RESOLVING US-CHINA IP DISPUTES THROUGH THE WTO: A LEGAL ALTERNATIVE TO UNILATERAL SANCTIONS

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Abstract: This article examines the United States’ ongoing trade dispute with China regarding Chinese abuses of American intellectual property rights. The U.S. has filed both a complaint against China before the WTO for violation of the Agreement on Trade Related Aspects of Intellectual Property Rights (“TRIPS”), and simultaneously imposed a series of unilateral sanctions on Chinese goods, in violation of the WTO Marrakesh Agreement. Imposing illegal sanctions while seeking redress from the WTO undermines the legitimacy of the U.S.’ claims and has provoked retaliatory tariffs. As the TRIPS agreement comprehensively covers the dispute in question, the U.S. should scale back its unilateral sanctions in favor of an expanded complaint before the WTO.

I. INTRODUCTION

On March 22, 2018, President Trump announced that the United States would impose unilateral tariffs on up to $60 billion worth of imports from China. These highly anticipated tariffs seek to retaliate against China for widespread theft of American intellectual property. Days later, the United States also filed a complaint against China with the World Trade Organization (“WTO”). This complaint accuses China of violating the Agreement on Trade Related Aspects of Intellectual Property Rights (“TRIPS”) by enacting intellectual property protection laws that disfavor foreign firms. Pursuing a claim within the legal framework of the WTO while simultaneously enacting unilateral tariffs threatens

2 See id. (characterizing the tariffs as “retaliatory”).
4 Id.

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the procedural legitimacy of the United States’ justifiable claims. The United States should scale back its unilateral tariffs in favor of a more robust claim before the WTO. Because China’s actions likely violate TRIPS, the United States’ claims against China before the WTO have a high chance of success. The WTO framework and TRIPS thus provide a comprehensive means for the United States to resolve its dispute with China in a way that enjoys the legitimacy of international law.

II. BACKGROUND

A. Scale of Chinese IP Theft

The United States has abundant cause to seek redress against China for failing to protect the intellectual property of American entities. Since its accession to the WTO in 2001, China has made some progress in strengthening its IP protection laws. Nonetheless, China’s IP protection laws remain poorly developed and ill-suited to protecting the intellectual property of foreign entities. In fact, China has only had functional IP courts since 2014. Lax enforcement continues to allow Chinese markets to export massive

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5 See infra notes 40–45 and accompanying text.
6 See infra notes 81–88 and accompanying text.
7 See infra notes 49–74 and accompanying text.
8 See infra notes 49–74 and accompanying text.
10 Id.
12 Id.
amounts of counterfeit products.\textsuperscript{13} China accounts for around 87% of counterfeit goods seized coming into the U.S.\textsuperscript{14} In 2017, Chinese theft of American intellectual property cost the U.S. economy more than $225 billion.\textsuperscript{15}

In addition to tolerating theft of American intellectual property by private actors, the Chinese state itself often facilitates transfer of American intellectual property to Chinese entities through unfair or illegal means.\textsuperscript{16} The Chinese government’s Indigenous Innovation policy requires foreign companies to transfer technology to their Chinese counterparts as a price for the right to conduct business in China.\textsuperscript{17} Other regulations permit Chinese firms that acquire foreign intellectual property through contract to modify that property against the wishes of the transferring firm or allow continued use of such property after the contract expires.\textsuperscript{18}

Beyond providing policies that facilitate private transfer of intellectual property to Chinese firms, the Chinese government has utilized cyber espionage to acquire American intellectual property.\textsuperscript{19} In 2014, the U.S. Department of Justice indicted five Chinese military personnel on economic espionage charges for hacking into the networks of various U.S. companies in order to steal trade secrets.\textsuperscript{20} American firms in industries identified as

