



US Claims under Special Section 301 against China Undermine the Credibility of the WTO

By Nirmalya Syam* and Carlos M. Correa**

I. The Aim of US Special Section 301

The United States has imposed massive tariffs on Chinese exports on the vague argument of ‘theft’ of US intellectual property and “discriminatory” transfer of technology requirements. This is inconsistent with the WTO rules. The US argument ignores that China has implemented its obligations under the WTO Agreement on Trade-related Aspects of Intellectual Property Rights (“TRIPS Agreement”), and that in some areas, as noted below, has even introduced TRIPS-plus provisions.

Unlike the case of the US that freely copied European technologies to initiate its industrialization process, China’s current industrial development and technological upgrading is taking place under the tight standards for protection and enforcement of intellectual property established by the TRIPS Agreement. Annual royalty payments by Chinese companies for the use of foreign technologies (notably to US right-holders) increased more than twenty times since the establishment of the WTO up

to US\$ 24 billion¹. Moreover, as a result of a dramatic increase in recent years, R&D investment in China has reached 2.1% of GDP. It accounts for 20.8% of global R&D, a percentage equivalent to R&D conducted in all the European countries together². As a result, China has become one of the world’s top 20 most-innovative economies³.

The unilateral trade retaliation imposed by the US on the theft argument aims at weakening the Chinese economy and, principally, at slowing down its industrial development and technological catching-up. It also raises systemic concerns. On the one hand, such measures affect international trade and distort production chains that involve many other countries, particularly in Asia⁴. On the other, any country –even if fully TRIPS compliant– may be victim of the intimidation and economic effects of the measures based on the US Trade Act of 1974. Although the procedures leading to the application of such measures have an appearance of legality, they are

Abstract

The US action to place China in the Special 301 ‘Priority Watch List’ is unjustified and in contravention to the WTO rules. The claims made against China are based on standards self-determined by the Office of the United States Trade Representative (USTR), not on international standards. This is an example of a systemic problem that requires a concerted response. WTO members should unite to firmly oppose the imposition of unilateral measures that undermine the multilateral trading system and the credibility of WTO as a ruled-based institution.

La décision des États-Unis d’inscrire la Chine sur la liste des pays à surveiller en priorité (Priority Watch List, en anglais) établie dans le rapport spécial dressé au titre de l’article 301 de la législation américaine sur le commerce est injustifiée et contrevient aux règles de l’Organisation mondiale du commerce (OMC). Les allégations contre la Chine se fondent sur des critères définis par le Bureau du représentant des États-Unis pour les questions commerciales internationales et non pas sur des critères internationaux. C’est un parfait exemple de problème systémique qui doit être traité de manière concertée. Les membres de l’OMC devraient s’unir pour s’opposer fermement à l’imposition de mesures unilatérales qui fragilisent le système commercial unilatéral et la crédibilité de l’OMC en tant qu’institution fondée sur des règles.

La decisión de los Estados Unidos de incluir a China en la lista de observación prioritaria (Priority Watch List) que figura en el informe de la Sección 301 de la Ley de Comercio de los Estados Unidos es injustificada y contraviene las normas de la Organización Mundial del Comercio (OMC). Las alegaciones contra China se basan en criterios libremente determinados por la Oficina del Representante de los Estados Unidos para Asuntos Comerciales (USTR) y no en criterios internacionales. Esto es un ejemplo de un problema sistémico que requiere una respuesta concertada. Los miembros de la OMC deberían unirse para oponerse firmemente a la imposición de medidas unilaterales que debilitan el sistema comercial multilateral y la credibilidad de la OMC como una institución basada en normas.

* Nirmalya Syam is Senior Programme Officer with the Development, Innovation and Intellectual Property Programme.

** Prof. Carlos M. Correa is the Executive Director of the South Centre.

grounded on arbitrary interpretations of foreign laws promoted by the industry's lobbies that ultimately shape the US trade policy.

II. Analysis of US claims under Special Section 301

Possible reasons for the alleged violation of US intellectual property rights in China are articulated in the USTR Special Section 301 Report,⁵ which places China, along with other countries, on the so-called "Special 301 priority watch list". This designation implies that, in the view of the US administration, the intellectual property laws and policies of China have serious deficiencies that require increased USTR attention, and which may lead to unilaterally determined economic sanctions.

