SAFEGUARDING AMERICAN INGENUITY: A COMPARATIVE ANALYSIS OF INTERNATIONAL TRADE REGIMES IN MITIGATING CHINESE INTELLECTUAL PROPERTY THEFT

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ABSTRACT

The ever-present tension between the United States and China has heightened in recent years due to a rise in the theft of American intellectual property from Chinese semiconductors. Pharmaceutical intellectual property is at the crux of this issue, as a hit to this valuable market comes with severe penalties for the United States. Neither legislation from the World Trade Organization nor the more recent Phase One Trade Deal can present a viable solution for this issue, resulting in the need for a structural rebirth in international trade legislation. Previous discussions on this issue have touched on the need to rebalance the TRIPS Agreement and reassess the United States' trade relationship with China. These arguments do not clarify the need to reformat the WTO as a whole and recognize the institution for what it is—a system that was not created to support the levels of

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innovation and technology that exist today; a system that certainly did not account for China's contrasting market structure. This paper examines a new dynamic goal that would require 1) the WTO to hold China fiscally and criminally responsible for its unfair market practices; 2) the United Nations to create a new, encompassing multilateral trade agreement in the future; and 3) the United States to develop a concrete plan to decouple from China.

I. INTRODUCTION

The flow of international trade is crucial for a successful global economy to operate and flourish, as trade contributes heavily to global efficiency.[1] Trade is the vessel through which countries can capitalize on their most successful goods and services, allowing for the highest levels of productivity in creating and selling their products.[2] The United States has had a long-standing gripe with China because of its reputation for intellectual property theft, resulting in the recent formation of a new trade agreement, Phase One, that was meant to enforce China's trade practices regarding intellectual property rights.[3] This theft is causing major issues in American industries; in 2022 alone, it is estimated that a single Chinese hacking operation siphoned millions of dollars of intellectual property from the American pharmaceutical sector.[4] Pharmaceutical information is an extremely sensitive type of intellectual property due to the nature of the field—pharmaceutical companies cannot research and develop the life-saving medicines they create if they do not have the secure knowledge that their inventions will be protected properly.[5] The Phase One agreement, along with previous legislation from the World Trade Organization ("WTO"), is now being criticized for its failure to protect the United States' intellectual property.[6]

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1 Brad McDonald, *International Trade: Commerce Among Nations*, INT'L MONETARY FUND, https://www.imf.org/en/publications/fandd/issues/series/back-to-basics/trade (last visited Feb. 20, 2025).

2 *Id.*

3 Victoria Huang, *U.S.-China Intellectual Property Issues in a Post-Phase-One Era*, NAT'L BUREAU ASIAN RSCH. (Jan. 29, 2022), https://www.nbr.org/publication/u-s-china-intellectual-property-issues-in-a-post-phase-one-era/.

4 *Chinese IP Theft Report*, CYFIRMA (June 30, 2023), https://www.cyfirma.com/outofband/china-ip-theft-report/#:~:text=in%202022%2c%20a%20single%20multifaceted,manufacturing%2c%20energy%20and%20pharmaceutical%20sectors.

5 Roy Bodem, *Pharmaceutical Patent Profits Facilitate Innovation*, https://www.mckendree.edu/academics/scholars/issue11/bodem.htm#:~:text=pharmaceutical%20companies%20have%20the%20ability,developing%20their%20new%20drug%20worthwhile (last visited Feb. 20, 2025).

6 *Id.*

The United States is currently involved in two major trade agreements.[7] The first of these is through legislation from the World Trade Organization, originally called the General Agreement on Tariffs and Trade ("GATT").[8] This agreement was originally signed by twenty-three countries at the Palais des Nations in Geneva in 1947, and it now encompasses 128 member nations.[9] The GATT treaty has gone through several rounds of negotiations since its creation in the 1940s.[10] Originally, the agreement did not include provisions protecting intellectual property rights.[11] This matter was altered during the Uruguay round of negotiations, creating the largest international trade agreement thus far.[12] This new agreement, dubbed the Trade-Related Aspects of Intellectual Property Rights ("TRIPS"), was created within the framework of the GATT treaty and finalized in 1994.[13] TRIPS established a set of standards for intellectual property trade, becoming one of the three pillars of World Trade Organization legislation, next to the standards for the trade of goods and the trade of services.[14]

The second of these agreements is referred to as the U.S.-China Phase One Trade Deal ("Phase One").[15] This deal was created to reform the United States' trade relationship with China; however, Phase One has faced many criticisms and tribulations since it was signed by President Trump in January 2020.[16] The deal encompasses several intellectual property protections, which strengthened and reinforced barriers against intellectual property theft from China that had not been enforced by prior trade agreements.[17]

To evaluate both the benefits and the downsides of each of these trade agreements and the degree to which they are successfully aiding in the protection of American intellectual property, this Note will begin by providing background information on each trade agreement and the benefits it was meant to provide to the

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7 Bodem, *supra* note 5.

8 *Press Brief Fiftieth Anniversary of the Multilateral Trading System*, WTO, https://www.wto.org/english/thewto_e/minist_e/min96_e/chrono.htm#:~:text=once%20a%20system%20involving%2023,the%20protection%20of%20patents%2c%20trademarks (last visited Apr. 6, 2025); GATT 1994: General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994].

9 *Id.*

10 *Id.*

11 *Id.*

12 DEP'T OF TRADE AND INDUS., The Uruguay Round of Multilateral Trade Negotiations 1986–94, 1994, HMSO, Cm. 2579, at 15–18 (UK).

13 *Id.*

14 MATTHEW KENNEDY, WTO DISPUTE SETTLEMENT AND THE TRIPS AGREEMENT: APPLYING INTELLECTUAL PROPERTY STANDARDS IN A TRADE LAW FRAMEWORK (Cambridge Univ. Press 2016); *Overview: the TRIPS Agreement*, WTO, https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last visited Feb. 20, 2025).

15 *Id.*

16 VIRGIL BISIO ET AL., U.S.-CHINA ECON. AND SEC. REV. COMM'N, THE U.S.-CHINA "PHASE ONE" DEAL: A BACKGROUNDER (2020).

17 *Rebalancing United States-China Trade*, U.S.-CHINA: PHASE ONE TRADE AGREEMENT, https://ustr.gov/phase-one#:~:text=the%20phase%20one%20economic%20and,and%20pharmaceutical%2drelated%20intellectual%20property (last visited Feb. 20, 2025).

countries it encompasses, highlighting the differences of each piece of legislation. This Note will then directly compare the two trade agreements, analyzing the ways in which each set of trade rules and regulations positively and negatively impacts the United States' pharmaceutical intellectual property. Lastly, it will end with a conclusion detailing what we know so far about the future of intellectual property trade laws that involve the United States. This section will also include a commentary about what future changes could be made to benefit the current trade legislation in the World Trade Organization and within the Phase One treaty that would further benefit intellectual property protections.

II. BACKGROUND

A. The History of Trade in the United States

The modern history of international trade relationships involving the United States starts with the Reciprocal Trade Agreements Act.[18] The Act was signed in 1934 during President Roosevelt's administration as a way to try and help the country's economy during the Great Depression.[19] This agreement was brought in during a time in which the United States had very high tariffs set on its imports.[20] Because there was no uniform agreement that defined the acceptable rules for tariffs, there were several barriers to international trade.[21] After the agreement was incorporated into the framework of American trade, several limitations to international trade were diminished.[22] Tariffs were finally lowered or completely thrown away on most goods, allowing for an increase in cooperation when trading with foreign countries.[23]

Following the Act, the next major step for the United States in advancing its placement in the arena of international trade was to join the General Agreement on Tariffs and Trade ("GATT").[24] The GATT treaty was formed to create reciprocally advantageous trade agreements aimed at reducing tariffs and obstacles to trade between the governments of Australia, Belgium, Brazil, Burma, Canada, Ceylon, Chile, China, Cuba, the Czechoslovak Republic, the French Republic, India, Lebanon, Luxemburg, the Netherlands, New Zealand, Norway, Pakistan, Rhodesia, Syria, South Africa, Great Britain, Northern Ireland, and America.[25] The

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18 *U.S. Trade Policy since 1934*, INV. NO. 332-325, USITC Pub. 4049 (Aug. 2009) (sixth update).