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\textsuperscript{13} Id.
\textsuperscript{14} Id.
\textsuperscript{15} Id.
\textsuperscript{17} Id.
\textsuperscript{18} WTO Secretariat China Summary, supra note 3.
\textsuperscript{19} Mandiant, APT1: Exposing One of China’s Cyber Espionage Units 3 (2013), available at https://www.fireeye.com/content/dam/fireeye-www/services/pdfs/mandiant-apt1-report.pdf.
\textsuperscript{20} Comm’n on the Theft of Am. Intell. Prop., supra note 11, at 8.
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“strategically significant” by China’s twelfth Five Year Plan are more likely to be targeted by hackers linked to the Chinese state.\textsuperscript{21} These industries include next-generation information technology, high-end equipment manufacturing, and new materials production.\textsuperscript{22} Numerous American firms in each “strategically significant” industry have experienced data breaches traceable to Unit 61398 of the Chinese People’s Liberation Army, which is responsible for computer network operations.\textsuperscript{23} Unit 61398 appears to primarily target computer systems based in English speaking countries, and has conducted at least 115 cyber-attacks on American industries since 2006.\textsuperscript{24} Unit 61398 most frequently targets firms that conduct business in the areas of information technology, transportation, and high-tech electronics.\textsuperscript{25}

\textbf{B. Unilateral Sanctions}

The United States’ current unilateral sanctions arose under section 301 of the Trade Act of 1974.\textsuperscript{26} Section 301 authorizes the President to direct the U.S. Trade Representative to combat trade practices by foreign states that are unfair to the U.S.\textsuperscript{27} Authorized actions can include tariffs and duties.\textsuperscript{28} Trade practices that may authorize sanctions under Section 301 are broadly defined, including the violation of rights conferred by any trade agreement

\begin{footnotesize}
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\item Id. at 15.
\item Id. at 19, at 3.
\item Id. at 21.
\item Id. at 23.
\item Breuninger & Tausche, supra note 1.
\item Id. at 12.
\item Id. § 2411(c)(1).
\end{enumerate}
\end{footnotesize}
or actions that unjustifiably burden U.S. commerce.\textsuperscript{29} Investigations to determine if a foreign state is engaged in unfair trade practices are overseen by the U.S. Trade Representative.\textsuperscript{30} The decision of whether unfair practices have been discovered is similarly left to the U.S. Trade Representative.\textsuperscript{31} In this way, the Trade Act of 1975 provides a means for the U.S. to independently define, investigate, and sanction unfair trade practices.\textsuperscript{32}

The Trade Act of 1975 allows the United States to expeditiously sanction unfair trade practices while avoiding the uncertainty of third party dispute resolution.\textsuperscript{33} Given that TRIPS does not explicitly address the sort of direct IP theft that the Chinese state engages in, reliance on section 301 sanctions is understandable.\textsuperscript{34} Nonetheless, straying from the dispute resolution framework of the WTO is misguided.\textsuperscript{35} Taking action under section 301 has provoked an ongoing escalation of retaliatory tariffs.\textsuperscript{36} After President Trump announced his first round of tariffs in response to China’s IP abuses, China announced that it would impose its own tariffs on imports of pork, wine, fruit, and metal from the United States.

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\textsuperscript{29} See id. § 2411(a)(1) (stating that any unjustifiable act by a foreign country that burdens U.S. commerce authorizes tariffs under Section 301).
\textsuperscript{30} Id. § 2412 (a)(2)-(4).
\textsuperscript{31} Id. § 2414(a)(1).
\textsuperscript{32} See id. § 2414 (a)(1) (authorizing the U.S. Trade Representative to independently identify and sanction unfair trade practices).
\textsuperscript{33} See id. § 2411 (a)(1) (authorizing the U.S. Trade Representative to independently sanction unfair trade practices with the President’s approval).
\end{footnotesize}
States.\textsuperscript{37} In response to China’s retaliatory tariffs, President Trump announced that he was considering laying tariffs on an additional $100 billion dollars of Chinese goods.\textsuperscript{38}

Beyond the economic threat posed by a series of retaliatory tariffs, unilateral action also prevents effective cooperation with other entities, like Japan and the EU, that also have related claims against China.\textsuperscript{39} Most importantly, the imposition of unilateral tariffs outside of the WTO dispute resolution system violates the Uruguay Round Agreement, which governs dispute resolution between WTO member states.\textsuperscript{40} Article 23 of the Uruguay Round Agreement explicitly forbids signing states from unilaterally retaliating against other members for actions that impede the attainment of any objective covered by the agreement.\textsuperscript{41}