The mere threat of sanctions by placing a country in any specific category in the US watch list violates the WTO rules. A WTO panel noted in a dispute brought in 1999 by the EU against Section 301 of the US law, that: "the threat alone of conduct prohibited by the WTO would enable the Member concerned to exert undue leverage on other Members. It would disrupt the very stability and equilibrium which multilateral dispute resolution was meant to foster and consequently establish, namely equal protection of both large and small, powerful and less powerful Members through the consistent application of a set of rules and procedures."⁶

The USTR Special Section 301 report raises the following concerns regarding the implementation of intellectual property law and policy in China:

1. Non-enactment of a specific legislation on protection of trade secrets
2. Lack of decisive action to curb widespread manufacture, sale and export of counterfeit goods, or bad faith registration of trademarks
3. Failure to address widespread online piracy and counterfeiting in e-commerce markets
4. Use of competition law to pursue industrial policy goals
5. Disclosure obligation on patents relating to standards
6. Treatment of supplementary data in pharmaceutical patent examination
7. Strict definition of "new drug" that would be eligible for regulatory data protection
8. Inadequate amendments to the copyright law
9. Provisions relating to technology transfer
10. Requirement to disclose ICT related IP on grounds of cybersecurity
11. Lack of opportunities to participate in opposition, cancellation, invalidation or other processes relat-

ing to geographical indication (GI) and trademark applications

These claims are based on standards self-determined by the USTR, not on international standards. In accordance with 19 U.S.C. 2242 ('Identification of countries that deny adequate protection, or market access, for intellectual property rights'), a "foreign country may be determined to deny adequate and effective protection of intellectual property rights, notwithstanding the fact that the foreign country may be in compliance with the specific obligations of the Agreement on Trade-Related Aspects of Intellectual Property Rights...".⁷ This means that the US claims the right to impose its own rules and to ignore those agreed upon under the TRIPS Agreement, including the flexibilities that WTO members may legitimately use to pursue their national priorities and protect essential interests, such as in the area of public health.

As a member of WTO, China's intellectual property law and policy must be in conformity with the requirements in the TRIPS Agreement and the provisions of the international treaties that it incorporates. China is also bound vis-à-vis the parties of other intellectual property treaties it has signed. In accordance with the terms of its accession Protocol to the WTO, China has the same obligations under the TRIPS Agreement as other developing countries. The Accession Protocol requires China to bring its intellectual property laws and provisions into conformity with the TRIPS Agreement but, with one exception, does not require China to go beyond the obligations imposed by those provisions. Thus, the merit of US claims on the basis of which China has been placed in Priority Watch List must be tested on the anvil of China's WTO obligations regarding the TRIPS Agreement. A preliminary review of the USTR arguments in the light of such obligations suggests the following:

First, there is no obligation on any WTO member under the TRIPS Agreement to enact a specific law for the protection of trade secrets. Article 39.2 of the TRIPS Agreement recognizes the right of natural or legal persons to protect information lawfully under their control from being disclosed to third parties without their consent, but does not prescribe how WTO members should implement such protection. Many WTO members do not have a specific trade secret law, but they generally protect it in the framework of unfair competition rules. China has the flexibility under the TRIPS Agreement to determine how to protect trade secrets and is not required to enact a specific trade secret law.

Second, the TRIPS Agreement requires WTO members to provide right holders with effective procedures and mechanisms for enforcing their rights, including measures to prevent infringements and remedies which constitute a deterrent to further infringements. However, the specific nature of these procedures and remedies are not specified. Indeed, WTO members have no obligation to create special regimes for the enforcement of IP that is separate from the general enforcement regime they have. Nonetheless, China has gone further and established specialized intel-

lectual property tribunals in various provinces. Moreover, the primary obligation for enforcing IP rights is on the right holder and not the State. Thus, the US allegation regarding lack of decisive action to curb counterfeit goods or bad faith registration of trademarks is untenable because the onus of taking decisive action against such acts falls on the right holders. The fundamental question is whether the procedures available to right holders to initiate such enforcement action are effective. A 2009 WTO panel ruling on a dispute between the US and China (*China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*) did not find the IP enforcement regime in China relating to customs measures and criminal liability thresholds to be in contravention of the obligations under the TRIPS Agreement.⁸

Third, there is no specific TRIPS obligation on WTO members with regard to addressing counterfeiting and piracy online. The WIPO Copyright Treaty (WCT), to which China is a Contracting Party, requires the application of measures necessary for the enforcement of copyright in the digital domain, but also clarifies that such measures need not be distinct from the general legal system of the Contracting Party. The additional standards of protection introduced by the WCT are not mandatory under the TRIPS Agreement. Moreover, the US has not alleged that China's IP enforcement regime relating to copyright in the digital domain is not consistent with the WCT.

Fourth, contrary to US assertion, it is legitimate under the TRIPS Agreement for any country to use competition law and policy to advance industrial policy goals. There are no binding international rules limiting the policy space to design national disciplines on competition law. Hence, countries are free to design their competition laws in accordance with their domestic interests and needs, taking their level of development into account, subject only to the limitations arising from the territorial applicability of such laws.

