53. *Id.* at 1133 (citing WEN JIABAO, PREMIER OF THE STATE COUNCIL, REPORT OF THE WORK OF THE GOVERNMENT, (Mar. 5, 2006) available at [http://web.archive.org/web/20081014232653/http://www.chinadaily.com.cn/china/2006-03/15/content\\_538753.htm](http://web.archive.org/web/20081014232653/http://www.chinadaily.com.cn/china/2006-03/15/content_538753.htm) (providing the full-text version of the Premier's report that was delivered at the Fourth Session of the Tenth National People's Congress)).
  54. See Ji & Huang, *supra* note 36, at 2 ("After this honeymoon period was over, . . . China's major trade partners intensified their WTO legal

against China between 2007 and 2012—three in 2007, two in 2008, one in 2009, three in 2010, one in 2011, and three in 2012.<sup>55</sup> The United States went from initiating two cases over five years against China to thirteen cases over six years.<sup>56</sup> Similarly, China has initiated a higher volume of cases against the United States since 2006—one in 2007, one in 2008, two in 2009,<sup>57</sup> one in 2011, and two in 2012.<sup>58</sup> China’s altered reliance on the DSB to resolve trade frictions with the United States is evident considering that China utilized the dispute settlement system once in the first five years and seven times in the subsequent six years. The statistical variations in litigation reliance within the WTO intimate a marked shift in both countries’ strategies for resolving trade frictions.<sup>59</sup> In fact, litigation between Beijing and Washington accounts for a significant portion of both countries’ overall DSB interactions. Both parties’ drastic changes in the usage of the DSB continue to garner significant discourse on the trend’s motivations and implications, particularly whether these changes symbolize a positive or negative development for the international trading system.

## II. DOES INCREASED LITIGATION PORTEND THE ONSET OF A TRADE WAR?

As Beijing and Washington alter their attitude toward the DSB, many interpret the aggressive litigation focus as a harbinger of a trade war between the two economic juggernauts. Some believe such an

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challenges against China, and, in response, China took on a higher offensive profile . . .”).

55. *Chronological List of Disputes Cases*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm) (last visited Aug. 13, 2013). As of August 13, 2013, China has not filed any new cases against the United States in 2013. *Id.*

56. *Id.*

57. China’s increased activity within the entire WTO in 2009 led many to term the year the “WTO’s China year.” Li, *supra* note 47, at 1112 (quoting Li Chenggang, the Deputy Director of the Ministry of Commerce’s Department of Treaty and Law, at the annual conference of the Shanghai Consulting Center for the WTO in December 2009); see also Manjiao, *supra* note 22, at 32 (“Year 2009 is deemed as ‘the year of China for the WTO dispute settlement’ since 7 out of the 14 cases filed in that year involved China.”).

58. *Chronological List of Disputes Cases*, *supra* note 55. As of August 13, 2013, the United States has not filed any new cases against China in 2013. *Id.*

59. Matthew Kennedy, formerly a senior lawyer in the WTO Secretariat, referred to China’s drastic shift in its utilization of the DSB as “the most significant change in the identity of the [DSB’s] top participants since the establishment of the WTO.” Kennedy, *supra* note 22, at 559.

event is imminent under current conditions. The rise in dumping charges, the political unwillingness to compromise, and the “proliferation of trade conflicts and protectionist measures” are cited as evidence of an escalating movement toward a full-blown trade war.<sup>60</sup> Other observers point to “tit-for-tat” WTO complaint filings as evidence of the deterioration of U.S.-Sino relations.<sup>61</sup> The increased litigation discussed in Part I.C is seen as a negative development that could have dangerous effects if not diminished.<sup>62</sup> Others temper this sentiment by pointing to specific failures on either side that *could* cause the relationship to devolve into a trade war. Chad P. Bown, Senior Economist for the World Bank’s Trade and International Integration Development Research Group, discusses that the inherent nature of litigation is volatile.<sup>63</sup> Bown questions the ability of China and the United States to utilize the DSB in a positive manner that mitigates frictions.<sup>64</sup> While not decrying a trade war as inevitable, Bown does say that “we are in for some U.S.–China fireworks emanating from Geneva.”<sup>65</sup> While trade frictions do exist and at times can get extremely heated, this Note advances a different interpretation of the increased litigation: a sentiment that views the trend as a positive development with the two economic juggernauts willing to resolve disputes through a rule-based, formal system. As the interaction between Beijing and Washington becomes more regular within the DSB, the possibility substantially diminishes for either to

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60. *Protectionism Provoking Trade War*, *supra* note 1, at 51–52.

61. *See, e.g., Offensive Maneuvers*, CHINA ECON. REV., Dec. 2012, at 6–7; *see also* Chu, *supra* note 2 (discussing concerns that an imposition of U.S. tariffs on Chinese solar-cell makers could lead to the reemergence of the “tit-for-tat trade spat that gained traction in 2009 when President Obama slapped steep duties on Chinese tires” and manifest itself in an “all-out trade war”).

62. *See* Kara Loridas, Note, *United States-China Trade War: Signs of Protectionism in a Globalized Economy?*, 34 SUFFOLK TRANSNAT’L L. REV. 403, 413 (2011) (emphasis added) (“As a result of the *onslaught* of WTO litigation between the United States and China, their relationship was characterized by the media as war-like, a characterization that speaks more to the political ramifications of the disputed trade barriers than to their economic magnitude.”); *see also* Chu, *supra* note 2 (discussing the implications of “tit-for-tat” tariff impositions as escalating trade frictions).

63. *See* Bown, *supra* note 37, at 31 (“In these WTO disputes, what starts as seemingly harmless legal maneuvering and argumentation often turns into political battles, threats, and legally-sanctioned implementation of actual retaliation, and media-fed worries of an all-out trade war.”).

64. *Id.*

65. *Id.* at 32.

make such a catastrophic “misstep”<sup>66</sup> that would cause the relationship to devolve into a trade war.

### III. CHARACTERISTICS MAKING THE DISPUTE SETTLEMENT BODY APPEALING

#### A. *Dispute Settlement Body’s Institutional Impact*

The DSB provides a number of direct benefits through its organizational structure and rule-based system.<sup>67</sup> Membership in the WTO assumes that nations will fulfill trade-related commitments and realize expected benefits.<sup>68</sup> The WTO deals broadly with the rules of trade between nations, encompassing a host of responsibilities both globally and intergovernmentally.<sup>69</sup> The DSB stands as the forum through which WTO rules and obligations are protected.<sup>70</sup> Serving as a crucial component to the WTO’s operation, the DSB attempts to promote stability within the international trading system.<sup>71</sup> When a member abrogates its WTO obligation, the DSB provides a dispute settlement process for aggrieved parties to seek remedy.<sup>72</sup>

First, the remedies available within the DSB structure provide a direct benefit to both the complainant and respondent. For the complainant, a favorable outcome from a panel ruling results in a judgment ordering the removal of the respondent’s disputed

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66. *Id.* at 31.

67. The function, role, and rules of the WTO’s dispute settlement system are encapsulated in Annex 2 of the WTO Agreement, the Understanding on Rules and Procedures Governing the Settlement of Disputes. The Dispute Settlement Body is established within this Understanding “to administer [the Understanding’s] rules and procedures and . . . the consultation and dispute settlement provisions of the covered agreements.” DSU, *supra* note 6, art. 2.1.

68. Every member of the WTO expects to receive the benefits of the WTO system’s primary tenets: (1) the Most Favored Nation Principle; (2) the National Treatment Principle; (3) reciprocal tariff concessions; and (4) a prohibition on quantitative restrictions. General Agreement on Tariffs and Trade arts. I, II, III, and XI, Oct. 30, 1947, T.I.A.S. 1700, 55 U.N.T.S. 194.

