Imposing IP Compliance: Trends in the USTR Special 301 Reports for India and China from 2000-2008

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INTRODUCTION

The 21st century brought with it hopes for change in the global power structure – with a different set of voices arising, and a different set of ideas finally being heard. In this chorus, intellectual property policy has been an area of particular controversy as nations attempt to balance public and private interests, as well as regional, national, and international ones. International bodies, governments, and activists are questioning the very foundation and goals of trade and intellectual property laws and many are advocating a reorientation of the entire regime. With the recent breakdown of the Doha rounds[1] and the emergence of the WIPO development agenda,[2] the seeds of possibility for a new global order in the realm of intellectual property rights have been sown. Yet, despite the call for more inclusive international multilateral structures and decision-making forums, the continuing instances of nations attempting to set international policy unilaterally threaten to stall global inclusivity.

The United States of America is facing serious economic and political challenges from several large-market developing countries, such as India and China. These nations have begun to change the current global geo-political and economic structure, and are expected to have an ever-increasing impact. With a different set of intellectual property ideals and priorities, these nations are representative of the growing trend towards - at least a consideration of - an alternative approach to IP and free-trade maximization. However, their approach to IP laws is in stark contrast to that of the United States.

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* Yale Law School, J.D. expected 2010; Brown University, A.B. 2006. I would like to offer my thanks to Lawrence Liang of the Alternative Law Forum, for encouraging me to read all the USTR Reports between 2000 and 2008 and for providing the impetus for starting this paper. I would also like to thank Lea Shaver of the Yale Law School Information Society Project for all of her support and excellent criticism, advice and suggestions as this project was put together.

1. *See Dismay at Collapse of Trade Talks*, BBC News, Jul. 30, 2008, http://news.bbc.co.uk/2/hi/business/7532302.stm, for a discussion of the 2008 breakdowns of the Trade Talks with particular focus on the relations between China, India and the United States. See also Barrie McKenna, *India Nixes WTO Deal to Cut Tariffs*, The Globe and Mail, Jul. 29, 2008, http://www.reportonbusiness.com/servlet/story/RTGAM.20080729.wwto30/BNStory/Business/home, for a more in depth look at India's role in the talks.
2. For more information on the WIPO Development Agenda, *see generally*, Development Agenda for WIPO, http://www.wipo.int/ip-development/en/agenda/.

This paper looks at the way the U.S. government approaches India and China with respect to IP laws and enforcement in one particular forum. It examines what critiques are offered and what demands are made on India and China between 2000 and 2008 in the yearly Special 301 Reports put out by the Office of the United States Trade Representative [USTR]. The USTR Special 301 Reports survey the state and progress state of intellectual property laws and their enforcement abroad and, place countries on various lists depending on their perceived level of IP norms and standards violations. For example, by putting a country on the Priority Watch List, the United States government opens the door to initiating trade sanctions. In this way the Reports can play a role in shaping intellectual property models around the globe, sometimes coercing nations into changing their IP regimes.

In the past ten years, over 65 countries have been placed on the various degrees of watch lists. India has always had a prominent place on the lists, but no country has been as heavily monitored and criticized as China. Examining how the Special 301 Reports critique India and China, and the trends in these descriptions, provides valuable information about the concerns of the U.S.A over India and China's IP regimes, the direction these concerns are going, and the places where the U.S.A. feels exerting pressure could lead to changes. As India, China and the United States struggle to build their economies and become or remain key economic and political forces, the ways in which the U.S.A. attempts to exert control or power over Indian and Chinese IP regimes becomes increasingly important.

This paper focuses only on and is bounded by, the language and content of the USTR Reports. It does not discuss actual changes initiated by India and China that may have been compelled by the reports. Its aim is to understand what the United States would like to change in India and China's intellectual property regimes and the ways in which this view has changed over the past 9 years. In so doing, it hopes to develop a framework and begin a discussion on the substance and direction of the Reports.

Specifically, this paper analyzes two broad trends within the Reports from 2000 to 2008.[3] It examines both the changes in the general tenor of reporting and the changes in the types of demands being made. Section One of the paper provides an overview of the USTR Reports, looking at their legal basis, current structure, and the ways in which they use threats to

3. The data for this paper was collected from a meticulous reading of all the USTR Reports between 2000 and 2008. Each report was compared and contrasted to the other reports for the various critiques offered, demands made, and calls for continuous monitoring articulated. The trends were drawn from this process.

spur changes in the IP policies of nations around the globe. Section Two Part A argues that, over time, the trend in Special 301 reporting on China has been a move away from vague lists of disappointments, to specific targeted critiques and demands, looking at individual markets and regions as areas in need of greater enforcement efforts. In Section Two Part B the paper turns to the descriptions of India, which focus on individual industries as locales of IP infringement. Section Three looks at the specific types of demands manifested by these trends. It argues that there has been a strong trend towards demanding greater, stricter and more frequent criminal responses to infringements of IP rights both in addition to and as replacements of current civil mechanisms. It also notes a trend of demands on India and China that are not necessarily in the public interest, that require anti-democratic policy implementation and that are counter to sovereign independence in law making.