If a dispute involves activity covered by a WTO agreement, the aggrieved member must rely on the WTO dispute resolution system to determine if a violation has occurred and what response is appropriate.\textsuperscript{42} President Trump’s tariffs thus give China a powerful tool to undermine the United States’ claims against it by attacking the legality of President Trump’s actions.\textsuperscript{43} In fact, China has already filed a complaint with the WTO against the United States for imposing unilateral tariffs without consulting the WTO dispute resolution


\textsuperscript{39} \textit{China Violating WTO Rules}, supra note 17.

\textsuperscript{40} Marrakesh Agreement Establishing the World Trade Organization, Apr. 15. 1994, Art. 23, 1869 U.N.T.S. 401.

\textsuperscript{41} Id.

\textsuperscript{42} Id.

\textsuperscript{43} See id. (identifying WTO dispute settlement as the only permissible source of redress for injuries caused by activity covered by a WTO agreement).
The United States’ decision to pursue a claim within the WTO framework while simultaneously imposing illegal unilateral tariffs invites well founded allegations of hypocrisy.\textsuperscript{45}

III. ARGUMENT: THE UNITED STATES SHOULD EXPAND ITS WTO COMPLAINT AGAINST CHINA

A. Expanding the United States’ WTO Complaint Against China

The WTO is an international organization composed of most of the world’s governments that acts to foster a rules-based system of international commerce.\textsuperscript{46} The WTO provides member states with a number of contracts that establish minimum standards for trade policy, principally the General Agreement on Tariffs and Trade (“GATT”) and Uruguay Round Agreement.\textsuperscript{47} The WTO dispute resolution system provides a forum for governments to adjudicate disputes that arise under WTO agreements, and is authorized to allow states to impose tariffs in retaliation for violations of these agreements.\textsuperscript{48}

The United States should rely exclusively on its claim against China in the WTO framework.\textsuperscript{49} TRIPS provides for a persuasive challenge against the Chinese government for its IP policies that favor Chinese firms.\textsuperscript{50} Article 3 requires that signing states treat

\textsuperscript{45} See id. (describing China’s claims against the U.S. for imposing unilateral tariffs in violation of the Uruguay Round Agreement).
\textsuperscript{46} \textit{Understanding the WTO}, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm (last visited Apr. 24, 2018).
\textsuperscript{47} Id.
\textsuperscript{49} See infra notes 81–88 and accompanying text.
\textsuperscript{50} See infra notes 81–88 and accompanying text.
foreign entities no less favorably than domestic firms regarding the protection of intellectual property.\textsuperscript{51} China’s Indigenous Innovation regulation and policies restricting foreign firms from limiting the use of transferred intellectual property do not impose similar obligations on Chinese firms.\textsuperscript{52} A WTO panel thus may find that these policies violate Article 3 by discriminating against foreign firms.\textsuperscript{53}

Though TRIPS does not explicitly address state espionage, the United States should expand its claim before the WTO to include allegations of IP theft by Chinese hackers.\textsuperscript{54} The United States should argue that theft of intellectual property by the Chinese state benefits Chinese entities at the expense of foreign firms.\textsuperscript{55} If such theft is officially sanctioned by the Chinese state, the United States can argue that these policies violate Article 3 by unfairly disadvantaging foreign firms.\textsuperscript{56}

The United States’ complaint against China before the WTO also should be expanded to address Chinese counterfeiting of American goods and software.\textsuperscript{57} The prevalence of such theft indicates that China is not fulfilling its obligations under TRIPS to


\textsuperscript{52} US, EU Will Take China to Task for Violating WTO Rules, supra note 16.

\textsuperscript{53} See Agreement on Trade-Related Aspects of Intellectual Property Rights art. 3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 (requiring that member states treat the IP rights of foreign nationals no less favorably than they accord their own nationals).

