



Making Sense Out of U.S. Trade Policy Or High-Stakes Poker Game? *"I'll see your tariff, and I'll raise you one of my own!"*

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ABSTRACT

This paper is a study of the genesis and function of the Office of United States Trade Representative. It describes the National Trade Estimate on Foreign Trade Barriers and the Special 301 Report which delineates countries placed on the Priority Watch List and Watch List for alleged violations relating to U.S. intellectual property rights. The paper also provides a discussion of Notorious Markets, both online and physical, and offers suggestions for the implementation of enforcement strategies to combat piracy and other forms of theft of U.S. intellectual property.

KEY WORDS: U.S. Trade Representative; Trade Barriers; Special 301 Report; Watch List; Priority Watch List; Notorious Markets

INTRODUCTION: A TRADE WAR WITH CHINA? THE TIP OF THE ICEBERG.

Swanson (2018) reported that the overall United States trade deficit in goods and services "widened 12.1 percent to \$566 billion last year, the largest gap since 2008. The gap between Chinese goods imported to the United States and American goods exported to China rose to \$375.2 billion last year, up from \$347 billion in the prior year." The trade deficit with China is without a doubt the largest recorded with any of our trading partners.

Are our current difficulties with China the beginning of a serious trade war (Luo, 2018; Tiezzi, 2018), a high-stakes poker game scenario, or a symptom of a far greater problem for the United States?

According to U.S. government estimates cited by Bruns (2017), "industries sensitive to intellectual property concerns directly and indirectly support 45.5 million American jobs, about 30 percent of all employment in the United States." Many of these jobs are involved with issues that arise in the context of international trade—more specifically, in industries or sectors of the American economy where protecting the property rights of American corporations who engage in a variety of international activities is of paramount importance. Trade relations with China seem to be especially problematic.

On June 20, 2018, the U.S. Trade Representative gave the required notice of an initial action in the Section 301 investigation of the "acts, policies, and practices of the Government of China related to technology transfer, intellectual property, and innovation." As a result, the United States imposed an additional 25 percent *ad valorem* duty on products of China with an annual trade value of approximately \$34 billion. The duty took effect July 6, 2018. The June 20 notice also sought "public comment" on the possibility of further actions in the form of an additional

25 percent *ad valorem* duty on products of China with an annual trade value of approximately \$16 billion. To no one's surprise, China was not pleased. On July 6, 2018, China responded by imposing additional duties on goods from the United States. China's new tariffs will be levied at rates of 5% or 10%, depending on the product. Mullen (2018) further reports that "more than 5,000 US goods will be affected, including meat, nuts, alcohol, alcoholic drinks, chemicals, clothes, machinery, furniture, and auto parts."

In light of China's decision to respond to the investigation by imposing duties on U.S. goods, the U.S. Trade Representative proposed a modification of the action taken in the initial investigation to maintain the original \$34 billion action and the proposed \$16 billion action, and to impose an additional 10 percent *ad valorem* duty on products of China with an annual trade value of approximately \$200 billion. This statement of proposed actions and reactions by China and the United States provides a fitting backdrop to a study of the creation and evolutionary role of the United States Trade Representative in creating and carrying out the trade policies of the United States. In addition, these actions and reactions will provide the basis for an analysis of two of the most important responsibilities of the USTR—the annual promulgation of the *Out of Cycle Review of Notorious Markets* (generally, Masterson, 2004; Strong, 2016) and the *National Trade Estimate Report on Foreign Trade Barriers* under Section 301 of the Trade Act of 1984.

AN HISTORICAL REVIEW

Prior to the early 1960's, the responsibility for dealing with trade and investment issues in the United States fell under the authority of the Department of State, which was also charged with overseeing the various trade agreements entered into by the United States. Reflecting a desire for greater clarity, responsibility, and specialization, Congress enacted the Trade Expansion Act of 1962 (Spier, 1964; Bale 1974), in which Congress called for the President to appoint a Special Representative for Trade Negotiations in order to conduct future U.S. trade negotiations. Spier (1964, p. 73) wrote that President Kennedy considered the Trade Expansion Act as "the most significant piece of legislation of 1962... marking a new concept of interdependence [which] underlies the gradual departure of the United States from its classical political and economic isolation...."

The legislation was intended to assure a balance between "competing domestic and international interests in formulating and implementing U.S. trade policy" (Office of United States Trade Representative, 2018a). The Trade Expansion Act of 1962 provided that the Special Trade Representative would serve as chair of a new *interagency trade organization* which would be responsible for making recommendations for future trade agreements in order to reduce the possibility of potential policy inconsistencies, bottlenecks, and bureaucratic inertia.