(I) The USTR Special 301 Reports

The Special 301 Reports

The Special 301 Reports are published annually by the office of the USTR and, in their own words, examine "in detail the adequacy and effectiveness of intellectual property rights protection" in countries around the globe.[4] The Special 301 Reports get their name from Section 301 of the United States Trade Act of 1974 amended by the Omnibus Trade and Competitiveness Act of 1988. Under Section 301, the USTR is required to take action, when the intellectual property rights of the U.S.A. or of persons in the U.S.A. have been violated in international trade or in a foreign country.[5] The following paragraphs lay out the USTR process, starting from the identification of countries where violations are occurring, to the implementation of sanctions.

Identifying countries where violations are occurring is the first step in the Special 301 process. The Trade Act of 1974 lays out the standard for being identified by the USTR. The Act mandates that the USTR identify countries that "deny adequate and effective protection of intellectual property rights, or deny fair market access to the United States persons that rely upon intellectual property protection."[6] Following the Uruguay Rounds in 1994,

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4. Office of the U.S. Trade Representative, Report to Congress on Section 301 Developments Required by Section 309(a)(3) of the Trade Act of 1974, at 1 (2005), http://www.ustr.gov/Document_Library/Reports_Publications/2005/2005_Special_301/Section_Index.html?ht= [hereinafter *2005 Special 301 Report*].
5. 19 U.S.C. § 2411.
6. *Id.* at § 2242 (a)(1)(A) – (B) (2000).

the Act was again amended, requiring the USTR to also identify countries that despite being TRIPS-compliant do not have intellectual property regimes that the United States deems adequate.[7]

The USTR identifies which nations to include in the Special 301 Reports through several means. First, the USTR must consult with the Register of Copyrights, the Under Secretary of Commerce for Intellectual Property, the Director of the United States Patent and Trademark Office and other appropriate officers of the Federal Government to gather their complaints and research.[8] Second, the USTR must "take into account information from such sources as may be available to the Trade Representative and such information as may be submitted to the Trade Representative by interested persons."[9] This information can come from reports done yearly for the President, the Committee on Finance of the Senate, and various committees of the House of Representatives.[10] It can also come from private individuals through petitions filed at the USTR.[11] These private individuals can include members of specific industries and lobbyists. Finally, the USTR can initiate investigations of its own accord.[12] In any case the USTR investigates each claim before identifying the country in question in the Report.[13]

The USTR may only identify foreign countries where research has shown that "there is a factual basis for the denial of fair and equitable market access as a result of the violation of international law or agreement, or the existence of barriers...." These barriers can include denying "access to a market for a product protected by a copyright or related right, patent, trademark, mask work, trade secret or plant breeder's right, through the use of laws, procedures, practices or regulations" which violate "international law or agreements to which both the United States and the foreign country are parties" or which "constitute discriminatory nontariff trade barriers."[14] However, protecting certain rights, while not protecting others, can still lead to a ranking on the USTR Special 301 lists. So while a country may be taking ameliorative steps in one area, by introducing a new Copyright Act,

7. 2005 Special 301 Report, *supra* note 4, 14. *See also* 19 U.S.C. § 2242 (d)(4) ("A foreign country may be determined to deny adequate and effective protection of intellectual property rights, notwithstanding the fact that the foreign country may be in compliance with the specific obligations of the Agreement on Trade-Related Aspects of Intellectual Property Rights referred to in section 3511(d)(15) of this title.").
8. 19 U.S.C. § 2242 (a)(2)(A) (2000).
9. *Id.* at §2242 (b)(2)(B).
10. *See id.* at. § 2241 (b).
11. *See id.* at § 2412 (a).
12. *See id.* at § 2412 (c).
13. *See id.* at § 2412 (a)-(c).
14. 19 U.S.C. § 2242 (d)(3)(A)-(B) (2000).

for example, they could still be failing to enforce another law, and thus remain in the rankings.

In the USTR Reports, countries identified as denying "adequate" and "effective" intellectual property rights protection are placed on a series of different watch lists: Priority Foreign Country, Section 306 Monitoring, Priority Watch List, or Watch List.[15] A ranking of Priority Foreign Country is reserved for those countries that "(1) have the most onerous and egregious acts, policies and practices which have the greatest adverse impact (actual or potential) on the relevant U.S.A. products; and, (2) are not engaged in good faith negotiations or making significant progress in negotiations to address these problems."[16] However, even a ranking of Watch List indicates that the United States is unhappy with the current state of IP law and enforcement within a country. The USTR describes the various rankings as follows,

> *Priority Foreign Countries are those pursuing the most onerous or egregious policies that have the greatest adverse impact on U.S. right holders or products, and are subject to accelerated investigations and possible sanctions. Countries or economies on the Priority Watch List do not provide an adequate level of IPR protection or enforcement, or market access for persons relying on intellectual property protection. ... [P]artners are placed on the Watch List, meriting bilateral attention to address the underlying IPR problems. [Countries], due to their serious IP-related problems are subject to another part of the statute, Section 306 monitoring, because of previous bilateral agreements reached with the United States to address specific problems raised in earlier reports.*[17]

