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THE OLD SHERIFF AND THE VIGILANTE: WORLD TRADE ORGANIZATION DISPUTE SETTLEMENT AND SECTION 301 INVESTIGATIONS INTO INTELLECTUAL PROPERTY DISPUTES

ZACHARY HARPER*

The current systems available for addressing unfair trade practices involving intellectual property are ineffective. While the World Trade Organization's dispute settlement process suffers from issues relating to monitoring and compliance when dealing with application of laws, the domestic process for resolving trade disputes, Section 301, suffers of unilateralism that is not supported by the international community. The current accusations by the United States that China is stealing intellectual property presents an opportunity to reconsider the issue of intellectual property dispute settlement. Ideally, both unilateral and multilateral methods of dispute settlement should be utilized. Alternatively, a new method of intellectual property dispute settlement, being bilateral negotiations, may be considered.

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I. INTRODUCTION

Imagine that someone has stolen one of your most prized possessions and you want to recover it. What is the most effective way to recover your loss? You could simply break into the alleged culprit's home and search for your item, risking direct confrontation or police intervention. You could also call the police and have them perform an investigation, potentially leading to litigation in which you may recover your loss. In either case, you could potentially succeed or fail to recover your loss. The option you ultimately choose will largely depend on which option has the highest probability of a successful recovery. However, what if both options have a similar probability for success? If both options have similar probability for success, you will likely go with the one which poses the least amount of risk to you. In this scenario, the option with least risk, maybe is going through a formal legal process, that is, have the police investigate the crime and then seek recovery for your losses in court. It carries some minor risks such as monetary loss during litigation and the length of the process. However, the alternative - breaking into the culprit's home - carries the risk of direct confrontation with the culprit which could cause you further injury. Additionally, the culprit could get the police involved, creating a risk that you will be punished by the very system you sought to avoid.

This is an interesting analogy to the recent actions that the United States has taken against China regarding China's trade policies for protecting intellectual property rights. The United States could take unilateral action, investigate the alleged crimes on their own and then take actions they deemed necessary to recover their losses. This would be analogous to the owner who sought to recover his losses on his own, without involving the police or the court. Alternatively, the United States could have their dispute heard by the World Trade Organization ["WTO"] in a formal process. This would be analogous to the owner who had requested that the police investigate and, then, filed a complaint against the culprit in court.

This article seeks to answer the question of which course of action the United States should take in dealing with China, or if they should seek an alternative third option. To answer this question, I will analyse the probability of success using both methods, considering the effectiveness of the WTO's dispute settlement body ["DSB"] and prior Section 301 investigations, and the availability of other options, being bilateral negotiations between the two countries.

II. CHINA'S INTELLECTUAL PROPERTY PROTECTION AND ANTICOMPETITIVE PRACTICES

On August 14, 2017 President Trump ordered the United States Trade Representative (“USTR”), an agency created to negotiate trade agreements and resolve trade disputes with foreign governments, to determine whether China has any trade policies which are unreasonable and place a burden on United States commerce.¹ The President relied on Section 302(b) to request an inquiry into China’s trade practices.² On August 18, 2017 the USTR, Robert Lighthizer, formally initiated an investigation into China.³ In a statement about the investigation, Lighthizer stated, “*We will engage in a thorough investigation and, if needed, take action to preserve the future of United States’ industry*”.⁴ There is a possibility of sanctions if China is found to be guilty of their alleged unreasonable trade policies. However, there may be some unwanted consequences if the United States goes down this path.

A. *China’s Alleged Infringement of Intellectual Property*

In 2017, the USTR released its annual Special 301 report detailing nations that should be carefully monitored based on their trade practices.⁵ In this report, the USTR lists several trade practices that China engages in, which have a deleterious effect on commerce in the United States. Such examples include China allegedly conditioning market access on the transfer of intellectual property, and incentivizing foreign firms to transfer intellectual property or simply develop it in China.⁶ On October 10th, 2017, after the initiation of the Section 301 investigation, the USTR held a public hearing to invite comments on the intellectual property protection issues in China.⁷ The accusations made by the USTR in the hearing included: requiring or pressuring foreign entities to transfer intellectual property to Chinese companies, depriving foreign companies of the

¹ *Presidential Memorandum for the United States Trade Representative* (Aug. 14, 2017), THE WHITE HOUSE, <https://www.whitehouse.gov/the-press-office/2017/08/14/presidential-memorandum-united-states-trade-representative>.

² 19 U.S.C. § 2412(b) (2012).

³ *USTR Announces Initiation of Section 301 Investigation of China*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (Aug. 18, 2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/august/ustr-announces-initiation-section>.

⁴ *USTR Robert Lighthizer’s Statement on the Presidential Memo on China*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (Aug. 14, 2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/august/ustr-robert-lighthizer-statement>.

⁵ USTR, *2017 Special 301 Review* (2017), <https://ustr.gov/issue-areas/intellectual-property/Special-301> [Hereinafter Special 301 Report].

⁶ *Id.* at 28-29.

⁷ USTR, *USTR SECTION 301 INVESTIGATION AND HEARING: CHINA’S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION*, (Oct. 10, 2017) <https://www.regulations.gov/document?D=USTR-2017-0016-0063> [Hereinafter 301 Hearing].

ability to set market-based terms in negotiations with Chinese companies, systemic acquisition of companies from the United States to gain technology transfers, supporting unauthorized intrusions into computer networks in the United States in an effort to steal intellectual property.⁸ One of the ways in which the Chinese government's complicity is seen in this matter is by virtue of its enactment of the Regulations on Technology Import and Export Administration, which requires foreign companies to develop intellectual property in or transfer intellectual property to China as a condition to enter the Chinese market.⁹ Due to these forced intellectual property transfers, it is estimated that the United States economy has lost approximately 1.6 trillion dollars over the last four years.¹⁰ Additionally, the forced intellectual property transfers have caused a loss of jobs and reduction in business creation and innovation, thereby leading to a lowered GDP.¹¹ The Commission of Theft of American Intellectual Property estimates that China is responsible for approximately 80 percent of international intellectual property theft.¹²

A specific example of intellectual property theft having a deleterious effect on the United States economy occurred in 2012. SolarWorld, a company in the United States, began to develop a new solar technology in 2008 known as Passivated Emitter Rear Contact ["PERC"], which allowed them to use solar power more efficiently.¹³ In 2012, just as SolarWorld was about to release its PERC technology in to the market, its computer systems were attacked by Chinese military hackers.¹⁴ China's PERC technology seemingly developed overnight, and by 2014, Chinese companies were using the technology in products that they sold in the market.¹⁵ The United States has several options to combat these deleterious trade practices, each with advantages and disadvantages, such as requesting consultations with China in the WTO's DSB, or simply placing unilateral sanctions on China.

B. China's Reaction to the Investigation

China has noted that its protection of intellectual property has steadily increased over the years, and that the domestic support for intellectual property protection is high.¹⁶ This is shown by an increase in intellectual property related cases in Chinese

⁸ *Id.* at 6.

⁹ *Id.* at 113.

¹⁰ *Id.* at 10.

¹¹ *Id.* at 11.

¹² *Id.* at 12.

¹³ *Id.* at 73.

¹⁴ *Id.* at 75.