69. The WTO identifies the numerous dimensions it covers as an international trade organization including liberalizing trade, serving as a forum for nations to negotiate trade agreements, resolving trade disputes, and operating a system of trade rules. *What is the World Trade Organization?*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm) (last visited Sept. 16, 2013).

70. *See supra* notes 28–29 and accompanying text.

71. *See supra* note 28 and accompanying text.

72. *See supra* note 29 and accompanying text.



measure.<sup>73</sup> Retaliation, as a permissible remedy, is allowed only as a “last resort” and is subject to a number of institutional limitations when a member fails to bring the measure into conformity with the DSB decision.<sup>74</sup> The complainant’s retaliatory measures are only “temporary” and can consist of a suspension of concessions at a level “equivalent” to the harm.<sup>75</sup> Given the various remedy measures, the complainant is provided some way to mitigate the harmful effects of the offending member’s measure.

Even when faced with an unfavorable verdict, the respondent is able to directly benefit from the structured remedy system within the DSB. The limitations surrounding retaliation ensure that the respondent is confronted by temporary measures that the DSB determines are equivalent to the respondent’s offending measure.<sup>76</sup> This remedy application mitigates the prospect of punitive damages that are meant to punish offending nations beyond the actual harm incurred.<sup>77</sup> These limitations also prevent escalation of a “tit-for-tat” trade war. Even when a complainant is permitted to retaliate, such actions are narrowly tailored to minimize the disturbance in liberalizing trade.<sup>78</sup>

These benefits provided by the DSB incentivize member nations, such as the United States and China, to utilize the formal forum rather than to engage in potentially volatile bilateral negotiations,<sup>79</sup> especially considering the lack of limitations on national action outside a formal international organization. This instills a confidence within both countries that a loss in the DSB will not result in

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73. See DSU, *supra* note 6, art. 3.7 (“[T]he first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if [the measures] are found to be inconsistent with the provisions of any of the covered agreements.”).

74. *Id.*

75. *Id.* arts. 22.1, 22.4.

76. *Id.*

77. See McRae, *supra* note 24, at 8 (clarifying that “WTO compensation and retaliation are sanctions” not in the sense of punishing members as in criminal law but rather in the sense of inducing compliance as may be found in contract or tort law); see also Granger, *supra* note 24, at 523 (citing ROBERT Z. LAWRENCE, CRIMES & PUNISHMENTS? RETALIATION UNDER THE WTO (2003); DAVID PALMETER, THE WTO AS A LEGAL SYSTEM: ESSAYS ON INTERNATIONAL TRADE LAW AND POLICY 346 (2003)) (“The DSU limits the form and scope of retaliations because the goal of dispute settlement is to support and maintain the integrity of the trading regime.”).

78. See Bown, *supra* note 37, at 35 (comparing the WTO retaliation structure to “surgical retaliation” and pronouncing a “political difference” between WTO retaliation and “blunt force retaliation”).

79. See discussion *infra* Part III.D.

exorbitant penalties that ultimately dwarf the initial harms.<sup>80</sup> The guarantee of proportionality allows both the United States and China to conduct a cost-benefit analysis concerning the maintenance of a measure, particularly when the removal of a WTO inconsistent measure is not politically feasible at the time of the panel determination.<sup>81</sup> Furthermore, both the United States and China can feel assured that taking sensitive topics to the DSB will not result in the imposition of additional obligations other than those agreed to and enumerated in the covered WTO agreements.<sup>82</sup> This ensures that no outcome from the DSB can burden either country with obligations that have not been fully negotiated and from which they could not opt out. These measures operate as safeguards that build faith in the efficacy of the WTO as an international organization entrusted with a mandatory dispute settlement system.

Second, the advent of the appellate process within the international trading system allows for review of panel decisions, providing a higher level of scrutiny and consistency.<sup>83</sup> The Appellate Body is designed to provide legitimacy to the economic dispute settlement system through a focus on the composition, scope of review, and structured deadlines. For composition, the Dispute Settlement Understanding (DSU) provides specific qualifications for persons serving on the Appellate Body in order to bolster the validity and legitimacy of appellate review determinations.<sup>84</sup> The scope of the appellate review does not include fact finding, which is the role specifically delegated to the panel.<sup>85</sup> Instead, the design of the DSB

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80. The DSU provides further safeguard mechanisms to ensure that retaliatory authorization is not abused through a resort to binding arbitration if the offending party objects to the level of concession suspension. DSU, *supra* note 6, arts. 22.6-22.7; MERRILLS, *supra* note 9, at 230.
81. DSU, *supra* note 6, art. 21.3 (granting the offending member a “reasonable period of time” to bring the measure into conformity if immediate compliance is “impracticable”).
82. *Id.* art. 3.2 (“Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.”).
83. Ryan, *supra* note 15, at 403.
84. For one, the DSB appoints persons to serve on the Appellate Body for a four-year term, with the possibility of being reappointed for one more term. DSU, *supra* note 6, art. 17.2. For another, the persons selected are those of “recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally.” *Id.* art. 17.3. The DSU further prohibits a person’s participation in any dispute that “would create a direct or indirect conflict of interest.” *Id.*
85. YANG GUOHUA ET AL., WTO DISPUTE SETTLEMENT UNDERSTANDING: A DETAILED INTERPRETATION 205 (2005).

appellate process reduces appealable issues to those of law that are “covered in the panel report and legal interpretations developed by the panel.”<sup>86</sup> Furthermore, the deadlines enumerated within the DSU for appellate decisions provide participants with a clearly defined timetable for the resolution of disputes.<sup>87</sup>

The Appellate Body quickly demonstrated its efficacy as it resolved a number of high-profile, controversial cases that had been holdovers from the previous GATT era.<sup>88</sup> The establishment and success of the appellate review within the WTO system provides China and the United States assurance that DSB litigation is not subject to a single panel determination, allowing either nation to target specific issues of law or legal interpretations thought to be incorrectly determined under the covered agreements. This feature instills confidence that the ultimate outcome of a contentious trade dispute between the United States and China will be properly adjudicated.<sup>89</sup>

Third, the myriad issues presented in each case allow the DSB to render determinations that are “win-win” rather than merely a “winner-take-all” system.<sup>90</sup> The DSB can achieve a mutually beneficial process through the application of independent review for resolving disputes.<sup>91</sup> Impartiality, as a hallmark of the DSB, allows panelists to divorce trade issues from the typical state-centric political rhetoric. The ability to separate and resolve multiple issues through a trade-forum intermediary provides the United States and China benefits in dealing with trade frictions. The political connections that complicate complex trade issues can be disassociated from the appropriate adjudication under the WTO covered agreements.<sup>92</sup>

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86. DSU, *supra* note 6, art. 17.6.

87. *Id.* art. 17.5; *see also id.* art. 20 (“time-frame for DSB decisions”).

88. For a discussion of the six controversial holdover cases and how the Appellate Body’s resolution of these cases cemented its dominant role in the DSB, see William J. Davey, *The WTO Dispute Settlement System: The First Ten Years*, 8 J. INT’L ECON. L. 17, 21–23 (2005).

89. See Stuart S. Malawer, *United States-China WTO Litigation (2001–2010)*, 59 VA. LAW. 28, 47 (2010) (“When litigation is resolved properly it establishes a strong basis to move forward in trade relations and negotiations.”).

90. See Bown, *supra* note 37, at 31 (noting that the resolution of trade disputes between China and the United States can produce mutually beneficial economic outcomes through “market access gains to U.S. exporters and reforms that enhance China’s economic growth”).