19 *Eighty Years After the Reciprocal Trade Agreements Act*, Inv. No. 332-325, USITC Pub. 4049 (Aug. 2009) (sixth update).

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.*

24 GATT 1994, *supra* note 8.

25 *Id.*

treaty was signed in October of 1947 after negotiations between the several governments.[26]

The treaty was originally meant to be used as an interim solution after World War II that would eventually be overtaken by a United Nations agency.[27] An agency was never formed, allowing the treaty to grow in importance.[28] The GATT treaty remained the primary set of rules and structure for international trade until 1995 when the World Trade Organization ("WTO") was created.[29] The WTO is now the governing body for trade regulation, but the GATT treaty is still the umbrella treaty under which most trade in goods is governed for the 125 countries that had signed it by 1995.[30] The treaty was expanded upon when the WTO was formed, covering more services and intellectual property matters.[31]

The most prominent principle in the treaty was to enforce equal trade opportunities between the countries.[32] This meant that trade would be open to each member nation equally and fairly, automatically reducing tariffs for every member if reduced for one member.[33] Additionally, the treaty requires uniform regulations at customs.[34] This ideal is one otherwise known as trade liberalization: the removal and reduction of restrictions and barriers on the exchange of goods between nations.[35] Overall, it is generally believed that trade liberalization has positively impacted the United States, allowing the country to gain more than it could have with restrictions and tariffs.[36]

Most recently, the United States entered into the U.S.-China Phase One trade agreement in 2020.[37] This agreement was created in part to resolve the issues created by China's recurring intellectual property theft of American products, just one of the many contentions that have historically run between the United States and China.[38]

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26 GATT 1994*, supra* note 8.

27 *Id.*

28 *Id.*

29 *U.S. Trade Policy since 1934*, *supra* note 18.

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.*

34 *U.S. Trade Policy since 1934*, *supra* note 18.

35 Caroline Banton, *Trade Liberalization: Definition, How It Works, and Example*, INVESTOPEDIA, https://www.investopedia.com/terms/t/trade-liberalization.asp (last updated Feb. 4, 2025).

36 *Id.*

37 BISIO ET AL., *supra* note 16.

38 Noah Berman & Anshu Siripurapu, *The Contentious U.S.-China Trade Relationship*, COUNCIL ON FOREIGN REL., https://www.cfr.org/backgrounder/contentious-us-china-trade-relationship (last updated May 14, 2024, 3:15 PM).

1. The History Behind the United States' Relationship with China

The contentious trade relationship between the United States and China can be traced back to the late 1970s.[39] After the People's Republic of China was established during the 1949 Chinese Communist Revolution, the United States and China had a near inexistent trade relationship.[40] China had removed itself from the GATT system, eliminating its routes of trade with several nations.[41] Nearly 40 years later, its general relationship with America was reinstated when China rehabilitated its relationship with the United States in the One-China Policy.[42]

Shortly thereafter, China informed the GATT system that it wanted to rejoin the organization as a contracting party in 1986.[43] During this time, China began a reform system that created a major impact on its economy, boosting its trade income by sixty billion dollars in the span of ten years.[44] Continuing into the early 2000s, China further reformed its trade regime to join the World Trade Organization ("WTO") in December of 2001.[45] As a condition of being admitted to the WTO, China agreed to a slew of economic reforms.[46] Reforms within this accession agreement included intellectual property protections, as well as an agreement that China would increase transparency with regard to its regulations.[47] The two countries continued to argue over intellectual property provisions after China's accession to the WTO until tensions reached a boiling point in 2018.[48] At this time, the United States accused China of carrying out state-sponsored intellectual property theft with the 2018 Sec. 301 Report, filing a WTO complaint against the country for its discriminatory license operations.[49]

Following its addition to the WTO, China's trade economy rose from $100 billion to $500 billion by 2022.[50] While this created immense success for China's export market, it also created a substantial amount of problems for the United States.[51] The first among these issues was a decline in manufacturing jobs in

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39 Berman & Siripurapu, *supra* note 38.

40 *Id.*; *The Chinese Revolution of 1949*, OFF. HISTORIAN, https://history.state.gov/milestones/1945-1952/chinese-rev (last visited Feb. 20, 2025).

41 *China's accession to the WTO and its relationship to the Chinese Taipei accession and to Hong Kong and Macau*, WTO, https://www.wto.org/english/thewto_e/acc_e/chinabknot_feb01.doc (last visited Feb. 20, 2025).

42 *U.S.-China Relations*, COUNCIL ON FOREIGN REL., https://www.cfr.org/timeline/us-china-relations; Stanton Jue, *The "One China" Policy: Terms of Art.*, 13 AM. J. CHINESE STUD., 79, 80 (The One-China policy was a joint statement that created a diplomatic relationship between China and the United States, made public on January 1, 1979).

43 *Id.*

44 *Id.*

45 Berman & Siripurapu, *supra* note 38.

46 *Id.*

47 *Id.*

48 Pratyush Nath Upreti & María Vásquez Callo-Müller, *Phase One US-China Trade Deal: What Does It Mean for Intellectual Property?*, 69 GRUR INT'L, 389, 389 (2020).

49 *Id.*

50 Berman & Siripurapu, *supra* note 38.

51 *Id.*

America.[52] This issue was attributed to the expensive costs of increasing trade with China as opposed to expanding trade with other countries.[53]

Secondly, the United States saw a rising amount of intellectual property theft by Beijing.[54] This issue began with the piracy of luxury goods and pharmaceuticals, but as time went on, it spread further into the intellectual property market.[55] The largest threat to American intellectual property today is cyber theft, defined as the counterfeiting and piracy of trade secrets and technology.[56] Now, it is estimated that America pays between $225 and $600 billion every year to cover the costs of China's theft of intellectual property.[57]

In 2020, the U.S.-China Phase One trade deal was created in part to address the burgeoning issues surrounding China's reluctance to honor intellectual property protections.[58] As further sections will detail, this agreement has only put a Band-Aid over what has grown to be a bullet hole in America's intellectual property infrastructure.[59]

B. The Creation of the WTO

In 1947, the General Agreement on Tariffs and Trade was created by the Havana Conference as a way to rebuild an economy that had been destroyed by World Wars I and II, as well as the Great Depression.[60] Additionally, the treaty was designed to be a bridge between the World Bank and the International Monetary Fund.[61] Immediately after the treaty's creation, the GATT was considered to be a provisional set of well-established rules.[62] Since then, the treaty has become more formal through negotiations.[63] From the creation of the first version of the GATT treaty to the present day, there have been eight full rounds of negotiations.[64]

The first round took place in Geneva, Switzerland, and included twenty-two contracting parties.[65] This round was called the Geneva Round of 1947 and was

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52 Berman & Siripurapu, *supra* note 38.

53 *Id.*

54 *Id.*

55 Paul Goldstein, *Intellectual Property and China: Is China Stealing American IP?*, STAN. L. SCH. (Apr. 10, 2018), https://law.stanford.edu/2018/04/10/intellectual-property-china-china-stealing-american-ip/.

56 *Id.*

57 *Id.*

58 *Id.*

59 *Id.*

60 Michael Unger, *GATT rounds: Who, what, when,* HINRICH FOUND. (Dec. 7, 2017), https://www.hinrichfoundation.com/research/tradevistas/wto/gatt-rounds/#:~:text=twenty%2dthree%20nations%20met%20in,and%20the%20elimination%20of%20discriminatory.

61 *Id.*

62 *The GATT years: from Havana to Marrakesh*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (last visited Feb. 5, 2025).