¹⁵ *Id.* at 75-76.

¹⁶ *Id.* at 125.

courts, as well as China's creation of specialized intellectual property courts in certain areas.¹⁷ According to Chinese officials, foreign intellectual property owners approximately have an 80 percent win rate in these courts.¹⁸ The Special 301 report came to the same conclusion in early 2017, noting that the pilot program for the intellectual property courts has been successful, resulting in more litigation and higher damages.¹⁹ These officials further claim that China has benefited from dialogue concerning intellectual property protection, and encourages further debate on the topic.²⁰ It appears as though progress is slowly being made in China's protection of intellectual policy; however, drastic unilateral action could slow this progress even further. Another Chinese official noted that trade in the United States and China is largely dependent on each other, and any negative actions taken under Section 301 could harm trade between the countries and discourage Chinese investors from participating in the United States market.²¹ This appears to be a warning that if certain actions are taken during the Section 301 investigation, it may result into a trade war.

C. *Possible Alternatives to Counter China's Infringement*

There are many in the United States who believe that China complies with none of their WTO commitments; however, there are those in the United States who believe that China has made significant progress in their compliance with international rules.²² Those who believe that China complies with none of its obligations point to the Chinese government's support of intellectual property theft and restrictions on market access based on the transfer of intellectual property.²³ There are also those who acknowledge that while China does have some problems in the area of intellectual property protection, they have made progress in this area and do attempt to comply with most of their international obligations.²⁴ Further, those who believe that China complies with none of its obligations often support the idea of unilateral retaliation while those who believe China is making progress prefer a multilateral solution; however, there are also individuals who support using both methods.²⁵ They support using both unilateral and multilateral methods to compel China to increase their protections for intellectual property rights, as well as negotiating with China on these policies.²⁶

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Special 301 Report, *supra* note 4, at 29.

²⁰ 301 Hearing, *supra* note 7, at 125.

²¹ *Id.* at 150.

²² *Id.* at 42-43.

²³ *Id.* at 42.

²⁴ *Id.* at 43.

²⁵ *Id.* at 122.

²⁶ *Id.*

Regardless of what method is supported, the consensus seems to be that the end goal should not be to impose sanctions, but instead to convince China to discontinue the policies that burden trade in the United States.²⁷ All these options could be successful, but past data and the status of the international trade regime points to bilateral negotiations as the best way to move forward.

III. SECTION 301 AND THE WORLD TRADE ORGANIZATION

Since the advent of Section 301 and the WTO, both means of dispute settlement have been used by the United States to resolve trade disputes. The two methods were created by different entities to achieve different goals, and as such they are very different procedurally.

A. Section 301 Investigation Process and Legislative History

Section 301 of the Trade Act of 1974 was created as a means of combating unreasonable foreign trade practices that have a deleterious effect on the United States economy.²⁸ It gave authority to the President to direct the United States Trade Representative to take action if the “unjustifiable” or “unreasonable” trade practices of another nation placed a burden or restriction on United States commerce.²⁹ These actions could include placing restrictions on the other nation, such as higher tariff rates or suspension of concessions. Section 301 has always been intended as a means for the United States to combat unfair trade practices of other nations; however, it has undergone many changes since its inception.

1. The Trade Act of 1974

The Trade Act of 1974 was approved on January 3, 1975.³⁰ The original version of Section 301 allowed the President to determine if a foreign trade practice was unjustifiable or unreasonable, and then follow up by taking any appropriate action, including suspension of concessions or imposition of sanctions, to eliminate the foreign trade practice that is negatively affecting the United States.³¹ This version of Section 301 also authorized private parties to file a complaint and request a hearing concerning negative trade practices.³² One major problem with this version

²⁷ 301 Hearing, *supra* note 7, at 25.

²⁸ Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978 (1975) [Hereinafter Trade Act].

²⁹ 19 U.S.C. § 2411 (2012).

³⁰ Trade Act, *supra* note 28, at § 301(A).

³¹ *Id.*

³² Trade Act, *supra* note 28, at § 301(D)(2),

of Section 301 was that all the complaints were required to be investigated; however, there were no deadlines for the investigation.³³ This essentially allowed an action to be filed without actually making any progress, leading to the President only making a determination on one investigation out of 21 by the end of 1979.³⁴ These issues would be fixed in the Trade Agreements Act of 1979.

2. *The Trade Agreements Act of 1979*

The Trade Agreements Act of 1979 modified Section 301; however, it failed to make certain changes that Section 301 desperately needed. It simplified the language of Section 301, making it clearer when action was required and how to proceed with that action.³⁵ One of its most important changes was that it allowed the USTR to determine if any action should be taken on a request for investigation from a private party.³⁶ This amendment established certain deadlines; however, it allowed these deadlines to be waived, thus ensuring that Section 301 would continue to be plagued with problems of inefficiency.³⁷

3. *The 1984 Trade and Tariff Act*

The 1984 Trade and Tariff Act made several key changes to Section 301. The most important change made in this amendment is that it allowed the USTR to initiate a Section 301 investigation on their own, without receiving a request from either the President or a private party.³⁸ The amendment also differentiated between “unreasonable” and “unjustifiable” practices, a distinction that would later become important.³⁹ “Unjustifiable” practices were categorized as those which violated some international legal right, while “unreasonable” practices were categorized as those that did not violate any international legal rights, yet is still unfair or inequitable.⁴⁰ The new amendment also required that the USTR identify acts and policies that had a deleterious effect on trade in the United States.⁴¹ The policy reason for these changes was to encourage the USTR to be aggressive in initiating

³³ THOMAS BAYARD & KIMBERLY ELLIOTT, RECIPROCITY AND RETALIATION IN U.S. TRADE POLICY 27 (1994) [HEREINAFTER BAYARD AND ELLIOTT].

³⁴ *Id.*

³⁵ *Id.*

³⁶ Trade Agreements Act of 1979, Pub. L. No. 96-39, § 301 (c)(2), 93 Stat. 144 (1979).

³⁷ BAYARD AND ELLIOTT, *supra* note 33, at 27.

³⁸ Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 302 (c)(1), 98 Stat. 2948 (1984) [“Trade and Tariff Act, 1984”].

³⁹ BAYARD AND ELLIOTT, *supra* note 33, at 27.

⁴⁰ Trade and Tariff Act, *supra* note 38, § 302 (c)(3).

⁴¹ *Id.* at § 181 (a)(1)(A).

Section 301 investigations.⁴² However, the lack of strict deadlines continued to plague Section 301 investigations.