15. The various Watch Lists are not discussed in The Trade Act of 1974, although the statute does note what factors make a country a priority. *See id.* at § 2420 (a)(2) (outlining what factors the USTR must consider when labeling a country a priority foreign country) and *id.* at § 2242 (b) (describing the rules of priority foreign country identification).
16. Office of the U.S. Trade Representative, Report to Congress on Section 301 Developments Required by Section 309(a)(3) of the Trade Act of 1974, at 14 (2004), http://www.ustr.gov/Document_Library/Reports_Publications/2004/2004_Special_301/Section_Index.html?ht= [hereinafter *2004 Special 301 Report*]. The language of "good-faith negotiations" in the Reports, presumably comes from language in The Trade Act of 1974, although no cite is give. The Trade Act of 1974 states that "in identifying priority foreign countries ... the Trade Representative shall only identify those foreign countries ... that are not – (i) entering into good faith negotiations, or (ii) making significant progress in bilateral or multilateral negotiations, to provide adequate and effective protection of intellectual property rights." 19 U.S.C. § 2242 (b)(1)(C)(i)-(ii) (2000).
17. See the text introducing the 2004 Special 301 Report, at the Office of the United States Trade Representative website, Office of the United States Trade Representative, Protecting Intellectual Property: The 2004 Special 301 Report, http://www.ustr.gov/Document_Library/Reports_Publications/2004/2004_Special_301/Section_Index.html?ht=.

For each level of ranking, the USTR Reports list all the problems in a country's IP regime at the statutory, judicial and enforcement levels, any improvements that have been made over the year, and often some suggestions by the USTR of specific things the country in question can change to be compliant with the standards espoused by the USTR and the United States broadly.

The Special 301 Reports get their teeth from Section 301 of The Trade Act of 1974. Under Section 301, or 19 U.S.C § 2411, the United States Representative is mandated to take action if,

> *(A) the rights of the United States under any trade agreement are being denied; or (B) an act, policy, or practice of a foreign country – (i) violated, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or (ii) is unjustifiable, and burdens or restricts United States commerce.*[18]

Therefore, those countries that are placed on the various watch lists, for the reasons stated above, can be subjected to a variety of actions.

The USTR's scope of authority to take action is broad. In order to remedy a country's violations of rights, the USTR can "suspend, withdraw, or prevent the application of, benefits of trade agreement concessions to carry out a trade agreement with the foreign country."[19] The USTR can also "impose duties or other import restrictions on the goods" of the foreign country for a time period to be determined by the USTR.[20] In addition, the USTR can enter into binding agreements with the foreign country "to–(i) eliminate, or phase out, the act, policy, or practice that is the subject of the action to be taken ... (ii) eliminate any burden or restriction on United States commerce resulting from such act, policy, or practice, or (iii) provide the United States with compensatory trade benefits."[21] The actions taken by the USTR may be against particular goods, or a whole sector of the economy, and they can be targeted "on a nondiscriminatory basis or solely against the foreign government."[22]

Structure of the Special 301 Reports

Between 2000 and 2008 the structure and organization of the USTR Reports remained similar. The Reports all begin by highlighting the major

18. 19 U.S.C. § 2411 (a)(1)(A) – (B) (2000).
19. *Id.* at § 2411 (c)(1)(A).
20. *Id.* at § 2411 (c)(1)(B).
21. *Id.* at § 2411 (c)(1)(D).
22. *Id.* at § 2411 (c)(3).

concerns of the United States in relation to IP and trade broadly. This introduction serves as a checklist of the largest perceived challenges across the globe to intellectual property law norms and intellectual property rights, mainly of American rights holders. The Reports continue by ranking countries violating the main-challenges as perceived by the United States. Countries are ranked according to the level of their violations and placed on the different lists. A summary of the disappointments and the measures the U.S.A. hopes each country will take as well as any future-monitoring plan is given for each country.

From 2000 to 2008, the USTR articulates serious challenges by close to 60 countries each year and from a total of about 70 different countries over the years.[23] The common thread that unites the lists of "violators" is not the nature of their violations, their locations around the globe, or their level of "development." Rather, the lists seem to serve as an indication of what countries are of strategic trading importance to the United States and what changes in these countries' policies would be beneficial to American interests.[24]

The only structural change in the Reports between 2000 and 2008 is the elimination of a section entitled "Developments in Intellectual Property Law" in 2006, which highlighted improvements in IPR protections across the globe. The list provided a strategic space to praise countries which feature prominently in the various watch lists for often trivial improvements, and to provide a lengthy list of highlights in the creation of IP laws and mechanisms in countries whose IP laws are largely insignificant to American property rights holders.[25]

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23. The figures in this paragraph were all compiled by gathering data from all the Special 301 Reports between 2000 and 2008. For access to all the Reports, except for the 2000 and 2001 Reports which are not available on the USTR website, see USTR Reports and Publications Home, http://www.ustr.gov/Document_Library/Reports_Publications/Section_Index.html.
24. For example, the only African nation on any list between 2000 and 2008 is Egypt. Egypt was on the Priority Watch List from 2000-2002, followed by a year on the Watch List in 2003, and another term on the Priority Watch List from 2004-2007 before returning to the Watch List in 2008. Nations or collections of nations that occur frequently on the various lists include Argentina (on the Priority Watch List between 2000 and 2008), Canada (on the Watch List between 2000 and 2008), the European Union (on the Priority Watch List between 2000 and 2004, and then on the Watch List until 2006) and Israel (moving between the Watch List and the Priority Watch List over the years).
25. While sub-Saharan African countries are almost never critiqued for poor IPR enforcement, though they likely have weak records of enforcement, they feature prominently on the list of Developments in Intellectual Property Law. The list reads as an homage to U.S. IP standards – creating an impression that U.S. standards are global standards and those nations that diverge are not simply diverging from the American ideal, but from the global norm. This strategic placing of countries in various lists bolsters the American position while creating the marginalization of those with different goals, needs and desires from IP protections.