63 *Id.*

64 *Id.*

65 *Id.*

known as the first trade round.[66] Within it, the parties wrote a set of rules that included a one-fifth deduction in tariffs on world trade.[67] The second round, called the Annecy round, also took place in Geneva.[68] In this division, a group of thirteen contracting parties signed on to nearly 5,000 concessions to remove tariff duties.[69] Following this, the Torquay round was held in England with thirty-eight members of the GATT.[70] Another Geneva round was held in 1956, leading up to the Dillon round in 1960.[71] This was the last round of negotiations to focus solely on tariffs, as the following Kennedy round held from 1964–1967 addressed both tariffs and anti-dumping measures.[72]

The seventh round, called the Tokyo round, had a boost in participation with 102 countries in attendance.[73] This round was the treaty's first attempt at reforming the international trade system as a whole.[74] While this decade of negotiations was successful in reducing the average tariff on industrial products, it also had several issues.[75] For one, the negotiations could not solve the problems impacting farm trade.[76] Additionally, not all members of the GATT actually followed the agreements made during this round, resulting in a set of arrangements referred to as "codes."[77]

The eighth round, called the Uruguay round, was the most crucial set of negotiations for the purpose of this note.[78] This session was held from 1986 until 1994 and was the first round to incorporate intellectual property protections into the GATT treaty.[79] At the end of these negotiations in 1994, the TRIPS Agreement was created at the ministerial meeting in Marrakesh.[80] Additionally, this session came to be the largest international trade negotiation ever held.[81]

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66 *The GATT years: from Havana to Marrakesh*, *supra* note 62.

67 *Id.*

68 *The Multilateral Trading System: 50 years of achievement*, WTO, https://www.wto.org/english/thewto_e/minist_e/min98_e/slide_e/slide_list.htm#:~:text=the%20first%20round%2c%20with%2023,preparation%20for%20the%20havana%20conference (last visited Feb. 7, 2025).

69 *The Multilateral Trading System: 50 years of achievement*, *supra* note 68; Unger, *supra* note 60.

70 *The Multilateral Trading System: 50 years of achievement*, *supra* note 68.

71 *Id.*

72 *Id.*

73 Unger, *supra* note 60.

74 *History of GATT Rounds*, S&P GLOBAL: J. COM. (Dec. 14, 1993, 7:00 PM), https://www.joc.com/article/history-gatt-rounds_19931214.html.

75 *Id.*

76 *The Multilateral Trading System: 50 years of achievement*, *supra* note 68.

77 *Id.*

78 *Id.*

79 *Id.*

80 Peter K. Yu, *TRIPs and its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369, (2006).

81 DEP'T OF TRADE AND INDUS., *supra* note 12.

1. Intellectual Property Protections Under the WTO

The first intellectual property-related protection instituted in the Uruguay round was the Agreement on Trade-Related Aspects of Intellectual Property ("TRIPS").[82] TRIPS is a full set of rules that requires members of the World Trade Organization to "provide minimum levels of protection and enforcement for intellectual property rights."[83] The agreement sets these standards by requiring the contracting parties to comply with the World Intellectual Property Organization ("WIPO"), the Paris Convention for the Protection of Industrial Property, and the Berne Convention for the Protection of Literary and Artistic Works.[84] The WIPO convention was held in 1979 and established the World Intellectual Property Organization "to promote the protection of intellectual property throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organization, to ensure administrative cooperation among the unions."[85] One of the main tasks of the Organization is to carry out the goals established in the Paris and Berne Conventions, held in 1883 and 1886, respectively.[86] The Paris Convention applies mainly to industrial property, including patents, trademarks, industrial designs, service marks, and geographical indications.[87] In contrast, the Berne Convention applies to literary works and the rights of authors, encompassing copyright and its principles.[88] Overall, TRIPS serves as the method by which these conventions can be enforced and is one of the three main components of WTO legislation, encompassing international trade standards for intellectual property.[89]

TRIPS is divided into sections based on the Standards, Enforcement, and Dispute Settlement requirements for international intellectual property protected by the World Trade Organization.[90] Within these three categories, TRIPS specifically delves into seven divisions of intellectual property: patents, copyrights, trademarks and service marks, geographical indications, industrial designs, trade secrets and know-how, and procedures and remedies.[91] Additionally, the TRIPS rules also include an agreement on subsidies and countervailing measures.[92] This agreement

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82 DEP'T OF TRADE AND INDUS., *supra* note 12, at 15–17.

83 *Id.* at 16.

84 *Overview: the TRIPS Agreement*, *supra* note 14.

85 *Convention Establishing the World Intellectual Property Organization,* WIPO, art. 3, (Sept. 28, 1979), https://www.wipo.int/wipolex/en/text/283854.

86 *Berne Convention for the Protection of Literary and Artistic Works*, WIPO, https://www.wipo.int/treaties/en/ip/berne/#:~:text=the%20berne%20convention%2c%20adopted%20in,the%20rights%20of%20their%20authors (last visited Feb. 20, 2025); *Paris Convention for the Protection of Industrial Property*, WIPO, https://www.wipo.int/treaties/en/ip/paris/#:~:text=the%20paris%20convention%2c%20adopted%20in,the%20repression%20of%20unfair%20competition (last visited Feb. 20, 2025).

87 *Id.*

88 *Paris Convention for the Protection of Industrial Property*, *supra* note 86.

89 DEP'T OF TRADE AND INDUS., *supra* note 12.

90 *Overview: the TRIPS Agreement*, *supra* note 14.

91 DEP'T OF TRADE AND INDUS., *supra* note 12.

92 *Id.*

is meant to elaborate on the rules created by the Tokyo round in GATT Article XVI that were initially only applied as codes to a subset of contracting parties.[93]

The patent subsection of the TRIPS agreement includes an obligation for the contracting parties to comply with the provisions of the Paris Convention.[94] This means that a patent must be protected for at least twenty years, and protection must be provided for pharmaceutical products in the same way.[95] Additionally, the Convention specifies that patents will be available, and the rights conferred by them enjoyable, "without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced."[96]

Pharmaceutical protection under TRIPS is located within the legislation regarding patentability.[97] For a pharmaceutical invention to be patentable in this agreement, it must meet the standard European Union requirements for patentability, including novelty, the inclusion of an inventive step, and industrial applicability.[98] Additionally, WTO members must disclose their inventions and may need to include a "best mode" instruction.[99] Aside from these rules, there is a public health exclusion that allows a member state to refuse certain genres of product for patentability if:

1. *The prevention of the invention's commercial exploitation is necessary to protect ordre public or morality, including to protect animal or plant life or health;*[100]
2. *The invention is a diagnostic, therapeutic, and surgical method for the treatment of humans or animals;*[101] *and*
3. *Certain plant and animal inventions.*[102]

Another prominent pharmaceutical feature within TRIPS is the inclusion of a mailbox rule in relation to agricultural, chemical, and pharmaceutical products.[103] This rule states that if a member State does not make patent product protection available for pharmaceutical and agricultural chemical products, then

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93 DEP'T OF TRADE AND INDUS., *supra* note 12.

94 *Id.*

95 *Id.*

96 *Id.*

97 *Pharmaceutical patents and the TRIPS Agreement*, WTO (Sept. 21, 2006), https://www.wto.org/english/tratop_e/trips_e/pharma_ato186_e.htm.

98 *Id.*

99 *Id.*

100 *Overview: the TRIPS Agreement*, *supra* note 14; *Economic and Trade Agreement Between the Government of the United States of America and the Government of the People's Republic of China*, USTR.GOV, https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/economic_and_trade_agreement_between_the_united_states_and_china_text.pdf (last visited Apr. 6, 2025).

101 *Overview: the TRIPS Agreement*, *supra* note 14.