\textsuperscript{54} See id. (prohibiting any measure that amounts to less favorable treatment of foreign entities, which may include theft of their IP).

\textsuperscript{55} See id. (suggesting that theft of foreign IP may amount to less-favorable treatment).

\textsuperscript{56} See id. (suggesting that theft of foreign IP may amount to less-favorable treatment).

\textsuperscript{57} See id. art. 9 (incorporating the Berne Agreement, which recognizes software as protected copyright, into TRIPS).
create legal mechanisms that prevent theft of protected intellectual property.\textsuperscript{58} TRIPS covers all classes of intellectual property.\textsuperscript{59} Articles 15 and 16 grant trademark owners the exclusive right to prevent use of their trademarks by all third parties.\textsuperscript{60} Article 9, which incorporates the terms of the 1971 Berne convention into TRIPS, provides similar enforcement rights relating to copyrights.\textsuperscript{61} Finally, Article 28 grants patent holders the right to enforce their patents against infringing third parties.\textsuperscript{62} Chinese production of counterfeit goods bearing trademarks owned by American firms violates Article 16 of the agreement while piracy of software of violates Article 9.\textsuperscript{63} Because China has failed to create mechanisms to effectively address and deter such theft, the United States may have a case against the Chinese state for violating Article 42 of TRIPS.\textsuperscript{64}


\textsuperscript{61} Id. art. 9.

\textsuperscript{62} Id. art. 28.

\textsuperscript{63} See Agreement on Trade-Related Aspects of Intellectual Property Rights art. 3, 9, 15–16, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 (Article 16 states that trademark owners have exclusive right to prohibit the use of their trademarks. Article 9 incorporates the Berne convention, which identifies software as protected copyright, into the TRIPS agreement).

Article 42 obliges signing states to ensure that civil mechanisms to enforce IP claims are made available within their domestic legal systems.\(^65\) Civil mechanisms must allow for effective action against any act of infringement and must provide remedies that both prevent continued infringement and provide for future deterrence.\(^66\) Though China has created specialized IP courts and has strengthened its regulatory framework in recent years, these measures have not effectively deterred theft of American intellectual property.\(^67\) China still accounts for the vast majority of counterfeit goods seized entering the United States\(^68\) and up to 70% of software used within China is not licensed.\(^69\) Given the sheer volume of IP theft that occurs within China, the United States may have a persuasive argument that the Chinese government has not met its obligations under Article 42 of the TRIPS agreement.\(^70\)

It is not enough that China has officially enacted laws prohibiting theft of foreign intellectual property if those laws have no practical effect.\(^71\) The WTO Appellate Body has ruled that to make civil remedies “available” under Article 42 means to make obtainable remedies that have force or efficacy.\(^72\) Right holders must have access to remedies that effectively bring about enforcement of their rights.\(^73\) Because the Chinese system does not

\(^{65}\) Id.

\(^{66}\) Id.

\(^{67}\) See COMM’N ON THE THEFT OF AM. INTELL. PROP., supra note 11, at 3 (indicating that the majority of counterfeit goods entering the United States originate in China).

\(^{68}\) Id.


\(^{70}\) See Omnibus Act, supra note 58. (indicating that, to comply with TRIPS Article 42, member state’s IP laws must provide effective protection of intellectual property rights in practice).

\(^{71}\) See id. (indicating that, to comply with TRIPS Article 42, member state’s IP laws must provide effective protection of intellectual property rights in practice).

\(^{72}\) Id.

\(^{73}\) Id.
provide for practically effective deterrence, its intellectual property laws may violate Article 42.74 If the WTO were to find that Chinese regulations do not meet its Article 42 obligations, China would be ordered to bring its regulatory framework into compliance.75 If it fails to do so, the United States may be authorized to impose retaliatory tariffs.76

B. Likelihood of Success of the United States’ WTO Claims Against China

There is little precedent to predict whether the United States’ claims before the WTO will succeed.77 Since the adoption of TRIPS, thirty-eight cases have been submitted to the WTO under the agreement.78 Though the WTO appellate body has ruled that Article 42 requires that domestic civil procedures have force or efficacy, it has not ruled on what characteristics may make a procedure inadequate.79 No case has addressed direct state theft of intellectual property or compulsory transfer of intellectual property between foreign and domestic firms.80