Noticeably, no sources are provided for any of the claims made or accounts given in the USTR Special 301 Reports. The Trade Act of 1974 indicates who can identify foreign countries and some of the Reports list the general sources, like "industry sponsors,"[26] but the Reports neither cite references nor provide any citations or exact sources for their information. This is particularly problematic when the Reports cite figures to substantiate their arguments. These figures are often used to illustrate the dollar amount of loss to various American industries that the USTR attributes to foreign IP infringements.[27] The Reports give no indication of where the figures were found, or how they were calculated. Hence, there is no way to check the reliability of either the figures or observations listed for each country in the Reports, let alone the conclusions drawn.[28]

Unilateralism and the Use of Threats as a Feature of the Special 301 Reports

The most fundamental feature of the USTR Reports is that they serve as a list of threats to nations to change certain aspects of their IP regimes or face trade sanctions. The USTR claims that the "Special 301 process and report send a message to the governments of countries where serious IP-related problems exist."[29] The Reports are rarely direct in the use of trade sanction threats, and don't often articulate in the text "if you don't do x, we will do y" but the muscle behind the Reports is well known. By listing complaints or commenting on problems within a foreign country's IP regime and laying the possibility of trade sanctions on the table, the USTR Reports use threats to force foreign countries to change their practices.

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26. *See e.g.* Office of the U.S. Trade Representative, Report to Congress on Section 301 Developments Required by Section 309(a)(3) of the Trade Act of 1974, 17 (2006), http://www.ustr.gov/Document_Library/Reports_Publications/2006/2006_Special_301_Review/Section_Index.html?ht= [hereinafter *2006 Special 301 Report*] (referring to "industry sources" as providing figures on IP infringements in China).
27. As one example, in 2006 the USTR Special 301 Report noted that "Industry sources in 2005 continued to estimate that levels of piracy in China across all lines of copyright business are 85 to 93 percent, indicating little to no improvement. For example, estimated business software losses fell to $1.27 billion in 2005 from $1.48 billion in 2004." *Id.* The Report gives no indication of who this industry source is, or how reliable their figures are. It provides no citation that can be followed for individuals or countries wanting to further look into truth of the matter asserted by the USTR.
28. The lack of sources is problematic for numerous reasons. The figures create a dramatic effect and stir reactions by attaching some tangible and cognizable loss to the otherwise broad and amorphous complaints. This is problematic because without more information about the acquisitions of these figures, it is impossible to judge their reliability or accuracy. It is unacceptable that a Report that provides the possibility of serious outcomes, and that outright threatens nations, does not have to substantiate its claims with proof.
29. 2004 Special 301 Report, *supra* note 17, 1.

Many critics have expressed deep concern over the use of threats by the reports. Their critiques underscore the importance of understanding the trends as well as the content in the reports. Drahos and Braithwaite use the image of a conveyor belt to describe the various watch lists, commenting that countries ranked in the reports know they are being sent a message, and have been placed "on the 301 conveyor belt that [leads] to trade sanctions."[30] This illustration highlights the construction of the reports – that it is not a country's actions that place it on the conveyor belt, but rather that the United States chooses and "places" countries on the conveyor belt for strategic reasons. The illustration also notes the looming eventuality of sanctions, and the possibility that changes in features (for example new IP laws in line with US norms or greater enforcement of IP violations) could cause the conveyor belt operator, the USTR, to remove a country from the unwanted fate. Drahos and Braithwaite continue to note that, for the purpose of the United States, it is "important to give countries the feeling that their behaviour on intellectual property was the subject of constant surveillance."[31] This conception of the 301 Reports further highlights the way in which the Reports try to force countries to change their IP systems by making them feel as though they are constantly being monitored.

Other critics have commented on the unilateralism of the USTR Reports and the Special 301 provision, claiming the use of threats results in a very one-sided approach to achieving compliance. Richard Shell labels the use of Section 301 of the USTR Reports as a "unilateral trade weapon" because while the USTR files GATT complaints as part of the 301 processes, they are not bound to wait for the results of these disputes before instigating trade sanctions.[32] Jagdish Bhagwati and Hugh T. Patrick compiled a series of essays into a volume called *Aggressive Unilateralism: America's 301 Trade Policy and the World Trading System*, which highlights the development of Section 301

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30. Peter Drahos and John Braithwaite, Information Feudalism: Who Owns the Knowledge Economy? 90 (Oxford University Press 2002). They also claim the reports aim "to push and prod developing countries into accepting intellectually property rules" and couch this under the guise that doing so will "allow their economies to be integrated into a global knowledge economy." *Id.* at 100.
31. *Id.* at 100.
32. *See* Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Organization*, 44 Duke Law Journal 829, 844-845 (March 1995). ("Ultimately section 301 gives the President authority to retaliate against foreign protectionist practices by various unilateral measures, including trade sanctions. Significantly, while the filing of GATT complaints was a part of the section 301 process, there was no requirement that the United States await the final results of GATT dispute resolution proceedings before taking unilateral action. The resulting use of section 301 as a unilateral trade weapon against foreign governments and industries outside the legal frame work of the GATT upset many U.S. trading partners and became a major issue in the Uruguay Round.").

and its various uses by the United States.[33] In his introduction, Bhagwati expresses deep concern with the unilateral approach, and notes that the lack of dialogue, debate, and mutual concessions is dangerous and unjust.[34] He argues for a multilateral approach to trade and IP policy.