102 *Id.*

103 John E. Giust, *Noncompliance with TRIPs by Developed and Developing Countries: Is TRIPs Working?*, 8 IND. INT'L & COMP. L. REV. 69, 78 (1997), https://mckinneylaw.iu.edu/iiclr/pdf/vol8p69.pdf.

that member must (i) allow and provide a way for applicants to file for patents on the aforementioned products, (ii) use the applicable criteria for patentability on those products, and (iii) allow for patent protection if that criterion is met.[104]

In terms of cybersecurity and data protection, Article Ten of the TRIPS agreement addresses computer programs and compilations of data.[105] This section states that computer programs are protected as literary works under the Berne Convention.[106] In addition, this Article also explains that data compilations are protected without prejudice to any copyright subsisting in the data or material itself.[107] Cybersecurity is also touched on in Article Thirty-Nine, within the section titled "Protection of Undisclosed Information."[108] This section elaborates on data protection, stating that protection against unfair competition should be enforced and that data submitted to a government or governmental agency should be protected.[109]

The TRIPS legislation includes an immense amount of invaluable material that enforces the upkeep of intellectual property protection; however, it has also faced criticism for being too flexible in terms of actual enforcement on the contracting parties that subscribe to it.[110]

C. The Creation of Phase One

Donald Trump was elected to be the president of the United States in 2016, bringing with him a new era in politics.[111] Being known by reputation as one of the most controversial and aggressive American presidents of the twenty-first century, Trump made his intentions and gripes with other nations extremely clear during his time in the Oval Office.[112] In the course of his administration, Trump declared that one of the goals of his tenure was to improve America's standing with China in a way that would bring the United States to the forefront of the dynamic between the two countries.[113] One of Trump's issues with the relationship between the two

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104 Giust, *supra* note 103.

105 TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Article 10, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter Agreement Establishing the World Trade Organization].

106 *Id.*

107 *Id.*

108 *Id.*

109 *Id.*

110 *President Donald J. Trump Is Protecting America from China's Efforts to Steal Technology And Intellectual Property*, THE WHITE HOUSE (May 29, 2020), https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-protecting-america-chinas-efforts-steal-technology-intellectual-property.

111 *Id.*

112 Michael Dimock & John Gramlich, *How America Changed During Donald Trump's Presidency*, PEW RSCH. CTR. (Jan. 29, 2021), https://www.pewresearch.org/2021/01/29/how-america-changed-during-donald-trumps-presidency/.

113 Austin Lowe, *U.S.-China 'Phase One' Trade Deal: Implications for the World Trade Organization*, 12 NOTRE DAME J. OF INT'L & COMP. L. 78 (2022).

countries was the fact that the United States was in a severe bilateral trade deficit with China.[114] Trump believed that the United States was being taken advantage of and wanted to bring the country back to equilibrium with China.[115]

Another United States official who shared these views was U.S. Trade Representative ("USTR") Robert Lighthizer.[116] Lighthizer initiated the investigation into China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation ("Investigation") in 2017 after speculating that China was stealing intellectual property from the United States and engaging in cyber theft.[117] The Investigation revealed that China's practices in technology transfer, intellectual property, and innovation were unreasonable, discriminatory, and a burden to United States commerce.[118] Specifically, China was found forcing U.S. companies looking to license technology in China to use non-market-based terms that benefited Chinese recipients and harmed American companies.[119] Additionally, China was facilitating the accession of U.S. assets and using U.S. companies to acquire technology and intellectual property for Chinese companies.[120] Lastly, the Investigation revealed that China was both conducting and supporting unauthorized entry into the computer networks of U.S. companies.[121] This allowed for illegal, unlimited access to United States trade secrets and commercial information.[122]

The impact of the Investigation resulted in Trump imposing a plethora of tariffs on various Chinese imports in July 2018.[123] In response to this move, China imposed equal tariffs on various U.S. imports.[124] Eventually, China could not match the number of goods that the United States had placed tariffs on due to its unequal amount of imports.[125] Instead, China started a claim within the WTO that the United States had been placing tariffs that broke provisions of the GATT treaty, along with two other claims.[126] These matters were heard by the Dispute Settlement Body in September 2020, which found that the tariffs laid by the United States were inconsistent with Section 301 of the Trade Act of 1974 because they only applied to products being imported from China.[127] This, therefore, violated the GATT treaty's "most favored nation" principle.[128]

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114 Lowe, *supra* note 113, at 79.
115 *Id.*
116 *Id.*
117 *Id.*; Docket No. USTR-2022-0014, OFF. U.S. TRADE REPRESENTATIVE, https://ustr.gov/sites/default/files/2022-10/4%20year%20review%20frn.pdf.
118 OFF. U.S. TRADE REPRESENTATIVE, *supra* note 117, at 2.
119 *Id.*
120 *Id.*
121 *Id.*
122 *Id.* at 3.
123 Lowe, *supra* note 113, at 79.
124 *Id.*
125 *Id.*
126 *Id.*
127 *Id.*
128 Lowe, *supra* note 113, at 79.

This back-and-forth routine of accusations and claims between the United States and China continued until a temporary truce was called in 2018.[129] Both countries agreed to stop any further escalation of their ongoing issues for ninety days; however, the two nations were at odds again by March 2019.[130] Finally, in October 2019, Trump officially declared that the Phase One Trade Agreement had been reached after several talks with China's Vice Premier Liu He.[131] The final deal was later disclosed in January 2020, encompassing new trade agreements regarding intellectual property, technology transfer, agriculture, and financial services.[132]

1. Intellectual Property Protections Under Phase One

The first chapter of the Phase One Trade Agreement concerns intellectual property rights.[133] Commentators have noted that placing intellectual property rights in the first chapter demonstrates just how dedicated the United States is to protecting its cybersecurity and intellectual property in this matter, as a U.S. trade agreement has never previously addressed these topics at the forefront.[134] This matter is so crucial to the agreement because, in addition to the opportunity costs being lost due to the bilateral trade deficit, the United States continuously loses an estimated $225 to $600 billion annually to Chinese intellectual property theft, as explained above.[135] The provisions within the intellectual property chapter encompass Trade Secrets and Confidential Business Information, Pharmaceutical-Related Intellectual Property, Patents, Geographical Indications, Piracy and Counterfeiting on E-Commerce Platforms, Border Measures and Enforcement at Physical Markets, Software, Trade Marks, and Judicial Enforcement.[136]

Section A of Chapter One outlines the General Obligations that both countries are taking on by participating in this agreement.[137] Specifically, this section highlights concerns from the United States for its intellectual property, as well as China's goal of establishing a comprehensive system of intellectual property protection and enforcement, given its growing status as an intellectual property producer.[138] To seal these goals within the agreement, the parties signed on to Article 1.2, stating that each nation is to ensure fair and effective protection and enforcement of intellectual property rights, as well as equitable market access to persons of the other Party that need intellectual property protection.[139] Throughout

129 Lowe, *supra* note 113, at 81.
130 *Id.*
131 Ana Swanson, *Trump Reaches Phase One Deal with China and Delays Planned Tariffs*, N.Y. TIMES (Dec. 13, 2019), https://www.nytimes.com/2019/10/11/business/economy/us-china-trade-deal.html.
132 *Rebalancing United States-China trade*, *supra* note 17.
133 Upreti & Vásquez Callo-Müller, *supra* note 48, at 390; Lowe, *supra* note 113, at 79.
134 Upreti & Vásquez Callo-Müller, *supra* note 48, at 390.
135 Lowe, *supra* note 113, at 83.
136 Upreti & Vásquez Callo-Müller, *supra* note 48.
137 USTR.GOV, *supra* note 100.
138 *Id.*
139 *Id.*

the majority of Chapter One, the agreement continues to outline policies that mainly rest on China's cooperation to be accomplished.[140] These policies range from requiring updates to China's administrative procedures to establishing a plan that China will use to stabilize its intellectual property protections.[141]

In terms of Trade Secrets, Phase One outlines the protections of "confidential business information."[142] This kind of know-how is defined as any information that concerns or relates to trade secrets and could cause substantial harm to a competitor if disclosed.[143] One of the several kinds of administrative and judicial stipulations within the agreement was created in this division as well.[144] Article 1.5 details that if the holder of a trade secret delivers prima facie evidence of misappropriation, the burden of proof will then shift to the accused Party.[145] Additionally, the agreement stipulates that there is no need to require "actual loss" to establish an investigation regarding the misappropriation of trade secrets.[146]