91. See MERRILLS, *supra* note 9, at 317 (describing the impartial nature of international judges).

92. See *id.* (identifying the potential for WTO litigation to “diffuse political tensions”).

This positive development in the resolution of complex trade issues is evident in the contentious dispute between Beijing and Washington over intellectual property protections within China.<sup>93</sup> The United States brought three claims against China under the Trade-Related Aspects of Intellectual Property Rights (TRIPS): the threshold for criminal procedures and penalties, the disposal of infringing goods, and the copyright protection for censored works.<sup>94</sup> While the Panel ruled favorably for the United States on the issues of the disposal of infringing goods and the copyright protection for censored works, the United States lost on the important issue of the threshold for criminal procedures and penalties.<sup>95</sup> The panel's mixed ruling allowed both sides to claim a successful outcome in the case.<sup>96</sup> The DSB was able to independently assess the complex, but related, claims and adjudicate each claim on its legal merit under the TRIPS agreement. Had these issues been subject to bilateral negotiations, the resolution of the trade friction may have been impossible due to political intermingling of all the issues into one "winner-take-all" scenario. This mentality may very well have escalated the trade frictions between Beijing and Washington into a full-blown trade war.

The institutional characteristics of the DSB encourage the United States and China to utilize the dispute settlement forum to resolve contentious trade issues.<sup>97</sup> As the WTO remedies a number of the inherent flaws that plagued the GATT system, members gain a greater confidence in the adjudicatory powers of the trade dispute

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93. *China—Intellectual Property Rights*, *supra* note 5, ¶ 1.1.

94. Peter K. Yu, *The U.S.-China WTO Cases Explained*, MANAGING INTELL. PROP., Oct. 1, 2009, available at [http://www.peteryu.com/managingip\\_362.pdf](http://www.peteryu.com/managingip_362.pdf).

95. *Id.*; see also Hsieh, *supra* note 39, at 388 (“[E]ven though the panel found in favor of the U.S. on most issues, the U.S. did not prevail on its Article 61 claim, which was presumably the most important claim from the perspective of U.S. businesses.”).

96. See, e.g., Yu, *supra* note 94 (“As the Acting US Trade Representative, maintained: ‘These findings are an important victory, because they confirm the importance of IPR protection and enforcement, and clarify key enforcement provisions of the TRIPs Agreement.’ The response by a spokesperson of the Chinese Ministry of Commerce, by contrast, was more subdued. Although he welcomed the report’s findings on criminal thresholds, he ‘expressed ‘regret’ about the [unfavorable] aspects of the ruling.’”).

97. Some argue that while both countries continue to permit the DSB to adjudicate politically sensitive issues, neither is willing to litigate perhaps the most contentious issue between the two powers, the valuation of the Chinese currency. See Malawer, *supra* note 89, at 30, 32 (calling the currency issue the “elephant in the room,” but ultimately concluding that it is not within the scope of the WTO disciplines).

settlement system.<sup>98</sup> The features of the rule-based organization that have augmented its efficacy and the members' willingness to utilize the DSB include its neutrality<sup>99</sup> and legitimacy.<sup>100</sup> The DSB provides members with a rule-oriented dispute settlement system with which to address trade frictions. The DSB provides tangible benefits through its remedy-limiting mechanisms, its appellate process, and its ability to adjudicate mutually beneficial situations. These benefits induce both the United States and China to continuously employ the DSB to mitigate trade frictions.

*B. Indirect Benefits that Induce Usage of the Dispute Settlement Body*

While the direct benefits from the DSB's institutional characteristics help to explain the rationale underlying the United States' and China's decisions to join and use the WTO and its dispute settlement system, the indirect benefits accrued by both nations may illuminate why both powers have drastically increased their utilization of the litigation feature. One indirect benefit of advancing national ends through WTO litigation is the mollification of domestic anxiety in both the People's Republic and the United States. Another benefit is the channeling of an individual nation's behavior so as to produce a more cooperative international trading environment. The continuous usage of the DSB as a forum for trade dispute settlement instills a long-term investment for both nations in the longevity and ultimate viability of the organization.<sup>101</sup> Additionally, the litigation focus through the DSB allows both Beijing and Washington to project "soft power" throughout the international system. Finally, experience with DSB litigation bolsters China's internal legal capacity, which can generate positive benefits for both China and the international system.

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98. See *supra* note 23 and accompanying text.

99. See MERRILLS, *supra* note 9, at 219 (identifying the dispute settlement panel's requirement to objectively assess the facts and the law pursuant to DSU Article 11); see also *Ten Years in the WTO: Has China Kept Its Promises?: Hearing Before the Cong.-Exec. Comm'n on China*, 112th Cong. 45 (2011) [hereinafter *Hearing Before the Cong.-Exec. Comm'n on China*] (statement of Claire E. Reade, Assistant U.S. Trade Rep. for China Affairs) available at <http://www.cecc.gov/events/hearings/ten-years-in-the-wto-has-china-kept-its-promises> ("China's WTO membership offers an important tool for managing the increasingly complex U.S.-[China] trade relationship. A common WTO 'rule book' and an impartial body in Geneva have helped [the United States and China] resolve differences when dialogue fail.").

100. See *infra* notes 119–20, 194 and accompanying text.

101. See, e.g., Kennedy, *supra* note 22, at 576 ("China has become vested in the maintenance of the norms of the system.").

The Sino-American relationship remains a salient political issue within the United States, with the People's Republic often vilified. A number of subjects tend to ignite the ire of the American public and Congress, including human rights, currency manipulation, and trade frictions. The U.S. administration's engagement of China through DSB litigation conveys a strong political stance in instances of perceived violations of China's international obligations. This litigation strategy toward China helps to placate the American public's anger as well as the calls for tougher legislation from Congress.<sup>102</sup> The saber rattling from Congress can prove potentially catastrophic for U.S.-Chinese relations as protectionist trade legislation can spark damaging retaliatory policies from China.<sup>103</sup> The U.S. administration can use WTO litigation to address issues preemptively before protectionist elements in Congress can act.<sup>104</sup> For the American government, WTO litigation provides a unique ability to diffuse political tensions that could have deleterious ramifications for the long-term benefit of the Sino-American relationship.<sup>105</sup>

While the Chinese government is not subject to the same democratic undulations, domestic pressure within China is of great concern to the Chinese Communist Party's (CCP) political stability. Economic concerns are always at the forefront of the CCP's domestic and foreign policy, as demonstrated through the maintenance of the currency policy that has caused much contention. Sometimes, China's initiation of WTO litigation is the direct result of domestic concerns toward particularly prominent trading partners.<sup>106</sup> Like the United States, the Chinese government can utilize DSB determinations to implement or speed up reforms that may not be particularly popular domestically.<sup>107</sup> This is particularly true in situations in China where

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102. See Malawer, *supra* note 89, at 30 ("The United States actively and aggressively uses the litigation process as a means for confronting China on a range of trade restrictions . . . . This clearly gives Congress and the American public the appearance of being tough on China . . . .").

103. See Bown, *supra* note 37, at 42–43 (examining the possible harms of Congressional protectionist measures on U.S.-Sino trade relations).

104. *Id.*

105. See, e.g., *id.* at 34 (emphasizing the importance that the U.S. Trade Representative and Beijing appropriately use WTO litigation to "diffuse political pressures within the United States").

106. See Malawer, *supra* note 89, at 30 ("China actively and aggressively uses the litigation process for both domestic and foreign policy purposes . . . [and] brings actions as a means of responding to domestic pressures.").

107. See *id.* at 30, 32 ("It allows the Beijing government to rationalize unpopular actions that need to be taken domestically in order to comply with WTO disciplines."); see also Bown, *supra* note 37, at 38 (noting

reform, without DSB determinations, would be untenable. The prospect of WTO litigation and the permeation of DSB norms throughout China can provide the CCP domestic credibility for instituting reformist policies.<sup>108</sup> Increasing WTO litigation and improving Chinese legal savvy can also provide the indirect benefit of bolstering the Chinese public's faith in not only the WTO and DSB but also other international organizations.<sup>109</sup> This provides the CCP with a stronger trade dispute mechanism that would have more support from the Chinese domestic populace.