Fifth, the requirement in Chinese law for any person participating in a standardization process to disclose all essential patents related to technical standards is not unique. Even in standard setting organizations in developed countries such as the American National Standards Institute (ANSI), European Telecommunications Standards Institute (ETSI) and Organization for the Advancement of Structured Information Standards (OASIS), the disclosure requirement is a common means to enable their technical committees to arrive at a fully informed decision about the particular technical specification and the estimated licensing costs. Such a requirement is not banned by the TRIPS Agreement, and is key to avoid anti-competitive practices resulting from opportunistic conduct of patent owners. In fact, in the US and other countries competition authorities and courts have taken measures to protect the public interests against the abuse of standard essential patents, including by refusal of injunctive relief.⁹

Sixth, Chinese patent examination guidelines have been amended to permit pharmaceutical patent applicants to file supplementary experimental data after filing their patent applications, but the applicant must satisfy the examiner that the technical effect of the supplementary data is capable of being derived from the original disclosure. The US contends that Chinese patent examiners have not applied the new guidelines to all examination questions to which supplementary data is germane. However, the Chinese guidelines only specifically apply to the admission of supplementary data in relation to sufficiency of disclosure objections raised by examiners. It is a matter of policy for China to determine whether supplementary data should also be admitted for other examination questions such as inventive step and novelty. This policy is fully within the space left by the TRIPS Agreement to WTO members to articulate patent examinations procedures.

Seventh, the US objects to the strict definition of a "new drug" that would be eligible for regulatory data protection under Chinese law. China accepted in the WTO accession process a TRIPS-plus obligation regarding test data for pharmaceutical products, through a commitment to introduce a form of "data exclusivity" that is not required under article 39.3 of the TRIPS Agreement. However, this commitment¹⁰ did not include any limitation regarding the way in which certain concepts, such as when a drug is to be deemed "new", could be applied. Hence, it is a policy choice that China can legitimately make under the WTO rules. Data exclusivity has been imposed by the United States and the European Union to partners in several free trade agreements, but the latter also generally enjoy some flexibility to mitigate the negative impact of such a TRIPS-plus protection in relation to access to medicines.¹¹ It is also worth noting that new draft rules aimed at enhancing test data protection were released in China for public comment in April 2018.¹²

Eighth, the USTR report merely alleges without any substantiation that major amendments in China's copyright law have not been carried out. No analysis is given in the USTR report regarding specific provisions in China's copyright law that are regarded by the US as inconsistent with TRIPS obligations.

Ninth, pursuant to an instruction from the US President, USTR conducted an investigation which found that Chinese acts, policies or practices, such as foreign ownership restrictions and administrative review and licensing processes to require US companies to transfer technology, restrictions in technology regulations on terms of licensing technologies, facilitation of investment in and acquisition of US companies and their IP over cutting-edge technologies by Chinese companies, and intrusions into computer networks of US companies to access sensitive commercial information and trade secrets, to be unreasonable, burdensome and discriminatory towards US commerce. Thus, the USTR has raised tariffs on certain products of Chinese origin and has initiated dispute settlement proceedings at the WTO against China's alleged discriminatory licensing requirements. While these issues, to the extent covered by the WTO rules, will have to be settled

through the WTO dispute settlement procedures, the unilateral imposition of increased tariffs on products of Chinese origin by the US without a resolution through the established WTO dispute settlement procedures, is in clear contravention to the WTO rules.¹³ Importantly, neither TRIPS nor the TRIMS Agreement forbid or otherwise regulate technology transfer performance requirements, particularly commitments of technology transfer that companies may be required and accept to make as one of the conditions for approval of a foreign direct investment.

Tenth, requirements in Chinese law to disclose ICT-related intellectual property on grounds of cybersecurity are not subject to the TRIPS disciplines; in any case, they would fall within the security exception that is available under that Agreement.

Finally, there is no international obligation for a WTO member regarding the opportunity to participate in opposition, cancellation, invalidation or other processes relating to GIs. Moreover, the TRIPS Agreement does not provide for a specific form of protection for GIs. The opportunity to oppose a trademark application or request the cancellation of trademark is granted under the Chinese law, which is subject to the general requirements established in article 15.5 of the TRIPS Agreement. The modalities under which third parties may submit an opposition or request cancellation, can be determined by WTO national laws. Neither the United States nor any other WTO member has so far raised these issues under the available WTO dispute settlement mechanism.

Conclusion

The US action to place China in the Special 301 priority watch list is unjustified and in contravention to the WTO rules. Moreover, it ignores the significant efforts that China has undertaken to reform its regime that already provides more protection and enforcement for IPRs than required in the TRIPS Agreement.