Next, Section G of Chapter One discusses the Manufacture and Export of Pirated and Counterfeit Goods.[147] Within this section of the agreement, rules are laid out for the creation and distribution of counterfeit medicines, goods with health and safety risks, and unlicensed software.[148] Article 1.23 on Unlicensed Software ensures that all software being used or controlled by government agencies from either country will be licensed.[149] Additionally, the Article states that China's software will be audited annually by a third party with no government affiliation, with the results to be published publicly.[150] The United States confirms in this article that it has previous measures in place to only use licensed software.[151]

Pharmaceutical protections are discussed in Section C of Phase One, Pharmaceutical-Related Intellectual Property.[152] The introduction to this division of the agreement emphasizes the importance of pharmaceuticals for such a large percentage of the human population.[153] To promote innovation and to protect these crucial inventions for society, the policy states that the Parties will provide for effective protection and enforcement of pharmaceutical-related intellectual property rights.[154] This includes patents, undisclosed tests, and other data submitted as a condition of marketing approval.[155]

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140 USTR.GOV, *supra* note 100.
141 *Id.*
142 Upreti & Vásquez Callo-Müller, *supra* note 48.
143 *Id.* at 390; USTR.GOV, *supra* note 100.
144 Upreti & Vásquez Callo-Müller, *supra* note 48, at 391; USTR.GOV, *supra* note 100.
145 USTR.GOV, *supra* note 100.
146 *Id.*
147 Upreti & Vásquez Callo-Müller, *supra* note 48; USTR.GOV, *supra* note 100.
148 USTR.GOV, *supra* note 100.
149 *Id.*
150 *Id.*
151 *Id.*
152 *Id.*
153 USTR.GOV, *supra* note 100.
154 *Id.*
155 *Id.*

Article 1.10 in Section C requires that China allow pharmaceutical patent applications to rely on supplemental data to satisfy patentability requirements.[156] Similarly, the United States affirms that the United States has sufficient measures to protect pharmaceutical patents.[157] Additionally, Article 1.11 outlines the mechanisms in place for the resolution of pharmaceutical patent disputes.[158] The article specifies that if a patent was previously approved and there is evidence of prior market approval by China in another territory, China shall provide a system to give a patent holder notice that they are seeking to market their product during the term of an applicable patent claim period.[159] Further, China will give the patent holder adequate time to seek available remedies such as judicial and administrative proceedings, preliminary injunctions, or dispute resolution concerning the validity or infringement of their approved pharmaceutical patent or its method of use.[160]

Additionally, Article 1.11 stipulates that China will produce a nationwide system for pharmaceutical products.[161] This system will provide a cause of action for patent holders to seek civil judicial proceedings and remedies concerning the infringement of an approved patent.[162]

Further into the agreement, the topic of technology transfer is discussed.[163] As mentioned previously, China was initially investigated by the USTR for its suspect methods in technology acquisition, requiring companies from the United States to first transfer their technology to Chinese companies as a prerequisite for market access.[164] Chapter Two addresses this issue and stipulates that a Party shall have access to operate in the jurisdiction of the other Party without any force or pressure to transfer their technology to persons of the other Party.[165]

Lastly, Section G regarding the Manufacture and Export of Pirated and Counterfeit Goods extends to pharmaceutical intellectual property protections. Article 1.18 of this section clarifies that China will take effective enforcement action against counterfeit pharmaceuticals and related products containing active pharmaceutical ingredients, bulk chemicals, or biological substances.[166] To accomplish this goal, the trade deal specifically outlines that China will take preventative measures, such as showing the United States its registration information concerning raw pharmaceutical materials that have been inspected by its regulatory authorities as proof that these substances comply with Chinese regulations and laws.[167] Additionally, China also agreed to publish an annual database on its enforcement measures of pharmaceutical products, including a log of any seizures, business license revocations, and fines taken by the National

156 USTR.GOV, *supra* note 100.
157 *Id.*
158 *Id.*
159 *Id.*
160 *Id.*
161 USTR.GOV, *supra* note 100.
162 *Id.*
163 *Id.*
164 *Id.*; Lowe, *supra* note 113, at 79.
165 USTR.GOV, *supra* note 100.
166 *Id.*
167 *Id.*; Lowe, *supra* note 113, at 79.

Medical Products Administration and the Ministry of Industry and Information Technology.[168]

III. COMPARISON

A. Strengths of the WTO Legislation

The TRIPS legislation, as well as the GATT treaty as a whole, has been both praised and criticized for a number of reasons.[169] In this section, I will delve into the many strengths that the GATT and TRIPS policies hold in relation to intellectual property protections for the United States.

One of the major compliments the TRIPS legislation has received since its conception is that it is an extremely transparent and informative piece of policy.[170] Within TRIPS, Appendix A specifically outlines a Guide to Transparency Under TRIPS.[171] This section outlines the legislation's six core transparency measures, which include: (1) requiring members to use formal notifications, (2) creating a checklist of their intellectual property enforcement measures that will be used to create those notifications to other Parties in the agreement, (3) publishing reviews of notified national intellectual property legislation, and (4) publishing reports on technology transfer mechanisms, among others.[172]

Additionally, TRIPS was commended for being the first international intellectual property agreement of its kind, delving deeper into the rules and conventions of the agreement than traditional intellectual property policies such as the Berne Convention.[173] Not only did this legislation span across international trade boundaries for several kinds of intellectual property, but it also addressed concepts of international intellectual property that did not involve trade.[174]

Another great strength of TRIPS surrounds the fact that it is a multilateral treaty (a treaty between multiple States).[175] In this case, the TRIPS policies are shared between 164 parties, encompassing all of the World Trade Organization's member states.[176] This is one of the factors that makes the agreement more binding

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168 USTR.GOV, *supra* note 100; Lowe, *supra* note 113, at 79.

169 Ayush Tiwari, *All you need to know about the Agreement*, PLEADERS (Feb. 5, 2022), https://blog.ipleaders.in/all-you-need-to-know-about-the-trips-agreement/#:~:text=advantages%20of%20the%20trips%20agreement&text=wipo's%20existing%20international%20legal%20system,based%20framework%20for%20resolving%20disputes; *Guide to Transparency Under TRIPS*, WTO, https://www.wto.org/english/tratop_e/trips_e/ta_docs_e/app1_e.pdf (last visited May 30, 2024).

170 Tiwari, *supra* note 169.

171 *Guide to Transparency Under TRIPS*, *supra* note 169.

172 *Id.*

173 Suma Athreye, Lucia Piscitello & Kenneth C. Shadlen, *Twenty-five years since TRIPS: Patent policy and international business*, 3 J. Int'l Bus. Pol'y 315, 315 (2020).

174 *Id*.

175 Tiwari, *supra* note 169.

176 *Id.*

than most previous international intellectual property agreements.[177] Additionally, this means that the treaty is relatively global in size and scope and brings a uniform set of rules to international trade.[178]

Regarding the benefits that TRIPS has created for pharmaceutical inventions and methods, it was one of the first agreements to expand upon protections for developing countries that are member states of the WTO.[179] Before TRIPS, most developing countries had very weak protections for pharmaceutical patents that mainly consisted of four- to seven-year patent terms that were narrow in the scope of defining and licensing the invention.[180]

TRIPS specifically benefits pharmaceutical intellectual property in the United States by providing universal intellectual property protections to all other participating WTO member states.[181] This function allows states to make exceptions to certain patent rights as long as these exceptions do not overstep the typical use of the specific patent.[182] This feature is often used by states in America to progress their technological and scientific innovations, as their research centers use patented methodologies to conduct new research and allow them to understand their inventions more comprehensively.[183]

Additionally, TRIPS provides marketing and production benefits for pharmaceutical manufacturers with its Bolar Provision, also referred to as its regulatory exception.[184] This exception is contained within Article Thirty and instructs drug-producing companies in the United States to receive marketing approval from various health organizations for their generic drug products based on existing patents.[185] Due to patent protection, a manufacturer can bypass receiving permission from the patent owner to begin planning to market the product as long as the patent has not expired.[186] This way, after the patent owner's monopoly on the

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177 Kimberly Amadeo, *Pros and Cons of Multilateral Trade Agreements*, BALANCE (Apr. 21, 2022), https://www.thebalancemoney.com/multilateral-trade-agreements-pros-cons-and-examples-3305949#:~:text=since%20they%20are%20among%20many,are%20only%20between%20two%20countries.