The Evolution of the Trade Representative

In response to Congressional action and concerns, President John F. Kennedy created a new Office of the Special Trade Representative, known by the acronym STR, in 1963. The STR would be placed in the Executive Office of the President (Claussen, 2017). Two Deputies—one in Washington, D.C., and the other in Geneva, Switzerland—were created.

Throughout the decade of the 1960's, the STR assumed responsibility for representing United States interests in the Kennedy Round of multilateral trade negotiations (Norwood, 1969), which were conducted under the auspices of the General Agreement on Tariffs and Trade or the GATT (Housman, 1994). Norwood (1969, p. 297) stated that the Kennedy Round of

negotiations was the "most important trade and tariff negotiations ever held... because the most notable technique was the "linear" or "across the board" reduction in duties."

Reflecting the view that the creation of the STR would mark a significant expansion of U.S. trade in the 1970s, the Congress would substantially expand the responsibilities and scope of authority of the STR. Under Section 141 of the Trade Act of 1974, a legislative charter (agenda) for the STR was established, which would operate once again as part of the Executive Office of the President. Holbik (1975, p. 122) wrote: "The Act gives the U.S. President extensive authority to engage in multilateral trade negotiations 'to promote the development of an open, non-discriminatory, and fair world economic system and to stimulate the economic growth of the United States.'"

Under Section 141 of the Trade act of 1974, the STR assumed responsibility for negotiating and implementing trade agreements under a three important pieces of Congressional legislation: the Tariff Act of 1930, the Trade Expansion Act of 1962, and the Trade Act of 1974. While the 1974 Act made the STR directly accountable to the President and the Congress for the expanse of trade responsibilities, importantly, it elevated the Special Trade Representative to cabinet level (Van Detta, 2014).

In 1979, President Jimmy Carter issued Reorganization Plan No. 3, which consolidated and further broadened the responsibilities of the STR. The 1979 reorganization and Executive Order 12188 strategically renamed the STR as the *Office of the United States Trade Representative* or USTR (Palmer & Kossel, 1980; Winniger, 2002). These actions centralized both policy-making and negotiating functions for international trade and greatly expanded the responsibilities of the newly named office.

Trade policy would be guided by the "the assertion and protection of the rights of the United States under all bilateral and multilateral international trade and commodity agreements" (Office of United States Trade Representative, 2018a).

Under the Trade and Tariff Act of 1984, the USTR was assigned the responsibility for developing and coordinating implementation of U.S. policies concerning *trade in services* (Borchert, Gootiz, & Mattoo, 2012; Hoekman, 2017). Francois and Hoekman (2010, p. 642) noted the important "linkages" between international trade and foreign direct investment in services "and the general pattern of productivity growth and economic development."

At the end of the decade of the 1980's, changes were also implemented relating to the powers and responsibilities of the USTR. The authority of the USTR was further enhanced under the Omnibus Trade and Competitiveness Act of 1988 (Lennon, 1990). Under Section 1601 of the 1988 legislation, the responsibilities of the USTR were codified and further expanded.

Taken as a whole, these changes were specifically designed to reinforce the *partnership between the legislative and executive branches* in conducting U.S. trade policy. Lennon (1990, p. 387) notes that "at the core of the Trade act was Congress' desire to remedy the growing trade deficit." The 1988 Act enlarged the responsibilities of the USTR.

The importance of the office of USTR in all matters affecting trade was further enhanced by shifting responsibility to the USTR for implementing any actions under Section 301 of the Trade Act of 1974, which provides for enforcement of U.S. rights under trade agreements entered into by the United States, subject to the overall direction from the President.

The Trade and Development Act of 2000 created two new posts within the USTR, the Chief Agricultural Negotiator and an Assistant United States Trade Representative for African Affairs (AUSTR) who would serve as the chief advisor to the U.S. Trade Representative on issues of trade and investment with Africa. The AUSTR serves as the chief point of contact within the Administration relating to such issues. Reflecting the importance of the agricultural sector in the United States (e.g., Bruinsma, 2017) and also internationally (Tangermann, 1991), recognizing the declining share of manufacturing in the U.S. economy (Chien & Morris, 2017) [the Bureau of Labor Statistics (2018) forecasts that as a share of employment in the United States, manufacturing would fall from 7.9% to 6.8% in 2026] and the shift in emphasis and scope of U.S. trade relations, the principal function of the Chief Agricultural Negotiator would be to conduct trade negotiations and enforce existing trade agreements relating to United States agricultural interests and the promotion of U.S. agricultural products.