The unfounded US unilateral action against China is a clear example of a systemic problem that requires a concerted response. WTO members should take a decisive action to prevent economic and political intimidation as a tool to push reform of intellectual property policies. Developing countries, in particular, should unite to firmly oppose the imposition of unilateral measures that undermine the multilateral trading system and the credibility of WTO as a ruled-based institution.

Endnotes:

¹ See statistics available from <https://www.indexmundi.com/facts/china/royalty-and-license-fees>.

² The Industrial Research Institute, 2017 R&D Trends Forecast: Results from the Industrial Research Institute's Annual Survey, Research-Technology Management, 60:1, 18-25, DOI: 10.1080/08956308.2017.1255049 em.

³ In accordance with the index published annually by Cornell University, INSEAD and the World Intellectual Property Organization (WIPO). See http://www.wipo.int/pressroom/en/articles/2018/article_0005.html.

⁴ Martin Khor, 'Trade War - Developing Countries Should Respond', 24 July 2018. Available from <http://www.ipsnews.net/2018/07/trade-war-developing-countries-respond/>.

⁵ See Office of the United States Trade Representative, 2018 Special 301 Report, pp. 38-46 at p. 38, available from <https://ustr.gov/sites/default/files/files/Press/Reports/2018%20Special%20301.pdf>. "The state of intellectual property (IP) protection and enforcement in China, and market access for U.S. persons that rely on IP protection, reflect the country's failure to implement promises to strengthen IP protection, open China's market to foreign investment, allow the market a decisive role in allocating resources, and refrain from government interference in private sector technology transfer decisions. ... Concerns extend not only to gaps in legal authorities and weak Enforcement channels, but also to investment and other regulatory requirements that promote the acquisition of foreign technology by domestic firms at the expense of providing the reciprocity, a level playing field, the transparency, and the predictability upon which the United States and others rightly insist. ... The United States, other countries, and the private sector have stressed the urgent need for China to embrace meaningful and deep reform as it proceeds with a years-long overhaul of its IP-related legal and regulatory framework. Yet, results to date have disappointed, as China enacts measures that fail to reflect priority recommendations of the United States and others. China's shortcomings in this respect suggest that China intends to continue business as usual. For these reasons, as elaborated below, China remains a hazardous and uncertain environment for U.S. right holders hoping to protect and enforce their IP rights."

⁶ See WTO (1999), United States - Sections 301-310 of the Trade Act of 1974, Report of the Panel, WT/DS152/R, 22 December 1999, p. 325. Available from [https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=\(@Symbol=%20wt/ds152/r*%20not%20rw*\)&Language=EN-GLISH&Context=FomerScriptedSearch&languageUIChanged=true#](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds152/r*%20not%20rw*)&Language=EN-GLISH&Context=FomerScriptedSearch&languageUIChanged=true#).

⁷ U.S. Government Publishing Office, United States Code 2011, Title 19 - Customs Duties, p. 506. Available from <https://www.gpo.gov/fdsys/pkg/USCODE-2011-title19/pdf/USCODE-2011-title19-chap12-subchapI-part8-sec2242.pdf>.

⁸ WTO (2009), China - Measures Affecting the Protection and Enforcement of Intellectual Property Rights - Report of the Panel, WT/DS362/R, 26 January 2009. Available from https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm.

⁹ See, e.g. Jones Day, Standards-Essential Patents and Injunctive Relief, available at <https://www.jonesday.com/files/Publication/77a53dff-786c-442d-8028->

906e1297060b/Presentation/PublicationAttachment/270fc132-6369-4063-951b-294ca647c5ed/Standards-Essential%20Patents.pdf.

¹⁰ See Report of the Working Party on the Accession of China, WTO Ministerial Conference, Fourth Session, Doha, WTO WT/MIN(01)/3, 10 November 2001, para. 284.

¹¹ Carlos Correa, "Mitigating the Regulatory Constraints Imposed by Intellectual Property Rules Under Free Trade Agreements", Research Paper 74, South Centre, 2017. Available from https://www.southcentre.int/wp-content/uploads/2017/02/RP74_Mitigating-the-Regulatory-Constraints-Imposed-by-Intellectual-Property-Rules-under-Free-Trade-Agreements_EN-1.pdf.

¹² See, e.g., China IPR, Draft of Data Exclusivity Rules Released by CFDA, available from <https://chinaipr.com/2018/04/26/draft-of-data-exclusivity-rules-released-by-cfda/>.

¹³ Aileen Kwa and Peter Lunenborg, "US' Section 301 Actions: Why They are Illegitimate and Misguided," South Centre Research Paper No. 86 (September 2018).

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For comments on this publication, please contact:

The South Centre
Chemin du Champ d'Anier 17
PO Box 228, 1211 Geneva 19
Switzerland
Telephone: (4122) 791 8050
Fax: (4122) 798 8531
E-mail: south@southcentre.int
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