178 *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS*, ORG. FOR ECON. COOP. AND DEV., https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm (last visited Apr. 6, 2025).

179 Arvind Subramanian, *Medicines, Patents, and TRIPS: Has the Intellectual Property Pact Opened a Pandora's Box for the Pharmaceuticals Industry?*, 41 FIN. & DEV. 22 (2004).

180 *Id.*

181 Chris Borges, *TRIPS Waivers and Pharmaceutical Innovation*, CTR. FOR STRATEGIC AND INT'L STUD. (Mar. 15, 2023), https://www.csis.org/blogs/perspectives-innovation/trips-waivers-and-pharmaceutical-innovation#:~:text=for%20example%2c%20trips%20allows%20wto,patented%20research%20tools%20and%20techniques.

182 *Id.*

183 *Obligations and exceptions*, WTO, https://www.wto.org/english/tratop_e/trips_e/factsheet_pharm02_e.htm (last visited May 30, 2024).

184 *Id.*

185 *Id.*

186 Borges, *supra* note 181.

patent has been extinguished, the manufacturer can immediately begin marketing their generic drug.[187]

Another aspect of TRIPS that benefits pharmaceutical intellectual property for the United States is its anti-competition provision.[188] The agreement stipulates that governments that adhere to it are allowed to prevent patent owners, as well as other intellectual property holders, from abusing their intellectual property rights to an unreasonable extent by way of restraining trade or interfering with the international transfer of technology.[189]

Lastly, TRIPS authorizes others to participate in compulsory licensing under certain circumstances, in which the government allows a company or individual to produce a patented product or process without the consent of the patent owner.[190] Article Thirty-One of the agreement specifies that other use of the subject matter of a patent is allowed even without the authorization of the right holder, including use by the government or third parties authorized by the government.[191]

B. Weaknesses of the WTO Legislation

TRIPS encompasses a plethora of strengths; however, they lie mainly within the structural attributes of the policy.[192] The weaknesses of the TRIPS agreement come into play when the nitty-gritty of its intellectual property protections are examined.[193] TRIPS covers high levels of patent protection; however, subject matter such as fertilizers, insecticides, and pharmaceutical items are not expressly protected in the patent provisions of the agreement.[194] Additionally, there is no section of the agreement that covers any kind of protection for traditional knowledge, a field of information that is held by traditional peoples and communities and is often passed down through generations.[195] This kind of knowledge was originally briefly mentioned in the Convention on Biological Diversity in 1992; however, it is not mentioned in much of the remainder of today's existing trade policies.[196]

By far the most prominent and common critique of TRIPS is that it poses a major ethical dilemma.[197] Because of the extremely stringent standards that the

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187 Borges, *supra* note 181.
188 *Id.*; *Obligations and exceptions*, *supra* note 183.
189 Borges, *supra* note 181.
190 *Id.*
191 *Id.*
192 Tiwari, *supra* note 169.
193 *Id.*
194 *Id.*
195 *Id.* at 25; Graham Dutfield, *TRIPS-Related Aspects of Traditional Knowledge*, 33 CASE W. RES. J. INT'L L. 233 (2001).
196 *Id.*
197 Junaid Subhan, *Scrutinized: the TRIPS agreement and public health*, 9 MCGILL J MED. 152 (2006); Marion Motari et al., *The role of intellectual property rights on access to medicines in the WHO African region: 25 years after the TRIPS agreement*, 21 BMC PUB.

agreement sets for patent protection and intellectual property as a whole, it created criteria that developing countries could not meet.[198] Patent requirements that create a monopoly on pharmaceutical products and prohibit generic medications that are more affordable and marketable have been frowned upon because they prevent developing nations from receiving access to affordable, life-saving medications.[199]

This issue was experienced firsthand by developing countries during the COVID-19 pandemic.[200] Because most of the world's vaccines are developed by firms located in the United States, Europe, China, and Russia, they are the most in-demand medicines in the market.[201] These cures are typically protected by patents, blocking the research efforts and data that could be used by researchers in developing countries to create effective medical treatments.[202] To try and fix this policy issue amid the pandemic, the WTO adopted the Ministerial Decision on the TRIPS agreement in June 2022.[203] This decision instituted a partial patent waiver on intellectual property rights to allow developing countries to receive access to the COVID-19 vaccine.[204] The decision functioned by allowing clinical trial data that was previously protected by intellectual property rights to be released to regions within India and Africa.[205] While the patent waiver provided some success in increasing regional vaccination rates, only 23% of citizens in low-income countries have received the vaccine.[206] This statistic led to great speculation surrounding the WTO's mitigation efforts and whether they were sufficient to solve this issue.[207]

Lastly, the TRIPS agreement is a multilateral treaty that encompasses the governments of over 100 different WTO members.[208] Because these kinds of treaties involve the interests of so many different parties, they are inherently difficult to negotiate.[209] Further, dispute resolution is an ever-present battle in agreements such as this.[210] The current dispute resolution procedure outlined in

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HEALTH 490 (2021); Cecilia Oh, *TRIPS and pharmaceuticals: A case of corporate profits over public health*, THIRD WORLD NETWORK, https://twn.my/title/twr120a.htm (last visited May 30, 2024).

198 Tiwari, *supra* note 169, at 25; Motari et al., *supra* note 197; Oh, *supra* note 197.

199 *Id.*

200 Sarah Gabriele, *What Happened to the COVID-19 Vaccine Patent Waiver?*, HARV. L. PETRIE-FLOM CTR. (Nov. 8, 2022), https://blog.petrieflom.law.harvard.edu/2022/11/08/what-happened-to-the-covid-19-vaccine-patent-waiver/; Borges, *supra* note 181.

201 Gabriele, *supra* note 200.

202 *Id.*

203 *Id.*

204 *Id.*

205 *Id.*

206 Gabriele, *supra* note 200.

207 *Id.*

208 *World Trade Organization (WTO) Members*, CURTIS, https://www.curtis.com/glossary/international-trade/world-trade-organization-wto-members#:~:text=wto%20members%20consist%20of%20164,trade%20organization%20members%20nor%20observers. (last visited Feb. 24, 2025).

209 *Id.*; Amadeo, *supra* note 177.

210 Andreas Motzfeldt Kravik, *An analysis of stagnation in multilateral law-making – and why the law of the sea has transcended the stagnation trend*, 34 LEIDEN J. INT'L L. 935-56 (2021); Amadeo, *supra* note 177.

TRIPS stipulates that the TRIPS Council will examine complaints and make recommendations to the Ministerial Conference for approval.[211] This process has faced criticism and is widely viewed as the final nail in the coffin for developing countries that subscribe to the agreement because of fears that it will end up causing intense litigation against developing countries in intellectual property disputes.[212]

C. Strengths of Phase One

The Phase One Trade Deal offered several promising features that allowed the United States to advance and reform its trade relationship with China.[213] Firstly, the agreement is a bilateral trade agreement involving only China and the United States, which allowed for more specificity in creating the pact.[214] By limiting the scope of the deal to the interests of the two nations, each party was better positioned to articulate their specific needs and negotiate a sufficient agreement.[215]

While the agreement itself involves several measures that were created to ensure the protection of American intellectual property, it also offers versatility by working in tandem with the CHIPS and Science Act ("CHIPS Act").[216] The CHIPS Act was created in 2022 by President Biden in an effort to set aside subsidies for the protection of America's semiconductors, which are devices that enable communication advancements in healthcare, intellectual property, computing, and more.[217] The CHIPS Act functions by providing boundaries for funding from the United States by limiting its recipients from expanding semiconductor manufacturing to countries such as China and Russia that have been known to tamper with the devices.[218] This Act helps to advance the Phase One Trade Deal by encouraging both investment and manufacturing for semiconductors and electronics

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211 *TRIPS Dispute Settlement*, WTO, https://www.wto.org/english/tratop_e/trips_e/ta_docs sec6_e.htm (last visited Feb. 24, 2025).