Nonetheless, the WTO dispute resolution framework provides the best means for the U.S. to encourage China to enact meaningful legal reforms.81 First, most cases brought

74 See id. (indicating that, to comply with TRIPS Article 42, member state’s IP laws must provide effective protection of intellectual property rights in practice).
76 Id.
77 See Find Dispute Cases, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm (last visited Apr. 24, 2018) (showing that no comparable dispute regarding the TRIPS agreement has advanced to a final ruling).
78 Id.
79 Omnibus Act, supra note 58.
81 See supra notes 71–74 and accompanying text.
before the WTO settle amicably without reaching a final judgement.\textsuperscript{82} The WTO thus provides a single forum for the U.S. and China to reach a negotiated settlement without resorting to further tariffs.\textsuperscript{83} Secondly, if the United States’ claims against China actually proceed to adjudication, the likelihood of a favorable ruling is high.\textsuperscript{84} The WTO has ruled in favor of the U.S. in 91% of cases that it has brought, and generally rules in favor of complaining states.\textsuperscript{85} Finally, a ruling favorable to the U.S. would likely result in the Chinese government bringing its laws into compliance with the WTO’s ruling.\textsuperscript{86} Where final judgements are reached, adjudicating states have complied with the WTO’s ruling in about 90% of cases.\textsuperscript{87} China’s compliance rate, as measured by the number of requests to the WTO to authorize tariffs for non-compliance, currently sits at 100%.\textsuperscript{88}

Pursuing a claim before the WTO also offers a variety of less tangible advantages over the imposition of unilateral sanctions.\textsuperscript{89} Judgement by an independent legal body, of

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\item[83] See id. (showing that the majority of disputes submitted to the WTO end in successful settlement prior to a final ruling).
\item[84] See Scott Linicome, At the Whitehouse, Confusion (Apparently) Reigns on US Trade Agreements, CATO (May 1, 2017), https://www.cato.org/blog/white-house-confusion-apparently-reigns-us-trade-agreements (indicating that the majority of complaints that the US submits to the WTO end in outcomes favorable to the US).
\item[85] Id.
\item[87] Id.
\item[88] Id.
\end{enumerate}
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which China is a member, for violating obligations that China voluntarily assumed will lend legitimacy to the United States’ condemnation of China’s actions.90 This will allow the U.S. to reaffirm its commitment to a rules-based system of international trade.91 Conversely, pursuing unilateral imposition of tariffs under the US Trade Act will delegitimize America’s claims.92 A complaint before the WTO can include Japan and the European Union, both of which are similarly harmed by China’s theft of intellectual property.93 A unified and successful claim by a coalition of states will put increased pressure on China to comply with the terms of the TRIPS agreement by both highlighting the scale of China’s violations and making retaliatory sanctions more effective.94

CONCLUSION

The United States should scale back its unilateral sanctions as much as possible in favor of action within the WTO framework. Though unilateral action under section 301 of the Trade Act of 1974 allows immediate retaliation against China for its abuses of American intellectual property, such sanctions violate international law. This will allow the Chinese government to dismiss the United States’ allegations against it by attacking the legitimacy of the United States’ procedural approach. Resolution within the WTO framework, conversely, will provide much needed legitimacy to the United States’ claims. TRIPS covers all categories of intellectual property and obliges member states to provide legal

90 See id. (explaining the multilateral nature of the WTO system).
91 See id. (explaining the multilateral nature of the WTO system).
92 See id. (explaining the multilateral nature of the WTO system).
93 See China Violating WTO Rules, supra note 16 (describing a joint case filed by the U.S., EU and Japan seeking redress against China for IP abuses).
94 See id. (describing past cooperation between the U.S., the EU, and Japan in their dispute with China).
mechanisms for intellectual property owners to protect their claims. The United States’ claim before the WTO has a high likelihood of success and should be expanded to include other categories of Chinese theft of intellectual property.