THE NATIONAL TRADE ESTIMATE REPORT

The National Trade Estimate Report on Foreign Trade Barriers (Lighthizer, 2018), commonly referred to as the National Trade Estimate or NTE, is an annual report prepared by the USTR, which highlights "significant foreign barriers to U.S. exports." Since 1986, the NTE has provided, where available, quantitative estimates of the impact of certain foreign practices on the value of U.S. exports. Information is also included related to actions that have been taken to eliminate or significantly reduce such barriers. The NTE is based on information provided by the USTR, the U.S. Departments of Commerce and Agriculture, and other agencies and sources (Office of U.S. Trade Representative, 2017).

Trade barriers may be broadly defined as "government laws, regulations, policies, or practices that either protect domestic goods and services from foreign competition, artificially stimulate exports of particular domestic goods and services, or fail to provide adequate and effective protection of intellectual property rights" (reported by Stirling, 2018).

The NTE classifies foreign trade barriers into ten different categories. These categories involve government-imposed measures and policies that "restrict, prevent, or impede the international exchange of goods and services." The following is a partially annotated listing of the covered categories under the NTE:

- "Import policies (e.g., tariffs and other import charges, quantitative restrictions, import licensing, customs barriers, and other market access barriers) (Bacchetta & Bora, 2007; Noonan, 2008; Pyne & Roy, 2018);
- Sanitary and phytosanitary measures and technical barriers to trade (Murina & Nicita, 2015; Kang, 2017);
- Government procurement (e.g., "buy national" policies (Larch & Lechthaler, 2015) and closed bidding) (Hufbauer & Moran, 2015);
- Export subsidies (e.g., export financing on preferential terms and agricultural export subsidies that displace U.S. exports in third country markets) (Brown & Troutt, 2018);
- Lack of intellectual property protection (e.g., inadequate patent, copyright, and trademark regimes and enforcement of intellectual property rights) (Flynn, 2010; Helfer, 2010; Hunter & Lozada, 2010; Bruns, 2017);
- Services barriers (e.g., limits on the range of financial services offered by foreign financial institutions, restrictions on the use of foreign data processing, and barriers to the provision of services by foreign professionals) (Hoekman, 2017);
- Investment barriers (e.g., limitations on foreign equity participation and on access to foreign government-funded research and development programs, local content requirements, technology transfer requirements and export performance requirements,

and restrictions on repatriation of earnings (so-called "blocked currencies" (Stanley, 1990)), capital, fees and royalties) (Smyth, Kerr, & Phillips, 2017);

- Government-tolerated anticompetitive conduct of state-owned enterprises (Joo, Shim, & Sul, 2017) or private firms that restricts the sale or purchase of U.S. goods or services in the foreign country's markets;
- Digital trade barriers (e.g., restrictions and other discriminatory practices affecting cross-border data flows, digital products, Internet-enabled services, and other restrictive technology requirements) (Selby, 2017; Malopulos, 2018); and,
- Other barriers (barriers that encompass more than one category, e.g., bribery and corruption, or that affect a single sector)" (Hunter, Mest, & Shannon, 2011; Hunter & Mest, 2015).

THE SPECIAL 301 REPORT

The Special 301 Report is prepared annually by the USTR under Section 182 of the Trade Act of 1974, which mandates that the USTR must make a report to Congress on an annual basis by April of each year (generally, Bello & Holmer, 1990). The purpose of the Report is to identify U.S. trading partners that "do not adequately or effectively protect and enforce intellectual property (IP) rights or otherwise deny market access to US companies that rely on protection of their IP rights" (Office of United States Trade Representative (Press Release), 2018b).

In 2006, in conjunction with the International Intellectual Property Alliance, the USTR published a list of places where large-scale copyright infringement takes place in the Special 301 Report. Since 2010, the *notorious markets report* has been published as a separate report by the USTR.

The 2018 Special 301 Report especially highlighted concerns raised in the pharmaceutical and medical device industries "so that trading partners contribute their fair share to the research and development of new cures and therapies" (reported by Buxbaum, 2018).