212 Molly Land, *Rebalancing TRIPS*, 33 MICH. J. INT'L L. 433, 445 (2012).

213 USTR.GOV, *supra* note 100.

214 *Id.*

215 *Id.*

216 *FACT SHEET: CHIPS and Science Act Will Lower Costs, Create Jobs, Strengthen Supply Chains, and Counter China*, WHITEHOUSE.GOV (Aug. 9, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/09/fact-sheet-chips-and-science-act-will-lower-costs-create-jobs-strengthen-supply-chains-and-counter-china/; *The CHIPS Act: What it means for the semiconductor ecosystem*, PWC.COM, https://www.pwc.com/us/en/library/chips-act.html (last visited Feb. 24, 2025).

217 *What is a Semiconductor?* SEMICONDUCTOR INDUS. ASS'N, https://www.semiconductors.org/semiconductors-101/what-is-a-semiconductor/#:~:text=semiconductors%20are%20the%20brains%20of,energy%2c%20and%20countless%20other%20applications (last visited Apr. 19, 2025); David Shepardson, *US finalizes rules to prevent China from benefiting from $52 billion in chips funding*, REUTERS (Sept. 22, 2023), https://www.reuters.com/technology/us-finalizes-rules-prevent-china-benefiting-52-bln-chips-funding-2023-09-22/.

218 Shepardson, *supra* note 217.

technology.[219] This funding aids the United States in advancing research and development in industries such as artificial intelligence, clean energy, quantum computing, and nanotechnology.[220]

Additionally, the substance of the Phase One agreement has been praised for reaffirming China's commitment to several aspects of trade policy that are pertinent to the protection of America's intellectual property.[221] Firstly, China committed to reducing its non-tariff barriers in relation to food safety.[222] Secondly, China reaffirmed its efforts to become more stringent regarding intellectual property violations committed in and by the country.[223] This includes stronger measures to enforce the protection of the United States' pharmaceutical intellectual property.[224] Finally, China confirmed its dedication to sufficiently compensate and justify the need for transfers of American technology and data.[225]

These commitments signaled a promising future for America's relationship with China, which had previously been viewed as too far gone by many.[226] The only question that remained was whether China would follow through on these promises.

D. Weaknesses of Phase One

Since its formation in 2020, Phase One has received criticism from all angles. One aspect of the agreement that the public took issue with was the fact that the same principles and commitments that both Parties made through the WTO were simply reiterated in Phase One.[227] The agreement has even been dubbed a "purchase order for U.S. goods, topped with plenty of rehashed Chinese promises of reforms in areas like intellectual property protection."[228] Repetition and overlap between the two sets of policy can be seen in several areas but is most notably observed in the policies reiterating China's technology transfer.[229] China has repeatedly released the narrative that it does not force outside companies to transfer technology as a

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219 Justin Badlam et al., *The CHIPS and Science Act: Here's what's in it*, MCKINSEY & CO. (Oct. 4, 2022), https://www.mckinsey.com/industries/public-sector/our-insights/the-chips-and-science-act-heres-whats-in-it; *FACT SHEET: CHIPS and Science Act Will Lower Costs, Create Jobs, Strengthen Supply Chains, and Counter China*, *supra* note 216.

220 *Id.*

221 Chad Brown, *Anatomy of a flop: Why Trump's US-China phase one trade deal fell short*, PETERSON INST. FOR INT'L ECON. (Feb. 8, 2021), https://www.piie.com/blogs/trade-and-investment-policy-watch/anatomy-flop-why-trumps-us-china-phase-one-trade-deal-fell.

222 *Id.*

223 *Id.*

224 Brown, *supra* note 221.

225 *Overview: the TRIPS Agreement*, *supra* note 14; USTR.GOV, *supra* note 100.

226 Lowe, *supra* note 113, at 81.

227 Keith Johnson, *5 Takeaways from Trump's New China Trade Pact*, FOREIGN POL'Y MAG. (Jan. 16, 2020), https://foreignpolicy.com/2020/01/16/trump-new-china-trade-pact-takeaways//.

228 *Id.*

229 Lowe, *supra* note 113, at 81.

condition of market access, as claimed to be evident by its agreement to eliminate this policy in 2001 as part of its inclusion in the WTO.[230] The reiteration of this promise in Phase One has led to questions regarding whether this legislation will actually change anything about the relationship between China and the United States.[231]

Secondly, regarding the WTO, many have noticed that Phase One does not fully comply with the declarations and prior agreements laid out by the WTO in its TRIPS legislation.[232] Within Phase One is a purchase agreement in which China suggests that it will lower its imports from other countries to increase its imports from the United States.[233] There has been criticism from other parties in the WTO that this section of Phase One violates the Most-Favored-Nation ("MFN") obligation set out in Article 1 of the GATT treaty. The MFN principle states that favorable treatment granted to one country must be immediately and unconditionally granted to all other countries that are party to the agreement as well.[234] The violation of this principle could result in disputes among the parties of the WTO.[235]

Another critique is found in the popular opinion that the agreement is not effective whatsoever when used in isolation, but rather that it needs the joint power of the CHIPS and Science Act to hold any weight concerning putting an end to intellectual property theft.[236] Additionally, Phase One is a bilateral trade agreement, which serves as an inverse weakness when the fact that the agreement is not hard to get around is exposed.[237] When examining the big picture of this matter, it is clear that China has already absorbed the benefits of a multilateral trade regime while avoiding the completion of any of its commitments.[238] This leaves it with little to no incentive to honor its promises.[239] In this instance, unilateral pressure from the United States may not be enough to reform China's historical pattern of decision-making in this arena.[240]

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230 Lowe, *supra* note 113, at 81.

231 *Id.*

232 *Most-Favored Nation Treatment Principle*, NAT'L DIET LIBR., https://www.meti.go.jp/english/report/data/2015WTO/02_01.pdf (last visited Apr. 6, 2025).

233 Lowe, *supra* note 113, at 81.

234 *Most-Favored Nation Treatment Principle*, *supra* note 232.

235 *Principles of the trading system*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited Apr. 6, 2025).

236 Gavin Bade, *'A sea change': Biden reverses decades of Chinese trade policy*, POLITICO (Dec. 26, 2022), https://www.politico.com/news/2022/12/26/china-trade-tech-00072232.

237 Lowe, *supra* note 113, at 81.

238 *Id.*

239 *Id.*

240 *Id.*

The final and most damning critique of the trade deal is that only about 60% of the promises made by China have been realized.[241] Because of this statistic, the deal is viewed as largely unsuccessful.[242] In failing to carry out several portions of the deal, China may have put an end to its progress in increasing cooperation with America's international trade regime.

IV. RECOMMENDATIONS AND LOOKING AHEAD

In assessing the future of international trade regimes such as Phase One, it is important to consider the aspects that contributed to its successes and failures. Here, as mentioned previously, one major failure for Phase One was in the fact that unilateral pressure, even from a country as powerful in trade as America, was not enough to encourage a large change.[243] Because of this, a new multilateral trade agreement may be more beneficial and enforceable in future relations with China.[244] The American Chamber of Commerce has gone so far as to announce that without an immediate action plan to begin a follow-up agreement, Phase One will go down as one of the biggest political and economic failures in this generation.[245]

Currently, several parties within the WTO are engaging in joint discussions regarding the creation of one such new agreement. The agreement has been proposed as "Phase Two," a multilateral trade agreement that will include more complex topics than those discussed in Phase One.[246] Among these new topics, the USTR has established that critical issues such as excess capacity, state-owned firms, state-sponsored intellectual property theft, regulatory transparency, and restrictions on data transfer should be included.[247] Another source from the United States Chamber of Commerce similarly noted that issues including subsidies, cybersecurity, digital trade, and competition policy should be included in Phase Two.[248]

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241 Sydney Martin, *Failures and Successes of the Phase One Trade Agreement with China*, ALL. FOR CITIZEN ENGAGEMENT (Dec. 5, 2023), https://ace-usa.org/blog/research/research-foreignpolicy/failures-and-successes-of-the-phase-one-trade-agreement-with-china/#:~:text=the%20phase%20one%20deal%20is,19%20pandemic%20disrupting%20trade%20flows.