A dedication to resolving trade disputes through the DSB provides the governments in Beijing and Washington both clout and political protection.<sup>110</sup> Given the complex political landscape, using the DSB allows both the United States and China to vent domestic frustrations through an international legal forum. The use of the DSB as a third-party intermediary allows both governments to deflect losses while still resolving tense political frictions. The DSB allows the United States and the People's Republic to diffuse political tensions that can arise within a domestic market, especially with the public, media, and political figures.

Another characteristic of the DSB, which may also characterize international organizations on a broader scale,<sup>111</sup> is the ability to channel the behavior of member states.<sup>112</sup> While realists may posit that states will always act with purely self-interested motives, within the legal framework of the DSB, such behavior may ultimately contribute to the long-term success of the dispute settlement body. The compulsory jurisdiction of the DSB assures members that involvement in the dispute settlement system will involve repeat participation, as both a complainant and respondent. This knowledge is bolstered through the explicit DSU requirement that all recourse concerning perceived violations of the WTO covered agreements be

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that China can use the U.S. threats of retaliation as “helpful political tools to *complement* its own reform effort”) (emphasis added).

108. Bown, *supra* note 48, at 281.

109. Bown, *supra* note 37, at 43; *see also* Ji & Huang, *supra* note 36, at 31 (arguing that the increase in litigation and regularity could help to dispel the Chinese suspicion of international organization and the imposition of international law in China).

110. Bown, *supra* note 37, at 31.

111. *Cf.* Ryan, *supra* note 15, at 394 (“Institutions are the humanly devised constraints that structure political, economic, and social interaction.”).

112. *See* McRae, *supra* note 24, at 6 (noting the ability of a legal system to channel the behavior of participants through “rules that provide guidance on how to behave or processes that make certain kinds of conduct possible”).

settled through the DSB mechanisms.<sup>113</sup> The knowledge of recurring involvement in the DSB instills within both the United States and China an investment in the long-term success of the organization.<sup>114</sup> This commitment means that both countries will be willing to comply with an adverse ruling in hopes that the other will comply the next time it faces an adverse ruling.<sup>115</sup> The understanding that future cases will be brought means neither nation will self-destruct the entire system.<sup>116</sup> The DSB provides stability for conducting bilateral negotiations knowing that there is a formal, predictable system to resort to if negotiations collapse or if promises are broken.

The WTO exemplifies the economic reality that all nations have interdependent economic systems. Accordingly, the appearance of trade frictions will not be an anomaly but rather a signature of a growing economic order in which interactions between members are ever-more prevalent and routine.<sup>117</sup> The DSB's legal functioning as the mechanism through which to resolve these trade frictions assures members of the reoccurrence of WTO disputes. In doing so, it establishes a significantly high threshold for measuring the importance of any one individual case or issue in the broader scheme of future DSB interactions as well as the enjoyment of other expected benefits provided under the covered agreements. The existence of this high threshold dissuades losing parties from persistently noncomplying or calling into question the legitimacy of the DSB itself.<sup>118</sup> In the rule-oriented dispute settlement structure of the DSB, all participants, whether a developed or a less developed country, have an interest in preserving the legitimacy of the dispute settlement system in order to accrue perceived benefits.<sup>119</sup> As such, the behavior of member states is

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113. DSU, *supra* note 6, art. 23.

114. *See supra* note 101 and accompanying text.

115. *See Granger, supra* note 24, at 532 (“Countries believe that their future gains will be higher if the dispute settlement system has a high rate of compliance.”).

116. The responses from the Chinese government have demonstrated a deliberate abstention from “making statements inside or outside the WTO that would call into question the authority of the dispute settlement system or discredit DSB rulings.” Kennedy, *supra* note 22, at 576. Instead, Beijing tends to express its discontent with more tempered rhetoric so as not to question the overarching legitimacy of the DSB. *Id.*

117. *See Granger, supra* note 24, at 532 (“States are aware of the importance of maintaining healthy long-term relations because they understand their trade prospects are integrally linked to their economic welfare.”).

118. *See supra* notes 114–16 and accompanying text.

119. Granger, *supra* note 24, at 532. For a discourse on a method for analyzing an the perceived legitimacy of an international tribunal or, in this case, an international dispute settlement body, see Laurence Helfer



channeled so as to preserve the longevity of the DSB. Both the United States and China thus have a sufficient vested interest in the DSB beyond any single dispute, with behavioral responses skewed toward compliance as well as an instilled reticence to indict any one DSB determination as perversely flawed or illegitimate.

As China attempts to project its brand as an international power on a “peaceful rise,”<sup>120</sup> it must employ tools other than its military might to advance this image. Professor Joseph Nye articulates that nations can exert influence and advance interest through the use of “soft power.”<sup>121</sup> Nye defines soft power as “us[ing] a different type of currency (not force, not money) to engender cooperation—an attraction to shared values and the justness and duty of contributing to the achievement of those values.”<sup>122</sup> The DSB is a forum from which the Chinese government can project both its legal acumen and willingness to engage international organizations as a soft power.<sup>123</sup> As a component of the peaceful-rise strategy, China is better able to protect its interests from within the WTO than challenging its legitimacy.<sup>124</sup> The People’s Republic has demonstrated that it is making a good faith effort to adhere to the rules of the international system and to provide more transparency for its actions. Even when China loses an argument in the DSB, it continues to hone its litigation skills and demonstrates an investment in the long-term viability of the DSB.<sup>125</sup> This is particularly important when China

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& Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 284–85 (1997).

120. See Hsieh, *supra* note 39, at 375 (“China’s participation in the WTO demonstrates the nation’s willingness to engage the global economic order and is consistent with the country’s foreign policy mantra of ‘peaceful rise.’”); see also Tong Qi, *China’s First Decade Experience in the WTO Dispute Settlement System: Practice and Prospect*, 7 ASIAN J. WTO & INT’L HEALTH L. & POL’Y 143, 169 (2012) (“China has self-managed its international image as a ‘trustworthy and responsible great power.’”).
121. JOSEPH S. NYE, JR., *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS* 5–6 (2004); see also DAVID SHAMBAUGH, *CHINA GOES GLOBAL: THE PARTIAL POWER* 207–68 (2013) (discussing and interpreting the status of China’s soft-power efforts).
122. NYE, *supra* note 121, at 7; see also Qi, *supra* note 120, at 169 (“China is becoming more and more influential abroad by advancing its ‘soft power,’ which refers to a nation winning influence abroad by persuasion and appeal rather than by threats or military force.”).
123. See Manjiao, *supra* note 22, at 48 (describing China’s growing activity in the DSB as a “manifestation of its growing soft power”).
124. Kennedy, *supra* note 22, at 572.
125. See Ji & Huang, *supra* note 36, at 30 (detailing that through both offensive and defensive cases in the DSB, China has “obtained substantial experience” and has bolstered its knowledge on the rule-based system of the DSB).

complies with an adverse ruling, demonstrating the validity of the DSB and projecting to other trading partners that compliance is required.<sup>126</sup> This ensures that China can utilize the DSB in order to advance its own interests and to get other trading partners, like the United States, to alter policies that are unfavorable to the Chinese economic system.<sup>127</sup>

One extension of this soft-power aspiration is the effect that active participation in DSB litigation has on the development of China's legal institution, both specifically within WTO disputes as well as the spillover effect to other Chinese legal forums. When China entered the WTO in 2001, its domestic legal capabilities were brought under harsher scrutiny. China was obligated to reform its legal system as a prerequisite to WTO accessions, demonstrated through the promulgation of myriad laws that aimed to bolster an anemic legal system.<sup>128</sup> At that time, China's legal profession was woefully underdeveloped in both experience and domestic reverence, having nearly nonexistent exposure to international dispute settlement systems.<sup>129</sup> Beijing was faced with the daunting task of confronting the WTO system's sharp learning curve.<sup>130</sup> In fact, some observers have speculated that China's legal capacity deficiencies contributed to its hesitation during the initial period after accession.<sup>131</sup> China recognized that the shortcomings of its legal system were jeopardizing its ability to effectively protect its trade interests through utilization of the DSB.<sup>132</sup> The prospect of DSB litigation serves as a catalyst for

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126. See *infra* Part III.C (discussing China's willingness to comply with an adverse ruling in *China—Intellectual Property Rights*).