4. *The 1988 Omnibus Trade and Competitiveness Act*

The 1988 Omnibus Trade and Competitiveness Act was the last major substantive change to Section 301. One of the most important changes was the imposition of a strict deadline for the conclusion of the Section 301 investigations. The amendment stipulated that the USTR was required to determine the action required, if any, within 18 months from the beginning of the investigation.⁴³ The amendment also divided Section 301 into two different categories: Special 301 or Super 301.⁴⁴ Special 301 was created to protect the intellectual property rights of the United States.⁴⁵ Special 301 requires the USTR to identify countries that have policies which deny the United States protection of its intellectual property rights.⁴⁶ The USTR then places these countries on a watchlist, labelling them as “priority foreign countries”.⁴⁷ When nations are labelled priority foreign countries, there is a possibility for further action through a Super 301 investigation.⁴⁸ The Super 301 investigation is a more detailed and in depth investigation into the unreasonable or unjustifiable trade policies that burden the United States economy.⁴⁹ If the Super 301 investigations confirm the deleterious trade practices, the United States may take unilateral action and impose sanctions, unless the trade practice falls within the scope of intellectual property issues discussed by the WTO.⁵⁰

B. *World Trade Organization Dispute Settlement Understanding*

When Section 301 was enacted, unilateral means of settling trade disputes were not uncommon. However, since the formation of the WTO after the completion of the Uruguay Round Negotiations, international trade disputes have involved a

⁴² BAYARD AND ELLIOTT, *supra* note 33, at 28.

⁴³ Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 304 (a)(2)(A)(ii), 102 Stat. 1107 (1988).

⁴⁴ CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS ON *SECTION 301 OF THE TRADE ACT OF 1974, AS AMENDED: ITS OPERATION AND ISSUES INVOLVING ITS USE BY THE UNITED STATES* 454(2000).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 3

⁴⁹ *Id.*

⁵⁰ *Id.*

more multilateral dispute resolution system.⁵¹ To accomplish this goal, the WTO established a Dispute Settlement Understanding ["DSU"] in which a panel, known as the DSB, would settle trade disputes between World Trade Organization member nations.⁵² It also incorporated the Trade Related Aspects of Intellectual Property Rights agreement ["TRIPS"], which governed trade policies surrounding intellectual property rights.⁵³ These new multilateral trade dispute systems led to a reduction in the use of Section 301 as a trade dispute settlement mechanism; however, it seems that it may once again have found its way into the international trade discussion.

1. *Pre-WTO Rules for Dispute Settlement: The GATT*

Before the WTO, there was the General Agreement on Tariffs and Trade ["GATT"].⁵⁴ Under the GATT, dispute settlement was handled using Articles 12 and 13.⁵⁵ The parties to the dispute would then undergo a process of consultation and negotiation.⁵⁶ If negotiations were unsuccessful, the GATT would form a neutral panel to issue a decision in the dispute.⁵⁷ However, there was a serious defect in this dispute resolution mechanism. The establishment of a panel or the adoption of a panel decision required unanimous support of all parties.⁵⁸ This effectively meant that the losing party could simply choose to not agree to comply with a panel decision, or even establish a panel in the first place.⁵⁹ Despite the ability to block panels, the losing party accepted the results of the panel in about 90 percent of the cases, illustrating the value of a multilateral dispute settlement system to member nations.⁶⁰ However, the member nations began to use blocking panels as a tactic with increasing regularity starting in the 1980s.⁶¹ Thus, this

⁵¹ General Agreement on Tariffs and Trade, Apr. 15, 1994, 1867 U.N.T.S. 187 [hereinafter GATT 1994].

⁵² Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

⁵³ General Agreement on Trade-Related Aspects of Intellectual Property, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS].

⁵⁴ General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 194 [hereinafter GATT 1947].

⁵⁵ DAVID PALMETER & PETROS C. MAVROIDIS, DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION 6 (2004).

⁵⁶ *Id.* at 7.

⁵⁷ *Id.* at 7.

⁵⁸ *Id.* at 9.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

ineffective system would be one of the most important issues to be corrected in the formation of the WTO.

2. *The World Trade Organization: Correcting Dispute Settlement in International Trade*

The WTO was established on January 1, 1995, as a successor to the GATT.⁶² It was created by the *Marrakesh Agreement Establishing the World Trade Organization*, at the end of the Uruguay Rounds of negotiations.⁶³ A major change is the new dispute settlement system created by the WTO agreement. The newly formed WTO contained an agreement known as the Understanding on Rules and Procedures Governing the Settlement of Disputes [“DSU”].⁶⁴ This agreement established the DSB, consisting of representatives from every WTO member nation.⁶⁵ This new agreement wasted no time fixing the issues that plagued the GATT’s dispute settlement mechanism. Where the old system required a consensus to establish a panel or adopt a panel decision, the DSU requires the exact opposite. The DSU requires a “negative consensus” to not establish a panel or adopt a panel decision.⁶⁶ Basically, in the new system if a member nation wants to block the establishment of a panel or the adoption of a panel report, they must get all other nations to agree. This allows the DSU to further meet its objective of “providing security and predictability to the multilateral trading system”.⁶⁷

The process for dispute resolution starts with a request for consultations.⁶⁸ Following consultations, a panel may be established upon request of the complaining party.⁶⁹ It is then the duty of the panel to “make an objective assessment of the matter before it.”⁷⁰ After hearing the dispute and making a decision, the panel must then issue a panel report which has to be adopted by the DSB.⁷¹ However, if a party to the dispute disagrees with the findings of the panel, they may appeal against the decision through the DSB’s standing appellate body.⁷² The appellate body may then either uphold, reverse, or modify the findings of the panel.⁷³ The nation which was ruled against, then has a reasonable period of time

⁶² *Id.* at 15.

⁶³ *Id.*

⁶⁴ DSU, *supra* note 52, at Annex 2.

⁶⁵ *Id.* at art 2.

⁶⁶ *Id.* at arts. 6.1 and 16.4.

⁶⁷ *Id.* at art. 3.2.

⁶⁸ *Id.* at art 4.3.

⁶⁹ *Id.* at art 6.1.

⁷⁰ *Id.* at art 11.

⁷¹ *Id.* at art 16.

⁷² *Id.* at art 17.

⁷³ *Id.* at art 17.13.

to comply with the provisions it was found to have violated.⁷⁴ If the nation does not comply within a reasonable period of time, the complaining party may request formation of an Article 21.5 compliance panel to address the issue.⁷⁵ If the nation still refuses to comply, the DSU may authorize the aggrieved party to suspend concessions or seek compensation from the nation that is noncompliant.⁷⁶

C. Section 301 in the Eyes of the World Trade Organization

On November 25, 1998, the European Communities requested consultations with the United States, alleging that the United States' use of Section 301 violates provisions of WTO agreements.⁷⁷ However, the panel noted that the United States considered this problem and accounted for it by creating the Statement of Administrative Action ["SAA"].⁷⁸ In the SAA, the United States agreed (in cases where Section 301 is being used to investigate an issue that involves an alleged violation of a WTO agreement) to use DSU dispute settlement procedures, base any determination on the findings of the DSB, allow the opposing party time to implement new policies, and seek authority from the DSB to retaliate against the opposing party if necessary.⁷⁹ This agreement allows the United States to conduct a unilateral investigation via Section 301; however, if the investigation involves a violation of a WTO agreement, the United States must still follow the WTO's dispute settlement procedures before making a determination in the Section 301 investigation. This effectively renders Section 301 useless in cases where a WTO agreement was violated, as the United States must comply with the findings by the DSB in these cases.

D. Trade Related Aspects of Intellectual Property Rights

The TRIPS is an agreement in the WTO that protects intellectual property rights. The first eight articles of the agreement set up generally what the objectives and principles of the agreement are, noting that the agreement is a set of obligations.⁸⁰ Articles 9-14 establish protections for copyright.⁸¹ Articles 15-21 set protections for trademarks, including a prohibition on compulsory licensing.⁸² Article 39

⁷⁴ *Id.* at art 21.4.