The unilateral aspect is key, as the Reports threaten nations to change their IP regimes to be more in line with the United States' conception of IP norms without expressly providing any dialogue or exchange between the countries.[35] If the demands made in the Reports were launched in the context of bilateral trade talks, there would be, at least hypothetically, the opportunity of negotiating for some other trade advantage in exchange for providing the demanded action on intellectual property. However, the unilateral aspect of Section 301 results in nations responding to the long lists of demands either by doing nothing and facing trade sanctions, or by complying without any bargained for exchange of mutually beneficial policies.[36]

The USTR makes the actual threats in two broad ways. Firstly, the reports are filled with long lists of criticisms of the IP regimes and enforcement records of various countries. These lists of criticisms are themselves implicit threats.[37] The threats come into play as nations have the possibility of removing themselves from the "conveyor belt"[38] by responding to the critiques in the Special 301 Reports with actual changes in legal and enforcement systems. These threats are just below the surface, as the reports list problems

33. *See generally* AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM (Jagdish Bhagwati and Hugh T. Patrick eds., University of Michigan Press 1993).

34. Jagdish Bhagwati, *Aggressive Unilateralism: An Overview*, *in* AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM 1, 36 (Jagdish Bhagwati and Hugh T. Patrick eds., University of Michigan Press 1993).

35. Bhagawati notes that even if the consensus is that the United States is protecting valid rights and enforcing just IP regimes through the USTR Reports, it is important "to reject the view that even a fair-minded country such as the United States should be permitted to play the roles of self-appointed "trade cop" and "trade czar" because trade policy "reflects the resolution of sectional interests in the political domain. There is no necessary correspondence, therefore, between the triumphant sectional interests and the national interest and, most important, the international or cosmopolitan interest that must define the world trading regime." *Id.* at 36-37.

36. In addition to the possibility of sanctions, there are other potential harms to being placed on the various Section 301 lists. For example, once on the list, a country is likely to be subjected to greater surveillance than previously, as the USTR continues to monitor developments. In addition there may be reputation or perception costs to being on the lists. Investors might be more cautious in their business plans, or other nations might become more cautious about engaging in trade with a country on a list.

37. The types of critiques made range from commentary on weak criminal sanctions for IP infringements (*see infra* Section III Part A) to concerns "about high levels of counterfeiting, particularly for medicines and auto parts," or commentary along the lines of, India's "court system is extremely slow, and there are only a few reported convictions for copyright infringements resulting from raids. Industry reports significant weaknesses in India's border protection against counterfeit and pirated goods." 2004 SPECIAL 301 REPORT, *supra* note 17, at 16.

38. DRAHOS & BRAITHWAITE, *supra* note 30, at 90.

rather than demands.[39] However, because of the consequences of inaction, the lists of disappointments can be seen as long lists of demands.

In addition to the underlying threat that forms the very substance of the reports themselves are a series of specific targeted threats for non-compliance.[40] These threats offer action in international venues if India and China do not follow the United States' demands. They are usually focused on engaging the WTO to help deal with the conflict – a costly, time-consuming and potentially image-damaging result, which still retains the possibility of leading to trade sanctions. These threats are different from the average threat in the Reports, not only for their specificity, but also in that they change the players in the game – moving away from a unilateral framework towards a multilateral one. If we forget for a moment who is responsible for the current standard embraced by the WTO and which countries had the most influence in developing global trade and IP standards, the engagement with the WTO presents a break from the general trends of the report. The Reports derive their thrust from domestic laws in the United States, which unilaterally compel nations around the globe to act without any participation in defining the terms. The WTO is a multilateral venue, deriving its legitimacy and weight from the ostensible coming together of nations across the world and based on standards hypothetically to everyone's advantage. Theoretically, India and China would have a voice in these settings, as they entail judicial processes, and this should lead to more just results for India and China.