127. For an example of China's successful ability to alter policies in the U.S. poultry industry, see *infra* Part III.C.

128. See Li, *supra* note 47, at 1125–26 (“The shortage in human capital was particularly acute because China was required to revise a large number of existing laws and regulations in conformity with the WTO.”).

129. See Kennedy, *supra* note 22, at 574 (“Chinese government lawyers had no prior experience of international dispute settlement, and the Chinese legal profession is small in relative terms and has a very short history.”).

130. Gao, *supra* note 37, at 147.

131. See *supra* note 47 and accompanying text.

132. China has commented on the deleterious impact that a laggard legal capacity can have on a member's ability to protect interests in the DSB. China has previously cited the lack of human capital (in the legal profession) and financial resources, in conjunction with capacity and limited process exposure, as creating a circumstance that “results in *de facto* imbalance in the participation in the dispute settlement mechanism.” Kennedy, *supra* note 22, at 574 (quoting Dispute Settlement Body, *Responses to Questions on the Specific Input of China*, TN/DS/W/57 (May 15, 2003)).

China to implement measures to bolster its legal institutional capabilities.

These measures focus on cooperation between the Chinese government and other individuals and organizations with legal knowledge beneficial for dealing with WTO dispute settlement. For example, in expanding the government's ability to account for WTO accession, the Chinese State Council established a Division of WTO Law that retains in-house lawyers with specialized knowledge of international law and the WTO system.<sup>133</sup> In addition, the Chinese government created a Permanent Mission in Geneva specifically for providing a more effective management of its DSB disputes.<sup>134</sup> Another feature is China's adamancy in seeking out scholars, legal experts, and professionals from around the world to instruct and disseminate WTO legal expertise within the Chinese government, legal profession, and universities across China.<sup>135</sup> Similarly, China has sent its legal experts abroad to study and practice international and WTO law at foreign universities and other world trade forums.<sup>136</sup> China has also fostered internal mechanisms for rapidly developing the legal acumen necessary for effective usage of the DSB, particularly through the generation of Chinese think tanks specialized in WTO law.<sup>137</sup> Finally, China built its legal experience within the WTO through participation in WTO disputes as an interested third-party

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133. Manjiao, *supra* note 22, at 30.

134. *Id.*

135. For a discussion about the extent to which China has sought to bring legal experts into China to bolster its WTO legal experience and knowledge, see *id.* at 33.

136. Howard Schneider, *U.S. Racks up Wins over China, but Spoils Are Uncertain*, WASH. POST, Aug. 9, 2012, at A11. An example of one such destination is Georgetown University's Institute of International Economic Law. *Id.*

137. A prime example of the Chinese home-grown WTO think tanks is the Shanghai WTO Affairs Consultation Center, sponsored by the Shanghai People's Municipal Government. The Shanghai WTO Center provides consulting services on legal and policy issues related to the WTO. Gong Baihua, *Shanghai's WTO Affairs Consultation Center: Working Together to Take Advantage of WTO Membership*, in *MANAGING THE CHALLENGES OF WTO PARTICIPATION* 167, 168 (Peter Gallagher et al. eds., 2005). The institution further provides "WTO-related training services," which is instrumental in disseminating broader general knowledge about China's commitments and expectations in the WTO. *Id.* The Shanghai WTO Center's services help Beijing manage WTO commitments and disputes more effectively. The institution provides notable support to both "central and regional governments in their adaptation to the WTO regime." *Id.*; see also Hsieh, *supra* note 38, at 1013–15 (discussing the role of think tanks in bridging the "information and communication gaps").

member.<sup>138</sup> In doing so, China was able to observe the process without being directly involved as a complainant or respondent. The extent to which China is dedicating human capital and financial resources to honing its WTO litigation capacity demonstrates its commitment to a high-quality legal framework.

As DSB litigation prompts China's continued internal legal development, the benefits from a stronger, more adept legal institution may transfer to other aspects of Chinese society as well as China's further interactions with other multilateral organizations. For one, active engagement in the international dispute settlement system can work toward strengthening the rule of law within China.<sup>139</sup> As the People's Republic dedicates more resources to the training and development of Chinese lawyers, the burgeoning legal profession has the potential to bolster other areas and forums of law within China. In acquiescing to the compulsory jurisdiction of the DSB and to WTO commitments, Beijing demonstrates the practical application of law as well as the ability of a rule-oriented dispute settlement mechanism to be a "powerful and effective way to guarantee that the laws are strictly followed by all members."<sup>140</sup> Additional benefitted institutions are the other multilateral regimes with which China interacts, both regionally and internationally. Some observers speculate that as China becomes more experienced and confident in the functioning of the DSB, this may create a shift in China's perception of other multilateral organizations.<sup>141</sup> While the WTO is the only international dispute settlement system from which China accepts compulsory

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138. Every WTO member has the right to participate in a dispute if it has a "substantial interest" in the dispute's resolution. DSU, *supra* note 6, art. 10.2. The member is permitted the opportunity to "be heard by the panel and to make written submissions to the panel." *Id.* During the initial period after China's accession, Beijing reserved the right to third-party status for most DSB disputes. *See* Ji & Huang, *supra* note 36, at 25 (noting that China reserved third-party status in every DSB panel established between August 2003 and early 2007). China was able to garner significant experience and knowledge for developing its own legal prowess with the DSB processes through the use of third-party status. *See id.* at 26 ("For the Chinese legal teams, the best way to follow and learn is to join in the practices [through third-party status] and to gather firsthand knowledge and experiences."); *see also* Qi, *supra* note 120, at 158 (discussing China's rationale for utilizing third-party status as "primarily concerned with acquiring knowledge of the system"); Hsieh, *supra* note 38, at 1034 (analyzing China's third-party participation as a low-cost means of providing China's Department of Treaty and Law lawyers and Chinese law firms with DSB expertise).

139. Manjiao, *supra* note 22, at 49.

140. *Id.*

141. *See, e.g.,* Li, *supra* note 47, at 1136 (discussing the possibility of the attitudinal shift to diffuse to "other areas of regional and global governance . . . requiring multilateral efforts").

jurisdiction, the positive experience within the DSB may foster a broader acceptance of multilateralism in Beijing that transcends to other multilateral organizations.

These indirect benefits provide both the United States and China with hefty incentives for maintaining a strategy of using DSB litigation to resolve trade frictions. First, the DSB serves as an outlet through which the governments in both countries can vent domestic frustration. Being a legal intermediary aids in bolstering the legitimacy of reform efforts in China while also diffusing the political frustrations surrounding such reforms. Second, the DSB helps to stymie the desire to engage in tit-for-tat trade battles through the use of channeled behaviors as both nations realize that future litigation means a routinized compliance system. Third, accepting the DSB's compulsory jurisdiction as an international dispute settlement body helps China project its soft-power presence within the global community. Finally, China's involvement within DSB litigation fosters the development of Beijing's legal capacity in regard to WTO litigation, the legal profession in China, and other multilateral regimes in which China is engaged.