⁷⁵ *Id.* at art 21.5.

⁷⁶ *Id.* at art 22.1.

⁷⁷ Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WTO Doc. WT/DS152/R, (adopted Jan. 27, 2000).

⁷⁸ *Id.* at 329.

⁷⁹ *Id.* at 331.

⁸⁰ CHRISTOPHER MAY & SUSAN K. SELL, *INTELLECTUAL PROPERTY RIGHTS* 164-165 (2006).

⁸¹ *Id.*

⁸² *Id.* at 167.

creates protections for trade secrets, with the goal of protecting sensitive information from being illegally obtained.⁸³ Many of these provisions could have relevance in this context as they may be violated in the ongoing Section 301 investigation, which would compel the United States to follow WTO dispute settlement procedure.

E. Unilateralism vs. Multilateralism: The Shifting Opinions on Globalization

Throughout modern history, opinions on globalization have shifted between preferring unilateral policies and multilateral policies. Prior to the formation of the WTO, many countries preferred to rely on unilateral policies for international trade. For example, before the Great Depression, the United States relied heavily on protectionist policies, causing severe problems economically.⁸⁴ After these policies failed, President Franklin Roosevelt enacted the Reciprocal Trade Agreement Act [“RTAA”], which led to a reduction in tariffs, illustrating a multilateral shift in the trade policy of the United States.⁸⁵ These policies helped facilitate the formation of the GATT, a promising sign that the multilateral ideals would continue.⁸⁶ However, as previously noted, the dispute settlement system in the GATT left much to be desired, which led to the creation of Section 301, a unilateral tool to combat unfair trade practices.

Due to the inherent problems with the GATT’s dispute settlement system, Section 301 was heavily relied on until the formation of the WTO, illustrating the United States’ reliance on unilateral methods during that period.⁸⁷ However, after the creation of the WTO, many believed that the United States should eliminate the use of Section 301, arguing that as there was a move away from unilateral decision making, the WTO should oppose the use of Section 301 altogether.⁸⁸ The fear was that if unilateral sanctions were allowed in a world where multilateral decision making was becoming the norm, the unilateral sanctions would once again become the dominant method for dispute settlement.⁸⁹ Since the United States helped to create the WTO and set the rules of that organization, their reliance on unilateral

⁸³ TRIPS, *supra* note 53, at art 39.2.

⁸⁴ DOUGLAS A. IRWIN, *FREE TRADE UNDER FIRE* 240 (2015) [HEREINAFTER IRWIN].

⁸⁵ *Id.*

⁸⁶ *Id.* at 242.

⁸⁷ *Table of Section 301 Investigations from 1976-1997*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (Aug. 18, 2017), https://ustr.gov/archive/assets/Trade_Agreements/Monitoring_Enforcement/asset_upload_file985_6885.pdf. [Hereinafter Section 301 Investigations]

⁸⁸ Jared R. Silverman, *Multilateral Resolution over Unilateral Retaliation: Adjudicating the Use of Section 301 Before the Two*, 17 U. Pa. J. Int’l L. 233, 239 (1996).

⁸⁹ *Id.* at 287.

methods would damage the reputation of the WTO, thus reducing faith in the multilateral system altogether.⁹⁰ Many believed that the United States should abide by the rules it helped create.⁹¹

The fears of the United States regressing into the use of Section 301 and other unilateral methods were not instantly realized. After the formation of the WTO, the number of Section 301 cases by the United States reduced drastically.⁹² In fact, the opposite was true for many years, as the United States benefited from the new multilateral system.⁹³ However, after having success in the early years of the WTO, many nations including the United States became disgruntled with the slow pace of the WTO process.⁹⁴ In all likelihood, it is this frustration that led to a rise in preferential trade agreements,⁹⁵ which seem to illustrate a shift away from the multilateral system. However, even with the rise of the unilateral agreements there does not seem to be a reduced interest in using multilateral methods and rules.⁹⁶ In fact, in the wake of the 2009 financial recession, multilateral entities stepped in to reduce the use of protectionist measures because of the recession.⁹⁷

When the multilateral entities stepped in to prevent the protectionist policies, global trade fell by 12%, and only 2% of that drop was attributable to the protectionist measures put in place.⁹⁸ It is difficult to measure the effect that the WTO had on preventing protectionism after the recession. However, the WTO does have policies and rules in place that prevented certain protectionist barriers to trade.⁹⁹ With these WTO policies and rules now firmly entrenched into the international community, it seems we have reached a point where unilateral and multilateral policies can be used in tandem. If history is any indication, there will continue to be shifts between embracing unilateral or multilateral policies. However, the WTO has become such a fixture in the international trade community that it will continue to influence trade policy, even if unilateral methods are used. For example, many think that Section 301 could still be useful as an investigatory tool, even in an international trade landscape that is dominated by multilateral decision making.¹⁰⁰ While unilateral methods do have a place in

⁹⁰ *Id.* at 285.

⁹¹ Judith H. Bello & Alan F. Holmer, *GATT Dispute Settlement Agreement: Internationalization or Elimination of Section 301?*, 26 Int'l Law. 795, 802 (1992) [Hereinafter Bello & Holmer].

⁹² Section 301 Investigations, *supra* note 87.

⁹³ IRWIN, *supra* note 84, at 267.

⁹⁴ PETER GALLAGHER, *THE FIRST TEN YEARS OF THE WTO 1995-2005* 128 (2005).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ IRWIN, *supra* note 84, at 258.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Bello & Holmer, *supra* note 91.

today's international trade environment, it seems that the WTO is here to stay, and the rules and policies of the WTO will continue to influence global governance.

IV. CASE ANALYSIS OF SECTION 301 INVESTIGATIONS VERSUS PANEL DECISIONS OF THE WORLD TRADE ORGANIZATION

Section 301 and the DSU of the WTO are quite different regarding procedure and results. Section 301 represents a much more unilateral approach to international trade disputes, while the DSB of the WTO is a multilateral approach to trade disputes. Both approaches have been effective at different points in history. Prior to the formation of the WTO, Section 301 was often used as a means of dispute resolution for trade disputes involving the United States.¹⁰¹ However, in the time leading up to the negotiation of the Uruguay Rounds and the formation of the WTO, there was a steep decline in the number of Section 301 cases, reflecting the United States' interest in using a multilateral approach to dispute resolution.¹⁰² From 1976 to 1997, Section 301 was used 116 times, but since then, the unilateral tool has been used infrequently.¹⁰³ It seems that the United States might be re-embracing the unilateral approach, by opting to use Section 301 instead of the WTO's DSB. The reason for this shift back to unilateralism could be discovered by an analysis of the differences between Section 301 and the DSB. In addition, to illustrate the difficulty in convincing other nations to change their intellectual property protections, concrete issues such as intellectual property cases will be analysed.

A. Section 301 Investigations

On June 16, 1989 the USTR began a Section 301 investigation of Japan.¹⁰⁴ The United States alleged that Japan's policies involving the purchase of supercomputers were negatively affecting the ability of United States firms and effectively denying them access to the Japanese market.¹⁰⁵ The United States was concerned about these practices, as supercomputers were an industry that were important for both financial and security reasons, and it seemed that Japan was trying to protect their domestic supercomputer industry through the use of subsidies and other anti-competitive trade practices.¹⁰⁶ When the United States first

¹⁰¹ BAYARD AND ELLIOTT, *supra* note 33, at 64-65 (1994).