II. GENERAL TRENDS IN REPORTING OVER TIME

China and India have both had a prominent place on the USTR lists over the last nine years. Over sixty countries appear on the lists, but no country is featured more prominently than China. India has been on the Priority Watch List every year since 2000, and China spent 2000 to 2004 subject to Special 306 Monitoring as well as on the Priority Watch List from 2000 to 2008.[41] The two countries appear in all sections of the Reports, as

39. Referring back to examples provided in note 38, the USTR authors could have outright demanded that India address the problem of counterfeit goods, the slow court system or problems of border enforcement. Instead the authors chose to leave the list as a set of critiques and allow the weight of future trade sanctions to inspire compliance by India.
40. Unlike the implicit demands just discussed, the specific demands tend to contain more active language (e.g., that China or India "need to" or "should" do x or y, and say such things as the US "urges" India or China to make x or y changes) or articulate the exact threat or action that the United States will pursue if China or India do not comply with the specified demand.
41. This summary was compiled by gathering data from all the Special 301 Reports between 2000 and 2008. For access to all the Reports, except for the 2000 and 2001 Reports which are not available on the USTR website, see USTR Reports and Publications Home, http://www.ustr.gov/Document_Library/Reports_Publications/Section_Index.html.

well as being recipients of their own individual write-ups each year. While China and India's presence in the report has been continuous, the nature of the critiques offered for their performance has changed through the years. In the last ten years the critique of China has become increasingly specific and targeted, moving away from general disfavor of legal apparatuses and enforcement to focusing on specific physical spaces where IPR infringements, according to the U.S.A., occur. On the other front, the critiques of India remain broad over the years and deal with challenges to the entire system. The critiques are often focused on goods entering the American economy and the challenges this poses to American industry. The following section, beginning with China and then India, outlines the general changes in the reports between 2000 and 2008.

China

Between 2000 and 2008, the USTR Reports developed a two-pronged approach to China's IP regime. Leading up to 2006, the reports primarily focused on holistic approaches - with critiques and demands concerned over the mechanics, legal substance and broad implementation record of China's IP system. In 2006, while employing this first prong, the Reports began to make a significant addition to how they analyzed China. The Reports from 2006-2008 focus more on particular markets and provinces in China, tapering down the critiques to bounded areas where China can police for IP infringements, rather than focusing solely on the system as a whole. This section will outline this evolution in the Reports.

In 2000, the base year for this paper, the Special 301 Report addressed China broadly and holistically with comments directed at the entire legal system, from the contents of the laws to their enforcement.[42] In discussing current Chinese law, the 2000 Report calls attention to the Chinese government's "first major revision" of its intellectual property regime since the bilateral intellectual property rights agreements with the United States in 1992 and 1995 and praises China for agreeing "to implement the TRIPS

42. It is interesting to note that China is given less than a page in the 2001 Report. OFFICE OF THE U.S. TRADE REPRESENTATIVE, REPORT TO CONGRESS ON SECTION 301 DEVELOPMENTS REQUIRED BY SECTION 309(A)(3) OF THE TRADE ACT OF 1974, at 15-16 (2001) [hereinafter *2001 Special 301 Report*]. By 2008, fifteen pages are dedicated to discussions of China, in addition to numerous mentions throughout the general sections of the Report. OFFICE OF THE U.S. TRADE REPRESENTATIVE, REPORT TO CONGRESS ON SECTION 301 DEVELOPMENTS REQUIRED BY SECTION 309(A)(3) OF THE TRADE ACT OF 1974, at 19-33 (2008) http://www.ustr.gov/Document_Library/Reports_Publications/2008/2008_Special_301_Report/Section_Index.html [hereinafter *2008 Special 301 Report*].

Agreement without recourse to any transition period."[43] On the enforcement side, the Report looks most notably at the joining together of four Chinese Authorities to combat the production and sale of pirated DVDs and optical media piracy.[44] In the 2000 Report, the discussion of enforcement, unlike later discussions, is not directed at a particular market or province, but rather to the entire country. Similarly, the discussion addresses the general legal framework, rather than demanding increased sanctions for a particular IP violation in domestic courts or the defining of a new right in intellectual property law.

This broad approach directed at altering national IP laws and increasing their enforcement continued to dominate the format of the reports in following years, even as the reports became more industry-specific in their concerns. In 2002 the Report's commentary was focused on system-wide doctrinal and enforcement problems with China's IP regime while also articulating specific concerns related to the problem of counterfeiting.[45] This same year the Report began to discuss what it labeled as "the disturbing trend" of optical media piracy.[46] The Report claimed that "extremely high levels" of pirated optical media were entering the Chinese market.[47] Over the next few years the reports became increasingly concerned with the rise of optical media piracy; yet these early concerns, from 2002 to 2005, were articulated at a national level, and when solutions were suggested they also remained national in perspective. Between 2000 and 2005, the mechanisms that the Reports use to address concerns continued to be targeted at changing the entire system of legal apparatuses and enforcement mechanisms – they addressed system-wide problems and system-wide solutions for creating more

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43. Office of the U.S. Trade Representative, Report to Congress on Section 301 Developments Required by Section 309(a)(3) of the Trade Act of 1974, at 13 (2000) [hereinafter *2000 Special 301 Report*].
44. *See id.* at 37 ("Four Chinese Authorities joined together to conduct another phase of several special enforcement actions specifically against DVD pirates. On March 2, 2000, the State Press and Publication Administration, the National Copyright Administration of China the Ministry of Public Security and the State Administration of Industry and Commerce issued an urgent joint circular to urge every provincial, regional and municipal government authority to launch a special campaign against DVD piracy in China.").
45. The reports express a deep concern over counterfeiting of such objects as video games. It is odd to think that copyright infringements of a children's toy could lead to trade sanctions. *See* Office of the U.S. Trade Representative, Report to Congress on Section 301 Developments Required by Section 309(a)(3) of the Trade Act of 1974, at 17 (2002) http://www.ustr.gov/Document_Library/Reports_Publications/2002/2002_Special_301_Report/Section_Index.html?ht= [hereinafter *2002 Special 301 Report*] ("The levels of optical media piracy (CDs, VCDs and DVDs) in China remain at extremely high levels in the domestic market, and China remains a center for entertainment software piracy and the production of pirated cartridge-based video game products.").
46. "Optical media" is a term used in the Special 301 Reports, but it is never defined. For the purposes of this paper it is used to describe such media storage devices as CDs, CD-ROMs, DVDs, VCDs etc.
47. *Id.* at 17.