*C. Compliance as an Indicator of Acceptance: U.S.—Poultry and China—Intellectual Property Rights*

The comprehensive compliance features of the DSB are one of the most important innovations of the WTO system, providing an enforcement mechanism within the international trading sphere.<sup>142</sup> While this Note recognizes that the DSB's enforcement mechanisms are far from perfect, the DSB does provide an invaluable tool for stabilizing the international economic system.<sup>143</sup> This Note advances the argument that compliance with DSB determinations through implementation is an indicator of a state's willingness to accept the

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142. Article 21 of the DSU highlights the importance of compliance, recognizing that “[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.” DSU, *supra* note 6, art. 21.1. The DSU implements a number of methods for monitoring and enforcing compliance with panel and Appellate Body determinations. For one, the DSU institutes a surveillance system for monitoring a state's compliance through a framework of specific deadlines. *Id.* art. 21.3. If these methods are unable to produce compliance, the DSU provides for targeted retaliation aimed at removing the noncompliant measures. *See supra* notes 74–75, 78 and accompanying text.

143. *But see* MERRILLS, *supra* note 9, at 230 (“[W]hile the DSU is generally good at generating adopted reports, securing their implementation, particularly in sensitive or controversial cases, may be subject to considerable delay. One reason . . . is that the system described above provides cost-free opportunities for foot-dragging by the losing party.”).

legitimacy of the DSB.<sup>144</sup> A state's compliance illustrates its recognition of the underlying principles of the DSB, and the implementation reaffirms the state's dedication to the long-term sustainability of the dispute settlement system.<sup>145</sup> Thus, a state's compliance record on adverse rulings serves as an effective mechanism for evaluating a state's commitment to resolving trade frictions through the DSB.<sup>146</sup>

In terms of compliance records for disputes between the United States and the People's Republic, the record of cases reaching either panel or appellate determinations is relatively limited. As of April 2013, five of the eight disputes China initiated as complainant had reached some determinative level.<sup>147</sup> The limited scope is more apparent in the number of disputes reaching panel or appellate determination when the United States initiates as a complainant—seven out of fifteen cases.<sup>148</sup> Since China's accession to the WTO in 2001, the Chinese government has often preferred to negotiate a settlement to the WTO dispute prior to the submission of the DSB determination.<sup>149</sup> A complete summary of all cases between Beijing and Washington would be unnecessary for the purposes of this Note. Instead, an analysis of two representative disputes in which both countries faced adverse rulings provides a beneficial insight into the United States' and China's approaches to DSB compliance.

In *U.S.—Poultry*, China requested a panel determination to challenge the United States' measure concerning China's access to the U.S. market for poultry.<sup>150</sup> The measure at issue was section 727 of the Omnibus Appropriations Act of 2009,<sup>151</sup> which prohibited the use of funds from the act to “establish or implement a rule allowing

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144. Because this Note focuses on litigation between the United States and China within the Dispute Settlement Body, analysis of China's compliance with commitments not brought before the DSB are beyond its scope (specifically, compliance with China's Accession Protocol requirements).

145. *See, e.g.*, Kennedy, *supra* note 22, at 580 (calling compliance and implementation the “ultimate test” for a state's acceptance of the WTO's rule-oriented system).

146. *Id.*

147. *Chronological List of Disputes Cases, supra* note 55.

148. *Id.*

149. *See, e.g.*, *China—Value-Added Tax on Integrated Circuits*, WT/DS309 (Oct. 5, 2005) (mutually agreed solution); *China—Measures Affecting Financial Information Services and Foreign Financial Information Suppliers*, WT/DS373 (Dec. 4, 2008) (agreement through Memorandum of Understanding).

150. *U.S.—Poultry, supra* note 4, ¶ 2.1.

151. Pub. L. No. 111-8, 123 Stat. 524 (2009).

poultry products to be imported” into the United States from China.<sup>152</sup> The provision constructively prevented Chinese poultry from being reimported into the United States after the U.S. Department of Agriculture (USDA) had determined that China was once again eligible to export poultry product to the United States.<sup>153</sup> This USDA determination removed the total ban on Chinese poultry that was imposed in response to the avian flu epidemic in 2004.<sup>154</sup>

China put forward a number of claims under various WTO-covered agreements, including Articles I and XI of the 1994 GATT Agreement on Agriculture and the Sanitary and Phytosanitary (SPS) Agreement.<sup>155</sup> The Panel in *U.S.—Poultry* held, with regard to the most important issues, that section 727 was inconsistent with U.S. obligations under GATT<sup>156</sup> and the SPS Agreement.<sup>157</sup> Furthermore, the Panel rejected the United States’ assertion of Article XX(b) of the GATT 1994 that claimed the measure was enacted in order to “protect human and animal life and health from the risk posed by the importation of poultry products from China.”<sup>158</sup> Despite the dispute involving an important national issue—health and safety—the United States did not appeal the determination. In fact, as the Panel noted, the measure in contest expired two days after China submitted its first written submission.<sup>159</sup> Although the measure expired prior to the Panel report, the dispute still provides a valuable insight into the United States’ approach to compliance with adverse DSB rulings involving China. The Panel addressed the fundamental issue of whether it was able to rule on an expired measure, illustrating the impact on compliance concerns. The Panel noted that the inconsistent measure was a component of an annual U.S. appropriations legislation; in fact, the inconsistent language was a reiteration of a previous appropriations provision.<sup>160</sup> Since the United States never conceded that the measure was inconsistent with its WTO obligations, without a DSB determination, the United States could have “easily re-imposed” the offending measure.<sup>161</sup> While this dispute

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152. *Id.* ¶ 2.2.

153. Ji & Huang, *supra* note 36, at 8.

154. *Id.*

155. *U.S.—Poultry*, *supra* note 4, ¶ 7.59.

156. *E.g.*, *id.* ¶ 7.441 (finding the measure inconsistent with Article I:1 of the GATT 1994).

157. *E.g.*, *id.* ¶¶ 7.204, 7.294 (finding the measure inconsistent with Articles 5.1, 5.2, and 5.5 of the SPS Agreement).

158. *Id.* ¶¶ 7.458, 7.483.

159. *Id.* ¶ 7.51.

160. *Id.* ¶ 7.55.

161. *Id.*

did not require the United States to take any proactive step in removing the offending measure, the DSB determination established the inconsistency of such a provision in future legislation. The United States demonstrated its willingness to comply with the Panel's determination through the continued omission of a similar provision in subsequent annual appropriations legislation.

Similarly, China was faced with an adverse panel ruling in 2008 over intellectual property rights protections.<sup>162</sup> The Panel analyzed three claims the United States brought against China under the TRIPS Agreement.<sup>163</sup> The United States challenged several Chinese measures, or lack thereof, including: (1) a lack of adequate thresholds for “criminal procedures and penalties to be applied in cases of wilful [sic] trademark counterfeiting or copyright piracy on a commercial scale”;<sup>164</sup> (2) “China's measures for disposing of confiscated goods that infringe intellectual property rights”;<sup>165</sup> and (3) “denying” the protection of its Copyright Law to creative works of authorship” for works not authorized for publication or distribution within China.<sup>166</sup>

The Panel in *China—Intellectual Property Rights* presented a detailed assessment of each claim's individual legality. With regard to the first issue on criminal thresholds, the Panel determined that the United States had not established any inconsistency in China's measure.<sup>167</sup> The Panel found in favor of the United States on the other two issues concerning customs measures<sup>168</sup> and the Copyright Law.<sup>169</sup> The Panel recommended “pursuant to Article 19.1 of the DSU that China bring the Copyright Law and the customs measures into conformity with its obligations under the TRIPS Agreement.”<sup>170</sup>

In response to the Panel's determination, China informed the DSB that it would comply with the Panel's recommendations.<sup>171</sup> Here, as with the United States in *U.S.—Poultry*, China did not appeal the Panel's ruling. China implemented internal changes to both measures

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162. See *supra* note 93 and accompanying text.