¹⁰² *Id.* at 60, Table 3.2.

¹⁰³ Section 301 Investigations, *supra* note 87.

¹⁰⁴ USTR, INITIATION OF SECTION 302 INVESTIGATION AND INVITATION FOR PUBLIC COMMENT; EXCLUSIONARY GOVERNMENT PROCUREMENT OF SUPERCOMPUTERS BY THE GOVERNMENT OF JAPAN, 54 Fed. Reg. 26, 137 (1989).

¹⁰⁵ *Id.*

¹⁰⁶ BAYARD AND ELLIOTT, *supra* note 33, at 101-102.

accused Japan of these anti-competitive policies, they agreed to discuss a solution to the issues with the supercomputer industry and other industries.¹⁰⁷ They decided to use the Market-Oriented Sector-Selective approach, with the goal of liberalizing the Japanese market and opening it for access by the United States' domestic industries.¹⁰⁸ The United States and Japan reached an agreement not long after, completing the agreement on August 7, 1987.¹⁰⁹

However, this agreement was reviewed in 1988, and the results were not satisfactory to the United States, leading them to launch the Section 301 investigation.¹¹⁰ Immediately after beginning the investigation, Japan refused to cooperate with the United States under threat of a Section 301 investigation; however, Japan finally complied, forming another agreement with the United States.¹¹¹ This new agreement was signed on March 23, 1990, and contained several provisions designed to further eliminate discriminatory trade policies of Japan.¹¹² The settlement resulted in an increase in the amount of supercomputers sold to Japan by the United States, with another increase in 1994.¹¹³ Through the use of Section 301, the United States was able to negotiate a settlement with Japan in about a year, and from the data it appears that the settlement was successful in opening the Japanese markets to firms from the United States. This is a stark contrast to the agreement that was reached in 1987, which was unsuccessful in opening Japanese markets. The pressure of being under a Section 301 investigation potentially explains the more favourable settlement in the 1990 agreement.

One of the major areas designed to be protected by Section 301 is intellectual property. Thus, it comes as no surprise that many of the cases involving Section 301 arise out of an intellectual property dispute. On July 27, 1987 the United States launched a Section 301 investigation into Brazil for their failure to protect intellectual property by denying patent protection for certain pharmaceuticals.¹¹⁴ The United States alleged that Brazil's failure to protect intellectual property led to a loss of market share in Brazil for pharmaceutical companies from the United States.¹¹⁵ On October 20, 1988, about a year after the investigation started,

¹⁰⁷ See *Semiconductor Trade and Japanese Targeting: Hearing Before the Subcomm. on International Finance and Monetary Policy of the Comm. on Banking, Housing, and Urban Affairs*, 99th Cong., 99-309 (1985).

¹⁰⁸ *Id.* (statement of Ass. USTR James M. Murphy).

¹⁰⁹ BAYARD AND ELLIOTT, *supra* note 33, at 108.

¹¹⁰ *Id.* at 110.

¹¹¹ *Id.* at 111.

¹¹² *Id.* at 111-112.

¹¹³ *Id.* at 112.

¹¹⁴ USTR, UNFAIR TRADE PRACTICES; BRAZIL PATENT PROTECTION FOR PHARMACEUTICALS; INITIATION OF AN INVESTIGATION, 52 FED. REG. 28,223 (1987).

¹¹⁵ *Id.*

President Reagan used his power under Section 301 to increase tariff rates against Brazil on certain products.¹¹⁶ However, the reaction to the retaliatory actions by the United States was not favourable. The unilateral sanctions imposed by the United States were illegal under certain provisions of the GATT, and other nations looked down on the unilateral move.¹¹⁷ Brazil filed a complaint with the GATT; however, the United States refused to consent to the establishment of a GATT panel to hear the complaint.¹¹⁸ Additionally, Brazil had considered making changes to their intellectual property policies; however, due to the sanctions Brazil decided not to make any changes to their policy.¹¹⁹ This was only a short term reaction, because in 1990 when a new President took office in Brazil, Brazil announced plans for legislation that would substantially increase patent protection for pharmaceutical products.¹²⁰ This led the erstwhile USTR, Carla Hills, to end the retaliation from the Section 301 investigation.¹²¹ However, this was not the end of the dispute, as Brazil did not pass any legislation in a timely manner. This led the United States to open another Section 301 investigation on May 28, 1993, investigating the still rampant abuse of intellectual property rights by Brazil.¹²² After an extension of the investigation, the USTR announced on February 24, 1994 that the United States had reached an agreement with Brazil on a timetable for intellectual property reform.¹²³ This agreement did not sustain for long, as the United States brought a dispute before the WTO in 2001 regarding Brazil's intellectual property policies.¹²⁴

The Section 301 investigations into Brazil created movement and awareness of the grievances of the United States, but they did not have the concrete effects that the United States might have hoped for. In fact, the retaliation might have undermined the credibility of the United States during the Uruguay Rounds.¹²⁵ However, it did show that the United States was serious about protecting intellectual property

¹¹⁶ POTUS, INCREASE IN RATES OF DUTY FOR CERTAIN ARTICLES FROM BRAZIL, 53 Fed. Reg. 41,551 (1988).

¹¹⁷ BAYARD AND ELLIOTT, *supra* note 33, at 188.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 198.

¹²⁰ *Id.* at 199.

¹²¹ *Id.*

¹²² USTR, INITIATION OF SECTION 301 INVESTIGATION AND REQUEST FOR PUBLIC COMMENT; INTELLECTUAL PROPERTY LAWS AND PRACTICES OF THE REPUBLIC OF BRAZIL, 58 Fed. Reg. 31,788 (1993).

¹²³ BAYARD AND ELLIOTT, *supra* note 33, at 199-200.

¹²⁴ Panel Report, *Brazil –Measures Affecting Patent Protection*, WTO Doc. WT/DS199/3, (adopted July 19, 2001).

¹²⁵ BAYARD AND ELLIOTT, *supra* note 33, at 207.

rights, which likely helped in pushing for the creation of the TRIPS.¹²⁶ It also reinforced the need for a more useful international trade dispute settlement system, which led to the formation of the DSU in the WTO.¹²⁷ This new system of dispute settlement would function quite differently than the United States' unilateral dispute settlement procedure under Section 301.

B. Panel Decisions from the Dispute Settlement Body

The DSB of the WTO acts as a multilateral dispute resolution mechanism for the member nations of the WTO.¹²⁸ The United States has been a party to WTO panels more than any other nation, which is logical considering the United States is one of the world's largest economies. The process of obtaining a panel decision from the DSB is quite different from the process of a Section 301 investigation; however, the two processes often seem to have similar results.