IPRs and better protecting those already in existence.[48]

In 2006, the Reports break with the system-wide critiques and begin to take on smaller-scale analysis looking at individual physical and virtual markets,[49] and targeting geographical locations, primarily specific provinces in China. The Reports label these locales as centers of IP rights infringement and areas in need of monitoring. Targeting specific markets has implications that are quite distinct from the previous focus on inadequate laws, policies and enforcement systems. In contrast to a focus on specific laws or the lack thereof, a focus on specific markets and specific provinces lowers the barriers to the success of the recommendations made in the Special 301 Reports. Rather than requiring the creation and implementation of new legislation or demanding that police pursue unnamed defendants, the reports provide an exact location for enforcement. In order to comply with the Reports' demands, Chinese authorities can target specific bounded areas, by shutting down a physical or virtual market, or by monitoring the particular procedural or enforcement inadequacies of a single province. In many ways, by listing physical areas of IPR infringements, the USTR acts as investigatory police for China. Listing physical markets reflects a trend towards encouraging the enforcement of laws in China, rather than the creation of new laws. It also creates new actors/agents of change. Whereas previously legislatures and judges were asked to change their practices, now police officers and law enforcers are called upon to stop operations in place.

The 2006 Report balances the new trend of specific locales with general system wide critiques. In speaking about specific markets, the Report notes four markets in China as "notorious" centers of global counterfeiting[50] and praises a "few bright spots in the area of enforcement."[51] The notorious

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48. Even in cases when the reports are not specific in their suggestions, their comments remain unbound by geographic regions, like that of a province, or a local, like a physical market or online website.
49. Individual and physical markets are understood here not as industry markets, for example, the car market, but rather markets that can be described as existing in one bounded location for example a particular area of a city where a collection of retailers sell products in the vicinity of each other, or in a virtual marketplace like a particular website where goods are sold.
50. 2006 Special 301 Report, *supra* note 27, at 47-48. The "notorious markets" include Baidu, Xiangyang, Silk Street Market, and Yiwu Wholesale Market. Report claims "industry has cited Beijing's Silk Street Market as 'perhaps the single biggest symbol of China's IP enforcement problems.'" *Id.* at 48. The Report does not cite what industry has claimed this, or where they found this quote.
51. *Id.* at 19. In 2006 these "bright spots" in the areas of enforcement included the continuing "Mountain Eagle" campaign against crimes of trademark infringements, that according to the Report has "resulted in increased arrests and seizures of infringing materials, although the disposition of seized goods and the outcomes of cases remain largely obscured by lack of transparency." *Id.* at 19. The Report also includes the announcement of a 2006 Action Plan on IPR Protection, the "recent adoption of amended rules governing transfer of administrative and customs cases to criminal authorities," and China's new "enforcement actions again Internet piracy." *Id.* at 19-20.

markets specialize in the counterfeit of a range of products from MP3s,[52] to fashion apparel,[53] and to the bulk sale of small consumer goods.[54] The new trend of looking at locales continues throughout the 2006 Report, with a review of four key "hot spots" requiring "increased attention and resources" – Guangdong Province, Beijing City, Zhejiang Province and Fujian Province. In these geographic locales the United States believes that "there is an acute need for authorities to more effectively establish and sustain proactive, deterrent IPR enforcement."[55] The Report acknowledges that "the U.S. government looks to China to take action" in these areas.[56] Each area is highlighted for different IPR infringements, from Guangdong Province being labeled as the "center of large-scale counterfeit and pirate manufacture" for a variety of goods, to Beijing City and Zhejiang Province noted as centers of distribution and retail of pirated goods.[57] The Report also contains a general critique of the legal system and China's national enforcement scheme. The Report recommends that China be more aggressive in enforcing "actions against internet piracy" and also suggests that China engage in several structural changes in order to better enforce existing laws.[58] The Report in this way followed the similar trend of past years, but also began what would be a new trend of accounting for specific locales as areas of severe IPR infringement, and in need of greater enforcement efforts.

After the introduction of specific locales in the 2006 Report, the trend of combining specific locales and general critiques carried through the

52. See *id.* at 6 for a description of Baidu ("Industry has identified Baidu as the largest of an estimated seven or more China-based "MP3 search engines" offering deep links to song files for downloads or streaming. Baidu has been the target of infringement actions. Notably, in September 2005 the People's Court of Haidian District in Beijing reportedly ordered Baidu to pay RMB 68,000 ($8,400) to a music company for unauthorized downloads. Baidu has reportedly appealed.").