The Lists

The USTR has identified 36 countries on either the Priority Watch List or Watch List. Trading partners on the Priority Watch List are those in which significant concerns have been raised regarding inadequate or ineffective IP protection or enforcement or actions that may limit market access for persons relying on IP protection (Wrase, 2000). The USTR identified 12 countries—Algeria, Argentina, Canada, Chile, China, Colombia, India, Indonesia, Kuwait, Russia, Ukraine, and Venezuela—on the Priority Watch List. IP issues in these countries will be the subject of intense "bilateral" negotiations (the USTR prefers the term "engagement") during the next cycle of trade talks.

Interestingly, China finds itself on the Priority Watch List for the *fourteenth consecutive year* (Express Pharma, 2018). There are both long-standing and more recent concerns that have been raised regarding IP protections including "China's coercive technology transfer practices, range of impediments to effective IP enforcement, and widespread infringing activity—including trade secret theft, rampant online piracy, and counterfeit manufacturing" (quoted in Enoch, 2018).

India also remains on the Priority Watch List for longstanding "challenges" and what the USTR terms as a "lack of sufficient measurable improvements," in the areas of protections of patents, copyrights, and trade secrets—most especially relating to upholding international drug company patents (Arie, 2013).

At the same time, the USTR downgraded Canada from the Watch List to the Priority Watch List (Graham, 2018). The United States raised concerns relating to poor border enforcement and the lack of customs authority to inspect or detain suspected counterfeit or pirated goods transshipped through Canada. The United States also raised concerns about procedures related to protections of pharmaceuticals, inadequate copyright protection, lack of transparency, and the absence of due process regarding the protection of geographical indications. [This redesignation may appear strange to some because at the same time the Report was being issued, the United States was announcing a new bilateral trade agreement with Canada to replace the NAFTA Agreement (Diamond, Liptak, Newton, & Borak, 2018).]

Colombia was also downgraded for its longstanding failure to make progress in fulfilling obligations it had previously undertaken under the United States-Colombia Trade Promotion Agreement, such as its obligation to amend its copyright law to provide effective protections for copyright holders (Commins, 2013).

The USTR also raised special concerns relating to Saudi Arabia and the United Arab Emirates (UAE) and placed both nations on the Watch List. Concerns regarding recent IP protection for pharmaceutical products, concerns regarding IP enforcement, and the continued use of unlicensed software by the Saudi government itself were raised. The UAE was placed on the Watch List in response to longstanding concerns about the sale and transshipment of counterfeit goods and the improper establishment of collecting management organizations. Helfer (2010) notes that collective management organizations were established to monitor the use of the works of intellectual property owners, negotiate with prospective users, grant users licenses and perhaps more importantly, "collect remuneration, and distribute it among the owners of rights." The UAE and Saudi Arabia were also cited for policies that may not provide adequate and effective IP protection for pharmaceutical products.

A CLOSER LOOK AT THE SPECIAL 301 REPORT

Hosch (2018) notes that piracy is the "act of illegally reproducing or disseminating copyrighted material, such as computer programs, books, music, and films." The United States Trade Representative in the *Out-of-Cycle Review of Notorious Markets* (2018c, p. 2) stated that "commercial-scale copyright piracy and trademark counterfeiting cause significant financial losses for U.S. rights holders and legitimate businesses, undermine critical U.S. comparative advantages in innovation and creativity to the detriment of American workers, and can pose significant risks to consumer health and safety."

Wishman (2017) reported that the Commission on the Theft of American Intellectual Property concluded "that the annual losses to the United States range from about \$225 billion to \$600 billion, with the theft of trade secrets cost[ing] the United States between \$180 billion and \$540 billion annually. Counterfeit goods cost the United States \$29 billion to \$41 billion annually; pirated software costs an additional \$18 billion a year."

The Commission labeled China (including Hong Kong) as "the world's No. 1 culprit," accounting for a staggering 87 percent of counterfeit goods seized entering the United States.

Frohlich, Hess, & Calio (2014) noted that the list of the most counterfeited products includes: optical media (CDs, DVD, games); labels and tags; computers and accessories; footwear; pharmaceuticals; wearing apparel; consumer electronics and parts; watches and jewelry; and handbags and wallets.

The 2018 List of Notorious Markets identified both prominent *online* and *physical markets* in which pirated or counterfeit products and services are available. The List of Notorious Markets contains online piracy sites that are funded through advertising revenues. According to an independent review of the top 5000 URLs that are responsible for trademark infringement in the United States, the European Union, and Australia, about "25-30% of advertising on websites posing an IP risk are from major brands" (Woollacott, 2018).