On July 7, 1995, the United States made a request for consultations with Japan regarding a Japanese law that taxed liquor differently based on certain physical properties.¹²⁹ The United States argued that Japan was attempting to protect one of their domestic liquors, shochu, even though it was similar to other liquors from the United States that were being taxed at a higher rate.¹³⁰ Thus, the United States further argued that under Article III, Section 2 of the GATT, shochu was a like product with the vodka from the United States, or in the alternative that the two liquors were directly competitive and substitutable products.¹³¹ The panel ultimately decided that Japan was in violation of Article III, Section 2 of the GATT, as shochu and vodka were deemed like products.¹³² The panel further noted that Japan was not in compliance with Article III, Section 2 of the GATT when they taxed other liquors at a higher rate than shochu, because the other liquors were directly competitive and substitutable products and thus must be taxed similarly.¹³³ The panel recommended that Japan bring their tax law into compliance.¹³⁴ However, the Japanese government failed to make changes to their tax law for an extended period of time after the panel's recommendation, so the United States made an Article 21¹³⁵ request for arbitration in order to compel

¹²⁶ *Id.*

¹²⁷ DSU, *supra*, note 52.

¹²⁸ *Id.*

¹²⁹ Panel Report, *Japan – Taxes on Alcoholic Beverages*, WTO Doc. WT/DS11/R (adopted July 11, 1996).

¹³⁰ *Id.* at 11.

¹³¹ *Id.*

¹³² *Id.* at 115.

¹³³ *Id.* at 122.

¹³⁴ *Id.*

¹³⁵ DSU, *supra* note 52 at art 21.

Japan to comply with the panel's recommendations.¹³⁶ The Article 21 panel reiterated that the purpose of the dispute settlement system was to provide security and predictability, thus all of the member nations have an interest in prompt compliance after a panel's ruling.¹³⁷ On January 9, 1998, two and a half years after the request for consultations was filed, Japan adjusted their policy to comply with the GATT.¹³⁸

On July 2, 1996, the United States made a request for consultations with India regarding its failure to protect intellectual property.¹³⁹ This was one of the early panel decisions, occurring not long after the formation of the WTO. The alleged misconduct was that India had failed to comply with provisions of the newly created TRIPS agreement, specifically Articles 70.8 and 70.9.¹⁴⁰ These provisions essentially provide that a nation must maintain a system for the application of patents and provide protection for those patents, including marketing rights.¹⁴¹ With regard to Article 70.8, the panel was not content with the temporary system that India had put in place for the patent application process.¹⁴² India attempted to argue that they had time until 2005 to implement patent protection legislation. However, the panel stated that India must have some form of patent protection in the transition period, noting that industries would not file for patents at all if they did not think there was a secure and predictable system for obtaining and maintaining a patent.¹⁴³ India's argument for its failure to comply with Article 70.9 was that the legislature was not in session and the President did not have authorization to enact the legislation on his own.¹⁴⁴ The panel rejected this argument, noting that regardless of India's inability to enact the legislation, it was still a violation of the TRIPS agreement.¹⁴⁵

¹³⁶ *Id.* at art. 21.3(c).

¹³⁷ Article 21.3(c) Arbitration Report, *Japan – Taxes on Alcoholic Beverages*, WTO Doc. WT/DS11/13 (adopted Feb. 14, 1997).

¹³⁸ *Current Status of Japan – Taxes on Alcoholic Beverages II*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds11_e.htm (last visited Mar. 26, 2018).

¹³⁹ Panel Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WTO Doc. WT/DS50/R (adopted Sept. 5, 1997) [Hereinafter *India-Patents US Panel Report*].

¹⁴⁰ *Id.* at 1

¹⁴¹ TRIPS, *supra* note 53, at arts 70.8 and 70.9.

¹⁴² *India-Patents US*, *supra* note 139 at 38.

¹⁴³ *Id.* at 54

¹⁴⁴ *Id.* at 58.

¹⁴⁵ *Id.*

After the panel reached its conclusions, the United States suggested that India implement a transitional regime similar to that of Pakistan, but the panel rejected this suggestion noting that India has the right to implement the TRIPS agreement in a way they see fit.¹⁴⁶ However, the panel required that India bring its transitional regime for intellectual property protection into conformity with the provisions of the TRIPS agreement.¹⁴⁷ India officially passed its legislation in April, 1999. This allowed them to comply with the provisions of the TRIPS agreement.¹⁴⁸ Roughly three years passed between the United States' request for consultations and India's implementation of the new policy that conformed with the TRIPS agreement.

C. Dealing with China: Section 301 and the WTO

Intellectual property protection has always been an issue in China, and the United States has elected to confront the issue in different ways in the past. The United States has had some success combating China with both Section 301 and WTO dispute settlement procedures. Two examples of United States action against China are the Section 301 investigation from 1991 and the WTO panel decision from 2009.

1. China, Intellectual Property, and Section 301

On October 10, 1991 the United States initiated a Section 301 investigation into China's protection of intellectual property.¹⁴⁹ The United States threatened retaliation to the amount of 3.9 billion dollars. The Congress and presidential administration were united in their support of the investigation, which greatly increased the support for the investigation.¹⁵⁰ The investigation did not result in retaliation, as China agreed to change its policies and comply with the United

¹⁴⁶ *Id.* at 62.

¹⁴⁷ *Id.* at 63.

¹⁴⁸ India-Patents US Panel Report, *supra* note 139, Add. 4..

¹⁴⁹ USTR, INITIATION OF SECTION 302 INVESTIGATION AND REQUEST FOR PUBLIC COMMENT: BARRIERS TO ACCESS TO THE MARKET OF THE PEOPLE'S REPUBLIC OF CHINA, 56 Fed. Reg. 51,943 (1991).

¹⁵⁰ BAYARD AND ELLIOTT, *supra* note 33, at 318.

States' demands.¹⁵¹ There are many reasons for China's decision to comply with the demands of the United States. As previously stated, the Congress and the presidential administration both supported the investigation therefore, China knew that the threat to retaliate was a credible one. Additionally, at the time of this investigation, China's economy was not as large as it is today, and it was largely dependent on the United States market, with nearly one third of the exports from China being sold in the United States.¹⁵² It was also relatively easy to point to areas that needed improvement because China's intellectual property protection policies of the early 90's were almost non-existent.¹⁵³ The United States also pointed out the fact that these policies would need to be changed to comply with GATT provisions, thus reinforcing the idea that the United States was considering multilateral trade policies in their investigation.¹⁵⁴ China was seeking entry into the GATT at this time, and they knew that if they cooperated, the United States would support their entry into the GATT which would eventually become the WTO.¹⁵⁵

2. *China, Intellectual Property, and the World Trade Organization*

On April 10, 2007, the United States requested consultations with China, alleging that China had failed to protect intellectual property rights.¹⁵⁶ Specifically, the United States was accusing China of violating Articles 9.1 and 41.1 of the TRIPS agreement.¹⁵⁷ Article 41.1 of the TRIPS agreement states, "*members shall ensure that enforcement procedures are available under their law as to permit effective action against any act of infringement of intellectual property rights.*"¹⁵⁸ The United States argued that China did not have adequate protections in their laws for copyright infringement.¹⁵⁹ The panel ultimately agreed with the United States on this particular issue, holding that China was in violation of its obligations under the TRIPS agreement, and recommending that China bring its laws into conformity with the provisions of the TRIPS agreement.¹⁶⁰ On April 13, 2010, China notified the WTO that it had

¹⁵¹ USTR, TERMINATION OF THE SECTION 301 INVESTIGATION REGARDING CERTAIN MARKET ACCESS BARRIERS OF THE PEOPLE'S REPUBLIC OF CHINA, 57 Fed. Reg. 47, 889 (1992).