242 Martin, *supra* note 241.

243 Lowe, *supra* note 113, at 81.

244 *Id.*

245 Martin, *supra* note 241.

246 *Id.*

247 *Id.*

248 *Id.*

A. Short-Term Recommendations

For the short-term future, there has been a plethora of varying proposals and suggestions for ways to better manage international trade.[249] Examining these suggestions through the specific lens of what will be the most beneficial in the protection of American intellectual property and technology, I would recommend three short-term solutions. Firstly, China should be held to WTO standards, and consequences should be enforced when they are not acting in accordance with those standards.[250] As part of China's accession to the WTO, the nation agreed to abide by the set international standards laid out for the protection of intellectual property.[251] Additionally, China agreed to accept several previously agreed-upon mechanisms within the WTO that may or may not reduce the flow of Chinese goods into foreign markets.[252] In using unfair practices to absorb foreign intellectual property, China is violating these commitments and harming the other parties to the WTO. As a consequence, within this first prong, all intellectual property theft and forced market transfers by China should be met with economic penalties.[253]

Secondly, the United States should restrict China's interests in certain areas of the economy that are reciprocally restricted to the United States.[254] The WTO has demonstrated that it is not designed to discipline China for its unfair practices and market policies.[255] Further, the *2023 Report to Congress on China's WTO Compliance* has shown that the majority of the harm China has inflicted is because of its own non-market approach to trade and the economy in general, rather than because it is solely evading WTO rules.[256] Due to this, a reasonable solution for the United States lies in decoupling from China in many areas of trade and commerce.[257] Finally, with the assistance of the first two prongs, a multi-lateral Phase II Agreement should be successfully negotiated and enacted.[258]

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249 *The China Trade Challenge: Phase II*, PUB. POL' CTR. CONF. BD. (Mar. 24, 2020), https://www.conference-board.org/research/solutions-briefs/china-trade-challenge-phase-II.

250 *The China Trade Challenge: Phase II*, *supra* note 249.

251 Nicholas Lardy, *Issues in China's WTO Accession*, BROOKINGS (May 9, 2021), https://www.brookings.edu/articles/issues-in-chinas-wto-accession/.

252 *Id.*

253 *Id.*

254 *Id.*

255 David Lawder, *WTO fails on dispute reforms before Trump takes office, US ambassador says*, REUTERS (Dec. 18, 2024), https://www.reuters.com/world/wto-fails-dispute-reforms-before-trump-takes-office-us-ambassador-says-2024-12-18/?utm_source=chatgpt.com.

256 *China, Not U.S., is Pursuing Trade Decoupling, USTR Says*, SANDLER, TRAVIS & ROSENBERG, P.A. (Feb. 29, 2024), https://www.strtrade.com/trade-news-resources/str-trade-report/trade-report/february/china-not-u-s-is-pursuing-trade-decoupling-ustr-says; *2023 Report to Congress on China's WTO Compliance*, U.S. TRADE REPRESENTATIVE (Feb. 2024), https://ustr.gov/sites/default/files/ustr%20report%20on%20china's%20wto%20compliance%20(final).pdf.

257 *Id.*

258 *The China Trade Challenge: Phase II*, *supra* note 249.

B. Long-Term Recommendations

In the long-term future of international trade, more drastic measures have been suggested as solutions to the issues facing the WTO.[259] The current state of the WTO is grim, with the organization facing critical problems.[260] First, the WTO must figure out a way to maintain its open trading system in the midst of "decouplings" between several parties, such as the likely decoupling between the United States and China.[261] Decoupling presents several difficulties, especially when occurring between these two parties.[262] China has historically served as a global factory floor for manufacturing, and the United States is its largest input for consumerism.[263] Due to the inherent complexities of the termination of a relationship such as this, the process will not be easy.[264]

Second, the WTO must find a way to rework its foundation if it is going to keep up with the changes and innovations of the twenty-first century. The amount of burgeoning technology that we have now simply did not exist when the WTO was organized, and it is not written in a way that has allowed it to properly adapt to these technological changes.[265] Already, we are seeing calls for stronger technology regulation that the WTO was not equipped with originally.[266]

Finally, the WTO needs to appoint some form of leadership for the future.[267] The aforementioned issues are being spoken out about by current WTO members, with more economically advanced countries asking for technology issues to be resolved while less developed countries are voicing issues such as food security.[268] The organization is in need of a comprehensive leader who can unite the parties on these critical issues and influence change.[269]

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259 Alan Wm. Wolff, *Can the World Trade Organization Be Saved? Should It?*, PETERSON INST. FOR INT'L ECON. 1, 1 (2023), https://www.piie.com/sites/default/files/2023-05/pb23-5.pdf.

260 *Id.* at 3–6.

261 Wolff, *supra* note 259, at 13.

262 Brendan Murray & Ramsey Al Rikabi, *Why Prospect of US-China 'Decoupling' Is Getting Serious*, BLOOMBERG, https://www.bloomberg.com/news/articles/2023-06-22/what-is-us-china-decoupling-and-how-is-it-happening (last updated Nov. 14, 2023, 9:00 AM).

263 Murray & Al Rikabi, *supra* note 262.

264 *Id.*

265 Wolff, *supra* note 259, at 2.

266 David Lawder, *US drops digital trade demands at WTO to allow room for stronger tech regulation*, REUTERS (Oct. 25, 2023, 4:04 PM), https://www.reuters.com/world/us/us-drops-digital-trade-demands-wto-allow-room-stronger-tech-regulation-2023-10-25/.

267 Wolff, *supra* note 259, at 13.

268 Penny Naas, *Future-proofing the World Trade Organization*, ATLANTIC COUNCIL (Feb. 27, 2024), https://www.atlanticcouncil.org/blogs/econographics/future-proofing-the-world-trade-organization/.

269 *Id.*

V. CONCLUSION

The developmental changes in technology, intellectual property, telecommunication, and software within the previous decades have given rise to the reconfiguration of the current international trade regimes existing within and in accordance with the WTO, including both the GATT treaty and the Phase One Trade Deal.[270] The economic relations structures set out in these early agreements do not reflect the new challenges associated with advanced technology.[271] Additionally, China's market and trade model may simply be fundamentally incompatible with global trading rules, and its unfair practices could be too far along to adapt now.[272]

The Phase One Trade Deal was initiated with the hope of a solution to the cracks in the international trade regime between the United States and China.[273] While the agreement promised to bring a new era of compliance from China and its market behaviors, it has proved to be ineffective in the years since its passing.[274] Now, the intellectual property and technology of the United States are left vulnerable to China's unfair access to semiconductors, along with the country's corrupt technology transfer practices.[275] In the short term, these issues could be delayed if China is held to WTO standards; its access to the United States market is restricted; and a multilateral Phase Two Agreement is spearheaded. For future solutions in the long term, the WTO must reconfigure its open-trading system, find a way to adapt to burgeoning technology, and appoint a new source of leadership for the future.

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270 Lowe, *supra* note 113, at 80–82.

271 *Id.*; Berman, *supra* note 38.

272 Berman, *supra* note 38.

273 Lowe, *supra* note 113, at 81–82; Berman, *supra* note 38.

274 Lowe, *supra* note 113, at 85–90; Berman, *supra* note 38.

275 Juliet Samuel, *Tech firm's fate shows Trump is right on China*, TIMES (Jan. 1, 2025, 9:00 PM), https://www.thetimes.com/comment/columnists/article/tech-firms-fate-shows-trump-is-right-on-china-txmhwqvc9?utm_source=chatgpt.com&region=global.