Online Markets

At the outset, it should be recognized that the List of Notorious Markets identifies online markets by their domain name. However, it is also common for operators of online markets to change a site's domain name (so-called "domain name hopping") or to use multiple domain names at one time so as to direct potential users to the main site. In addition to encouraging trade mark infringement, illegal online marketing sites often will lack standard safeguards for privacy, security, and safety (Lefkovitz, 2018). The USTR (2018c) notes that some of these sites "actively and surreptitiously install malware on users' computers, commit advertising fraud, and enable phishing scams that steal personal information"—with one in three content theft sites exposing consumers to malware and other risks.

Physical Markets

In addition to online markets, physical markets are a source of serious violations of intellectual property rights. As the 2018 Report (Office of the United States trade Representative, 2018b) notes, "physical markets, however, remain a primary distribution channel for counterfeits in much of the world."

The following is a listing of countries and the sites where counterfeit products are sold:

- China: Silk Market, Beijing; Hongqiao Market, Beijing; Tianya Jewelry Market, Beijing; Shenzhen Jindu Garment Wholesale Market, Shenzhen, Guangdong Province; Jinxiang Foreign Trade Garment Market, Guangzhou; Jinshun Garment Market, Guangzhou; and Shanxi Area Markets, Guangzhou.
- Argentina: La Salada, Buenos Aires. A large number of goods imported from China.
- Canada: Pacific Mall, Markham, Ontario. Cosmetics, sunglasses, fragrances.
- India: Tank Road, Delhi. Apparel and footwear.
- Indonesia: Mangga Dua, Jakarta. Handbags, clothing, fashion accessories.
- Italy: Mercato del Venerdi, Ventimiglia. Clothing.
- Mexico: El Tepito, Mexico City. Video games, game circumvention devices, counterfeit apparel; Mercado San Juan de Dios, Guadalajara. Pirated and counterfeit goods, including video games.
- Paraguay: Ciudad del Este. Low priced counterfeit goods.
- Spain: Els Limits de La Jonquera, Girona. Including the sale of goods with infringing labels.
- Turkey: Grand Bazaar, Istanbul. 4,000 shops selling counterfeit handbags, wallets, leather goods, jewelry, watches, and perfumes.
- United Arab Emirates: Dragon Mart and Ajman China Mall. 5,000 stores selling appliances, stationery, communication and acoustic equipment, lamps, household items, building materials, furniture, toys, machinery, garments, textiles, footwear, bags, and watches, with an estimated 80% of the companies being Chinese.
- Vietnam: Nin Heip Market, Hanoi, and Tan Binh Market, Ho Chi Minh City. Counterfeit goods and labels.

CONCLUDING COMMENTS AND SUGGESTIONS FOR CHANGE

The evolutionary nature of the role, function, and responsibilities of the United States Trade Representative since the decade of the 1960's underscores the vital importance of international trade in the U.S. economy. Through the annual Out-of-Cycle Review of Notorious Markets, the United States Trade Representative has focused attention on the worst violations of U.S. patent, trademark, and copyrights in both online and physical markets.

However, it is apparent that greater attention must be paid to serious abuses of intellectual property rights. One step would be to aggressively pursue the suggestions offered by Kilday (2013) discussed earlier relating to strengthening protections against the theft of U.S. intellectual property rights by China. The USTR (2017c, pp. 26-27) has also argued that countries should implement a broad array of enforcement tools which may include:

- Effective border enforcement measures ;
- The ability of customs and criminal authorities to detain and seize counterfeit and pirated goods entering into and exiting from Free Trade Zones;
- Robust border enforcement authority to interdict small consignment shipments sent through postal or express courier services;
- Asset forfeiture;
- Criminal procedures and penalties for trafficking in counterfeit labels and packaging;
- Enhanced criminal penalties for "particularly serious cases, such as trafficking in counterfeit trademark products that threaten health and safety."

In addition, the United States must influence the demand for illegal and pirated products and educate U.S. consumers to turn away from these products towards legitimate alternatives, in order to "educate consumers on the negative impacts of the counterfeit products not only on consumers but also on the economy as a whole" (Moon, Javaid, Kiran, Awan, & Farooq, 2018).

The path chosen by the Trump Administration to combat the illicit practices outlined in the 2018 Report is *a* solution. But is it the best solution?

Entering into a trade war with China or other nations may become a high-stakes poker game where the dialogue may be reduced to a simple "I'll see your tariff, and I'll raise you one of my own" which may provide a temporary solution—but one that will surely not solve the piracy of American goods and technology.

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