¹⁵² BAYARD AND ELLIOTT, *supra* note 33, at 319.

¹⁵³ *Id.*

¹⁵⁴ BAYARD AND ELLIOTT, *supra* note 33, at 320.

¹⁵⁵ BAYARD AND ELLIOTT, *supra* note 33, at 319.

¹⁵⁶ Panel Report – *China, Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WTO Doc. WT/DS362/R (adopted Jan. 26, 2009) [Hereinafter *China — Intellectual Property Rights* Panel Report].

¹⁵⁷ *Id.* at 34-37.

¹⁵⁸ TRIPS, *supra* note 53, at art 41.1.

¹⁵⁹ China — Intellectual Property Rights Panel Report, *supra* note 156, at 36-37.

¹⁶⁰ *Id.* at 134.

changed its policies to meet its obligations under the TRIPS agreement, and the United States never needed to request an Article 21.5 panel.¹⁶¹ The process took approximately three years from the time the complaint was filed to the implementation of the new policies.

D. Analysis of Section 301 Investigations and World Trade Organization Panels

Section 301 and the WTO's DSB have both struggled when it comes to compliance with their decisions. Section 301 has been mildly successful in most instances, considering how almost half of the Section 301 cases initiated have led to at least modest market opening.¹⁶² However, the numbers are much worse when only intellectual property investigations are analysed. The increase in Section 301 cases involving intellectual property rights led to a decrease in the overall effectiveness of Section 301, as almost none of the Section 301 investigations involving intellectual property rights achieved more than marginal success.¹⁶³ The reasons for the United States' struggles to successfully use Section 301 to deal with intellectual property issues are multifold. These include the inability to clearly define the barrier to be negotiated,¹⁶⁴ and domestic support for market opening.¹⁶⁵ For these reasons, using Section 301 for an intellectual property investigation has led to only nominal results and very little trade liberalization.¹⁶⁶ It can be argued that these investigations pushed certain nations to eventually change their intellectual property practices; however, it could also be argued that these nations would have eventually opened their markets anyway.

The WTO has similar problems with compliance from its member nations. On one hand, compliance with WTO panel decisions is encouraged by the international community because it is a rule based system for dispute resolution, which is preferable due to its consistency and predictability.¹⁶⁷ On the other hand, member nations do not want to have their sovereignty questioned, often choosing the sanctions of non-compliance rather than complying with a ruling they do not agree with or that they do not feel is in their best interest.¹⁶⁸ As successful as the

¹⁶¹ Understanding Between China and the United States Regarding Procedures under Articles 21 and 22 of the DSU – China, *Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WTO Doc. WT/DS362/15 (adopted Apr. 13, 2010).

¹⁶² BAYARD AND ELLIOTT, *supra* note 33, at 331.

¹⁶³ *Id.* at 332 and 335, Summary Table.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 355-368.

¹⁶⁷ Benjamin L. Brimeyer, *Bananas, Beef, and Compliance in the World Trade Organization: The Inability of the WTO Dispute Settlement Process to Achieve Compliance from Superpower Nations*, 10 Minn. J. Global Trade 133, 166 (2001).

¹⁶⁸ *Id.* at 167.

WTO's dispute settlement system has been, it is clearly not perfect. There are many instances of member nations postponing compliance with a panel ruling, or simply not complying at all.¹⁶⁹ However, it is still the only multilateral dispute resolution system for international trade, so if member nations have confidence in the system it will be valuable.¹⁷⁰ The danger comes when member nations begin to lose confidence in the system.

The WTO, like Section 301 investigations, has also had significant struggles with issues involving intellectual property. In the early days of the WTO, many of the disputes involving TRIPS were statutory claims, where one nation lacked sufficient statutory protections for intellectual property, violating the TRIPS agreement.¹⁷¹ These issues are easy to point out and simple to remedy; the offending nation must create a law that protects intellectual property pursuant to the TRIPS agreement.¹⁷²

However, challenging the effectiveness of domestic remedies is much more difficult. For example, it would require the offended nations to have substantial proof, which is much more difficult than pointing out lack of statutory remedies.¹⁷³ Additionally, even if proof is found, there is no established baseline for when a domestic remedy is ineffective.¹⁷⁴ If there is a substantial amount of intellectual property right infringement, such as 75%, the domestic remedies are likely insufficient.¹⁷⁵ However, if the number is closer to 25%, the question becomes much less clear.¹⁷⁶ Another problem with challenging the effectiveness of domestic remedies is that even if the WTO makes a finding against the offending nation, they will not force a nation to take any specific action, instead allowing the nation to come up with their own method for correcting the issue.¹⁷⁷ These issues make a claim challenging the effectiveness of remedies much less effective than a claim targeting the lack of statutory protections. This is probably why the United States chose to frame their complaint against China in 2007 as an insufficiency of statutes claim, instead of a claim of ineffective applications of those statutes.¹⁷⁸ The United States' experience in that dispute might have shaped their recent decisions involving Section 301.

¹⁶⁹ *Id.* at 147.

¹⁷⁰ *Id.* at 167.

¹⁷¹ Yoshifumi Fukunaga, *Enforcing TRIPS: Challenges of Adjudicating Minimum Standard Agreements*, 23 *Berkeley Tech. L. J.* 867, 900 (2008) [Hereinafter Fukunaga]

¹⁷² *Id.* at 900.

¹⁷³ *Id.* at 908.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 909.

¹⁷⁸ *Id.* at 911.

The United States' use of Section 301 against China could be due to the United States' growing dissatisfaction with the WTO. WTO dispute settlement procedures typically take longer, as the deadlines for panel decisions and implementation are longer than the deadlines currently used in Section 301 investigations. This lengthy process may seem less favourable, as the policies that are burdening the United States will be in place longer under the WTO's method of dispute settlement; however, the result is that a nation will be more likely to comply in the end. WTO panel decisions have multilateral support, as opposed to Section 301 investigations which are looked down on by the international community as a unilateral act. The United States seems to believe that Section 301 could make a return for dispute resolution; however, they need to consider whether this will cause more issues than it fixes.

V. THE PATH FORWARD: HOW THE UNITED STATES SHOULD DEAL WITH CHINA'S FAILURE TO PROTECT INTELLECTUAL PROPERTY

There are many ways for the United States to proceed from this point in the investigation. They can continue to act unilaterally, as an international vigilante, and seek to recover their losses, or change Chinese intellectual property protection policies. They could also seek to bring their dispute to the WTO, the old sheriff with the unreliable gun, seeking a multilateral resolution to the dispute. They could also seek to ignore these options all together and seek the third option of bilateral negotiations; or adopt a combination of these. It is possible that the unilateral method of a Section 301 investigation and the multilateral method of a WTO panel could just be posturing by the United States, with the real goal being to force China to negotiate on this issue. The most effective and efficient way to resolve this dispute would be for both parties to come to an agreement about China reducing their intellectual property policies that harm the United States.