163. *China—Intellectual Property Rights*, *supra* note 5, ¶¶ 2.2-2.4; see *supra* note 94 and accompanying text.

164. *China—Intellectual Property Rights*, *supra* note 5, ¶ 2.2.

165. *Id.* ¶ 2.3.

166. *Id.* ¶ 2.4.

167. *Id.* ¶ 7.669.

168. *Id.* ¶ 7.395(c).

169. *Id.* ¶ 7.191.

170. *Id.* ¶ 8.4.

171. Communication from China, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/11 (Apr. 15, 2009).



found inconsistent with China's TRIPS Agreement obligations. China notified the DSB that the Standing Committee of the Eleventh National People's Congress had adopted an amendment to the Copyright Law to bring the measure into conformity.<sup>172</sup> In addition, the State Council of the People's Republic amended the customs measures in order to comply with the remainder of the Panel's recommendations.<sup>173</sup> Subsequently, on April 20, 2010, China notified the DSB that it was compliant with regard to all measures found inconsistent in *China—Intellectual Property Rights*.<sup>174</sup> This case indicates China's willingness to comply with the adverse rulings and bring its inconsistent measures into conformity with its WTO obligations.

While the cases discussed demonstrate a good record on DSB compliance from the United States and China, *U.S.—Poultry* and *China—Intellectual Property Rights* represent a small body of available DSB-compliance cases between the two nations. Many allege that the United States is a notoriously noncompliant state within the WTO because the United States has repeatedly been accused of delaying compliance.<sup>175</sup> However, when faced with adverse rulings in disputes with China, the United States has maintained a better compliance record, although not always through routine means of implementation.<sup>176</sup> For China, many scholars laud its compliance record within the DSB as one demonstrating a "responsible attitude toward its international obligations."<sup>177</sup> In terms of additional

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172. Status Report Regarding Implementation of the DSB Recommendations and Rulings in the Dispute by China, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/14/Add.2 (Mar. 9, 2010).

173. Kennedy, *supra* note 22, at 581.

174. Ji & Huang, *supra* note 36, at 19 (citing Dispute Settlement Body, *Minutes of Meeting*, ¶ 82, WT/DSB/M/282 (Apr. 20, 2010)).

175. *See id.* at 4 n.9 (citing a representative example of U.S. delayed compliance).

176. *See, e.g.*, Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R (Mar. 11, 2011) (implementing the determination on August 13, 2012, with no compliance proceeding initiated); *see also* Ji & Huang, *supra* note 36, at 4 (discussing the United States' removal of the disputed measures in *U.S.—Steel Safeguards* only days before the adoption of the DSB report).

177. Qi, *supra* note 120, at 169; *see also, e.g.*, Manjiao, *supra* note 22, at 37 (discussing China's "positive attitude toward WTO dispute settlement"); Kennedy, *supra* note 22, at 588 (praising China for not "challeng[ing] the authority of the WTO dispute settlement system or attempt[ing] to frustrate the procedures"); Malawer, *supra* note 89, at 32 (acknowledging that China has been "playing by the rules of the

compliance instances, both nations have notified the DSB of the implementation of two adverse panel determinations in 2013; one against China (*China—Electronic Payment Services*)<sup>178</sup> and one against the United States (*U.S.—Shrimp and Sawblades*).<sup>179</sup> In both cases, the losing party informed the DSB that it intends to comply with the determination, implementing the recommendations within the negotiated reasonable period of time deadline under Article 21.3(b) of the DSU.<sup>180</sup> If the trend toward increased usage of the DSB to resolve U.S.-Sino trade frictions continues, the record of disputes reaching either panel or appellate determinations should increase in frequency.<sup>181</sup> Ultimately, this will provide a greater sample size for determining the degree to which the United States and China are willing to implement adverse rulings. If either nation consistently fails to implement determinations in the future, the viability of the DSB to resolve trade frictions may be jeopardized because noncompliance may instigate reciprocal noncompliance from the other nation.

*D. Less Appealing Alternatives to the Dispute Settlement System*

One of many factors inducing China and the United States to engage one another in the DSB is that alternative mechanisms for alleviating trade frictions are not as alluring. First, bilateral negotiations present a number of obstacles that can prove ineffectual

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international trading system [which] indicat[es] a growing support of that system”).

178. Panel Report, *China—Certain Measures Affecting Electronic Payment Services*, WT/DS413/R (July 16, 2012).

179. Panel Report, *U.S.—Anti-Dumping Measures on Shrimp and Diamond Sawblades from China*, WT/DS422/R (June 8, 2012).

180. On July 11, 2013, China notified the DSB of its implementation of the Panel’s determination in *China—Electronic Payment Services*. Status Report Regarding Implementation of the DSB Recommendations and Rulings in the Dispute by China, *China—Certain Measures Affecting Electronic Payment Services*, WT/DS413/9/Add.1 (July 12, 2013). Likewise, the United States notified the DSB on March 14, 2013 of its implementation of the adverse ruling in *U.S.—Shrimp and Sawblades*. Status Report Regarding Implementation of the DSB Recommendations and Rulings in the Dispute by the United States, *United States—Anti-Dumping Measures on Certain Shrimp and Diamond Sawblades from China*, WT/DS422/8/Add.1 (Mar. 15, 2013).

181. Two disputes initiated by China are currently in the panel stage of the DSB process. *Chronological List of Disputes Cases*, *supra* note 55. On the other hand, the United States has five disputes against China in the consultation and panel stages of the DSB. *Id.* If these disputes ultimately result in a DSB determination, the resulting implementation efforts will illuminate whether the United States and China, when faced with more potential adverse rulings, will continue to maintain a good compliance record.

at resolving complex and politically sensitive trade disputes.<sup>182</sup> Trade relations between two powers are often extremely complex, especially considering the diverse expectations and interests between the United States and China. Bilateral relations have the potential to succumb to volatile national interests because multiple, complex issues are woven into inseparable political interests creating an impasse in negotiations.<sup>183</sup> Furthermore, when bilateral negotiations deteriorate, it can lead to unconstrained unilateral retaliation. Unilateral actions have the potential to spark tit-for-tat retaliation between the countries, leading to a worsened trade environment.<sup>184</sup>

Secondly, the prospects of multilateral negotiations resolving trade disputes or remedying flaws in the current system remain far from certain. While the Doha Round<sup>185</sup> of negotiations concerning further WTO development continues, little progress has been made in reaching consensus on major issues.<sup>186</sup> The Doha Round of discussions has effectively stalled, and expectations of meaningful reform do not appear reasonable in the near future. In fact, the inability of members to utilize the WTO's rule-making function to enact fundamental changes through the Doha Round further augments the role of the DSB in resolving current trade frictions.<sup>187</sup> The self-interest of invested parties can cause important issues to become intractable, reducing the efficacy of both bilateral and multilateral negotiations.

This Note recognizes that the other forms for resolving trade frictions remain useful mechanisms, which DSB litigation will not outright supplant. Instead, the role of WTO litigation as a tool with

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182. See Malawer, *supra* note 89, at 32 (discussing how bilateral trade discussions “repeatedly fail to reach accommodations”).

183. See MERRILLS, *supra* note 9, at 236 (“[T]rade disputes are complex, often involve changing economic and political interests and are capable of arousing strong national passions.”).

184. See Bown, *supra* note 37, at 42–43 (examining the retaliatory events that can follow U.S. Congressional unilateral action against China and the deleterious effects of those actions). In addition to the damage to economic factors, unilateral action also imposes a burden to demonstrate the legal basis for the restriction within the international community. *Id.* at 42.

185. Launched in 2001, the Doha Round “is the latest round of trade negotiations among the WTO membership. Its aim is to achieve major reform of the international trading system through the introduction of lower trade barriers and revised trade rules.” *The Doha Round*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/tratop\\_e/dda\\_e/da\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/da_e.htm) (last visited Nov. 8, 2013).