A. Section 301: The Vigilante

As noted in part II of this article, the United States has had minimal success using Section 301 investigations to compel other nations to change their intellectual property policies. One reason for this is that nations will typically not change their intellectual property protection policies unless there is domestic support to do so. Some might point to the United States' success when using Section 301 against China in 1991; however, there are some key differences that need to be noted between those investigations. For example, in the early nineties, China had almost no intellectual property protections, so it was quite easy to point to areas that their protections could improve. Additionally, China was not the economic powerhouse that it is today, reducing its bargaining power. At the time, China was also seeking entry into the GATT and later, the WTO. Therefore, the United States was able to

convince China to improve its intellectual property protection by indicating that there would soon be a multilateral agreement that forced them to do so. In the current Section 301 investigation, the United States has much less bargaining power.

Another concern, if the United States decides to continue such investigations, is what the endgame would be. If the United States decides to impose sanctions, it could face significant hurdles. For example, if the United States seeks retaliation, China could use a strategy of counter-retaliation, triggering a trade war between the two nations. Even if China does not seek to use a strategy of unilateral retaliation, there is a very real possibility that China could bring a dispute to the WTO after the United States imposes sanctions. The United States is supposed to bring disputes to the WTO if they are alleging a violation of a WTO agreement. It is debatable whether the United States is alleging something that might be a violation of a WTO agreement in this investigation; however, China could at least attempt to make that claim in the WTO. It seems that the support of unauthorized intrusions into foreign computer networks would be a violation of Article 39 of the TRIPS Agreement, thus the United States would be compelled to bring the dispute to the DSB and make a determination based on their findings.¹⁷⁹ This could potentially allow China to retaliate in a way that has multilateral support.

B. World Trade Organization: The Old Sheriff

The WTO's dispute settlement process has had some success in the area of intellectual property; however, it is more difficult to challenge the application of a statute than to challenge the existence of a statute. This is the main reason why, in 2007, the United States framed its WTO dispute against China as a statutory claim, and not as an ineffectiveness of remedies claim.¹⁸⁰ The United States could easily frame its current dispute to attack a statute in China, or at the very least, the United States could claim that China is in violation of Article 39 of the TRIPS agreement, protecting trade secrets. This route could potentially achieve some success for the United States; however, the issues that would be resolved in a WTO dispute would likely be very narrow, and the United States might not achieve its broader goal of increased protection for intellectual property in China.

If the United States decides that its approach to this issue is a binary choice, either using Section 301 or the WTO, using the WTO's dispute settlement procedure would likely achieve the best results. If the United States requests consultations

¹⁷⁹ TRIPS, *supra* note 53, at art 39.2.

¹⁸⁰ Fukunaga, *supra* note 171.

with China and goes through the formal dispute settlement procedures of the WTO, they would likely be successful if they were able to frame the issues as statutory issues. This would have the additional benefit of showing that the United States still supports multilateral decision making when it comes to international trade. Any decision made by the WTO would have multilateral support, and China would be unable to use a strategy of counter-retaliation. This approach also prevents China from going to the WTO claiming that the United States has unilaterally penalized them for their violation of provisions covered under WTO agreements. Additionally, China has already shown that they have some willingness to cooperate on issues relating to intellectual property protection. Intellectual property protection in China, while not nearly strong enough, has improved since the formation of the WTO. Their formation of specialized intellectual property courts is an example of a promising step they made in the right direction. If the United States unilaterally imposes sanctions on them, giving China no real means to dispute the allegations, China might simply decide to retaliate and be unwilling to make efforts on their own to increase intellectual property protections. However, if the United States follows the proper channels and settles this dispute in the WTO, China might be willing to comply with a decision that has multilateral support. The WTO dispute settlement process would likely be a more effective tool than any unilateral action, but there is another method that might work even better.

C. Bilateral Negotiation: The United States' and China's Mutual Interest in Protecting Intellectual Property

The most effective method for dealing with China's intellectual property protection would be for both nations to meet as equals and discuss the benefits of China increasing their intellectual property protections. Domestic support is one of the most important factors in protection of intellectual property. China currently has some domestic support for these protections, as their protections have increased since the early days of the WTO, with the creation of more strict laws and specialized intellectual property courts.¹⁸¹ If the United States unilaterally investigates and then imposes sanctions on China, China might lose the support that it had for intellectual property protections. In effect, if the current situation is that China is actively trying to protect intellectual property, by imposing sanctions on them, we run the risk that China may lose all interest in protecting intellectual property at all and simply using a strategy of counter-retaliation. This would effectively be the opposite of what the United States wants, closing markets instead of opening them up.

¹⁸¹ 301 Hearing, *supra* note 7, at 125.

If the United States decides to take the dispute to the WTO, it would likely need to frame it as a statutory complaint to get an effective remedy. However, even in that hypothetical scenario, the remedy would simply be that China would need to change its laws to bring them into conformity with the TRIPS agreement or other relevant WTO agreements. They would then make these changes, likely taking quite a while to do so, and things would largely go back to the status quo. China would likely still have problems with the effectiveness of their domestic remedies, which is the real problem in this instance. The problem of how China regards intellectual property is not a problem that can be solved without changing China's outlook on intellectual property in the first place.

If the United States wants to achieve its broader goal of increased protection for intellectual property, neither Section 301 nor the WTO will be an effective method. The United States must show China that protection of intellectual property is in their mutual best interest. It is clear why it is in the best interest of the United States. Companies from the United States do not want their intellectual property stolen. Taking this simple fact into consideration, there is a rather logical conclusion to be drawn. Currently, companies from the United States seek to manufacture in China because it is cheaper than manufacturing in the United States. However, if the theft of intellectual property continues, companies might begin to factor in the cost of losing their intellectual property, resulting in them moving their businesses out of China. This would negatively impact the Chinese economy by removing foreign investors from their economy. If the current course continues and intellectual property continues to receive little protection, foreign companies will be disincentivized from doing business in China.

The effective solution to the problem is neither under Section 301 nor the WTO's dispute settlement procedures. Investigating them and then sanctioning them pursuant to Section 301 will mostly only lead to sanctions against China, which will probably trigger counter-retaliation by China, possibly leading to a trade war. If the United States takes the dispute to the WTO, it may require China to change some of its laws, but the effectiveness and application of those laws will still be lacking. The only way to achieve the ultimate objective of increasing protection for intellectual property is to make China see the inherent benefits in doing so.

VI. CONCLUSION

The dispute settlement process for intellectual property disputes between nations has always been a troublesome issue. If the WTO handles the dispute settlement, the issue will be resolved in an ineffective way, as the WTO will not dictate how a nation applies its laws, which is the most important part of intellectual property protections. If the United States attempts to resolve the dispute unilaterally using

Section 301, it will likely be ineffective in doing so, as the United States has had only marginal success in using Section 301 to resolve intellectual property disputes. Additionally, any unilateral sanctions placed by the United States would not have the support of the international community. A compromise would be to use both processes to resolve the dispute, allowing the Section 301 investigation to continue, possibly proposing sanctions, then requesting the WTO to form a panel and consider the issue, possibly supporting the sanctions proposed by the United States. Alternatively, a third solution, of bilateral negotiations, could solve the issue in an efficient manner which would require cooperation between the United States and China, and the two governments agreeing that intellectual property protection is in both of their best interests.