186. See, e.g., Malawer, *supra* note 89, at 32 (noting that the “multilateral negotiation process of rule-making” has become “bogged down” in the Doha Round of negotiations).

187. Kennedy, *supra* note 22, at 572.

which to mollify trade frictions is expanding within the framework of U.S.-Sino relations.<sup>188</sup> The WTO dispute settlement mechanism is particularly important when bilateral negotiations break down, requiring another intermediary to mitigate the trade frictions.<sup>189</sup> As trade frictions between the United States and China proliferate, the unique position of the DSB as a compulsory international dispute settlement body provides both countries with a viable—and perhaps preferred—method of handling trade issues.

#### IV. LIMITATIONS TO THE THEORY

As with any mechanism for resolving disputes between diverse parties, the efficacy and viability of the DSB is subject to limitations. One limitation is the particular political conditions that can prove to be extremely volatile.<sup>190</sup> Another limitation is that the system can only be effective insofar as both the People's Republic and the United States continue to subjectively believe the DSB is legitimate, fair, and impartial.<sup>191</sup> The involved parties must have confidence in the dispute settlement process for the benefits discussed in Parts III.A and III.B to accrue and for the DSB to have long-term success.<sup>192</sup> If either

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188. While the statements of the U.S. Trade Representative on China's WTO Compliance demonstrate a commitment to traditional bilateral and multilateral methods, they also express the United States' willingness to use the DSB without hesitation. *Compare* U.S. TRADE REP., 2012 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE 12 (2012) ("The [U.S.] Administration will use all available tools to achieve these objectives, including the pursuit of productive, outcome-oriented dialogue in both bilateral and multilateral settings . . . ."), *with id.* ("At the same time, as the United States has repeatedly demonstrated, when dialogue is not successful in resolving WTO-related concerns, the United States will not hesitate to invoke the dispute settlement mechanism at the WTO where appropriate.").

189. *See id.* at 23 (noting that when bilateral negotiations failed to remedy the United States' concerns, the United States utilized the DSB to hold China accountable for adherence to WTO rules); *see also* *Hearing Before the Cong.-Exec. Comm'n on China*, *supra* note 99, at 45 ("A common WTO 'rule book' and an impartial body in Geneva have helped the two sides resolve differences when dialogue fails.").

190. *See supra* note 183; *see also, e.g.*, Ji & Huang, *supra* note 36, at 37 (discussing the potentially harmful effect of politically sensitive issues on China's "prompt and proper" compliance); Kennedy, *supra* note 22, at 574 ("The sensitivity in China regarding some of the issues . . . is illustrated by the fact that access to the International Economic Law and Policy blog, well-known in WTO circles around the world, was blocked in China for a time.").

191. *See* Bown, *supra* note 37, at 43 (discussing the possibility that, if the system is perceived as unfair, there could be "calls" for China to withdraw from the DSB).

192. *See supra* notes 112–19 and accompanying text.

country begins to feel as though it is the target of arbitrary or capricious DSB determinations, the country's willingness to utilize the dispute settlement mechanism may drastically wane.<sup>193</sup> Furthermore, persistent noncompliance with DSB determinations, from either Washington or Beijing, may undermine the DSB's legitimacy and cause a reciprocal pattern of noncompliance.<sup>194</sup> Persistent noncompliance would have a rippling effect throughout the WTO as an effective enforcement mechanism is necessary to protect and ensure the commitments and expectations of member states.

The extreme of these limitations is that either China or the United States could lose *complete* faith in the DSB. This result would diminish the DSB's long-term effectiveness as countries refuse to resort to WTO litigation. Such diminishment would be evidenced by: (1) plummeting compliance rates, (2) more unilateral trade retaliations, and (3) increased potential for a full-blown trade war. While the extreme scenario is highly improbable, both countries should be wary of the potential for a slippery slope of system abuse. Although the increased litigation between the United States and China in the DSB has effectively managed trade frictions between the parties, bestowing both direct and indirect benefits, the operation of the DSB as an international dispute settlement mechanism is subject to potential erosions in legitimacy.<sup>195</sup>

## CONCLUSION

Ever-expanding global trade relations have spawned highly contentious disputes between the United States and China, two of the world's most powerful economic juggernauts. The volatility of these

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193. Bown, *supra* note 37, at 43; *see also* MERRILLS, *supra* note 9, at 236 (“[A]n insistence on established rules can only be effective if the rules in question are not only interpreted competently, but also regarded as appropriate, and as such command general acceptance.”).

194. *See* Kennedy, *supra* note 22, at 587 (warning of the danger that China may view “past and present cases of non-compliance” as the status quo and change its implementation approach to mimic the perceived normative practice).

195. Laurence Helfer & Anne-Marie Slaughter analyzed the importance of legitimacy in supranational adjudication as the ability to “command acceptance and support from the community.” Laurence Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 284 (1997) (quoting ARCHIBALD COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 103 (1976)). The erosion of the DSB's legitimacy can occur through a number of events dealing with members' perception of the institution (for example, loss of impartiality; flawed decision making, either in principle or reasoning; and lack of consistency in DSB determinations). *Cf. id.* at 284 (describing some of the “formulations of the sources of judicial legitimacy”).

disputes has caused numerous observers to opine that trade frictions could devolve into an outright trade war. The United States and China have demonstrated a willingness to utilize the DSB and its rule-oriented structure to mitigate the harmful effects of possible trade warfare. While the design of the DSB is not perfect, its institutional structure provides a number of direct benefits that induce member participation. This Note examined how these direct benefits ensure a stable economic environment through a highly regulated remedy structure, an appellate system to serve as a legal safeguard, and an independent quasi-judicial body to diminish political unpredictability on issue determination. Aside from these institutional benefits, the indirect benefits that both Washington and Beijing accrue help explain the surge in desire to resort to DSB litigation. For one, both the U.S. and Chinese governments can garner political protection from utilizing the DSB as an intermediary through which to release domestic frustrations. Additionally, the DSB also assists in channeling member behavior toward a long-term investment in the international economic system, projecting soft power, and building the Chinese legal capacity. The attractiveness of DSB litigation continues to grow as other mechanisms for resolving trade frictions fail to provide suitable resolution, including both bilateral and multilateral negotiations. This Note examined the dedication of both the United States and the People's Republic to the long-term viability of the system through an analysis of compliance with DSB determinations. In both *U.S.—Poultry* and *China—Intellectual Property Rights*, the countries accepted the recommendations of the DSB and brought the offending measures into conformity with WTO obligations

Ultimately, both the United States and China must devote great care and attention to the management of DSB litigation. The United States must be wary of vilifying China when trade frictions arise; such a perception can foster anti-Chinese sentiment which can lead to protectionist measures. The growth in protectionist measures predicated on domestic ire will frustrate the effective operation of the DSB and diminish the direct and indirect benefits that the organization provides. The United States should recognize the significance of China's willingness to resolve trade frictions through a compulsory, third-party intermediary. Although litigation is adversarial in nature, the United States would benefit from a stronger Chinese confidence in international dispute settlement systems.

While the DSB is providing a means of resolving tense trade issues, the efficacy and legitimacy of the system is predicated on the United States' and China's perceptions of the DSB's fairness, impartiality, and legal quality. Although some commentators interpret the increased DSB litigation as foreshadowing an impending trade war, the discourse must be transformed into a broader scrutiny of the role of the DSB and the approach that the United States and

China have taken toward trade disputes. With responsible management of DSB litigation, the countries are able to benefit from the existence of a highly functioning international legal forum. As illustrated by DSB interactions since China's accession to the WTO, the United States and the People's Republic have much to gain from the usage of the DSB to resolve contentious trade frictions and would do well to maintain such an advantageous system.

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