53. See *id.* at 6 for a description of Xiangyang Market ("In early 2006, the Shanghai Municipal Government said it would close this market on grounds of rampant sale of counterfeit fashion and apparel products. More recently, authorities pushed the closure date back to June 30, 2006. The United States welcomes commitments to close Xiangyang Market, and will monitor their implementation. Authorities must remain alert to the possibility that vendors of infringing products may seek to migrate their operations to other Shanghai markets or to the internet").

54. See *id.*at 6 for a description of Yiwu Wholesale Market ("Yiwu Wholesale Market reportedly sells approximately 410,000 different items, mostly consisting of bulk sales of small consumer goods. Market officials recently estimated receiving approximately 400 complaints of IPR violations from buyers in 2005. Local officials have acknowledged certain problems and stressed their commitment to IPR enforcement."). Later the Report also comments "rights holders have repeatedly drawn attention to the City of Yiwu as an important distribution center for small commercial goods, including for example, suspected counterfeit lighter fluid and yellow wristbands suspected of infringing the LIVESTRONG trademark of the Lance Armstrong Foundation." *Id.* 22.

55. *Id.* at 21.

56. *Id.*

57. *Id.* at 21-22.

58. *Id.* at 20.

following years. In 2007 the USTR Report also focused on specific regional and individual markets, in addition to types of IP infringements, and inadequate laws. The list of locales included both physical as well as virtual locations. The list of physical markets noted problems in Beijing's Silk Street Market (which the Report claimed was designated as "'perhaps the single biggest symbol of China's IP enforcement problems'" by the "industry")[59] and Yiwu's China Small Commodities Market (which sells apparently an approximate 410,000 different items and is a "center for wholesaling of infringing goods."[60]) The list of virtual markets reputed as centers of IP rights infringement[61] singled out the Baidu market as "the largest of an estimated seven or more China-based 'MP3 search engines' offering deep links to song files for downloads or streaming."[62] The general system-wide critique of China in 2007 noted inadequate anti-pirating laws and enforcement,[63] as well as legal obstacles in criminal sanctions for IPR infringement.[64] The 2008 Report again noted Baidu as a center of massive IP rights infringement[65] and mentioned two forms of virtual markets, business-to-business (B2B) and business-to-consumer (B2C), like Alibaba and Taobao, prevalent in China and "cited by industry as offering infringing products to consumers and business."[66] The Report also outlined provinces and other markets where IP infringement were problematic, as well as noting general problems in China's legal system.

The change towards a two-pronged approach to China's IPR regime – both the system-wide legal and enforcement accounts and the specific targeted locales – creates a much more in-depth and complete critique of China than that offered of India in the Reports. The Reports not only tell China what to do (close down the specifically identified markets) but how to do it (change IP laws in the manner articulated in the Reports). By singling out laws, enforcement of particular laws, and spaces of infringement, the report

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59. Office of the U.S. Trade Representative, Report to Congress on Section 301 Developments Required by Section 309(a)(3) of the Trade Act of 1974, at 7 (2007) http://www.ustr.gov/Document_Library/Reports_Publications/2007/2007_Special_301_Review/Section_Index.html [hereinafter *2007 Special 301 Report*].
60. *Id.* at 7. There is no footnote or source provided for this statistic and no way of verifying its validity.
61. Even though the virtual market itself is not physically tangible, it still presents an exact source or place for change, rather than a national scope. Like a physical market, virtual markets can be easily targeted and the success of any mission to shut them down, and even prosecute them, easily observed.
62. *Id.* at 7.
63. *Id.* at 18-19.
64. *Id.* at 19.
65. 2008 Special 301 Report, *supra* note 42, at 7.
66. *Id.*

demands that China change their entire IP system dramatically and shut down all areas of infringement, or face sanctions. This requires China to make changes at all levels, and indicates the USTR's continuing surveillance of the country's affairs.

India

The critique of India in the USTR Reports focuses less on specific laws or the enforcement of these laws and more on the general problems of piracy and counterfeit. Far less is written in the reports about India than China,[67] and the comments themselves tend to stay at a more general level. There is no discernable change in trends over time, but there is a somewhat consistent trend towards focusing at once on the entire system and on certain sectors of the economy where pirated goods are having industry effects in the United States. In these sectors, the reports are concerned with IP infringements in the creation of physical items, particularly items that can be transported back to the United States. This is unlike the descriptions of China, which focus more on physical markets than on the goods within them.[68]

Between 2000 and 2008 the reports speak about general problems within the India IP rights regime and move between complaints about loose controls over optical media piracy and a variety of other forms of counterfeit goods. In 2001 and again in 2002 the critique of India focused both on the backlog of the legal system and its legal inadequacy.[69] In their general critique, the Reports claim that the process of patenting an item takes too long and the opportunities for competitors to oppose are "overly-generous," leading to the failure of the system.[70] In both 2001 and 2002, the Reports use the same language when speaking about industry concerns and claim "India

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67. For example, in 2008 fifteen full pages are dedicated solely to China, whereas India is covered in one paragraph. *See id.* at 35-36 (discussing India); *and id.* at 19-33 (discussing China.).
68. The reasons for this difference are not the subject matter of this paper but could be that the USTR has greater faith in Indian rule of the law and that demanding changes in laws and national policy will result in real changes on the ground. It could also be that monitoring or regulating industry is more successful in India while policing is more successful in China. Alternatively the different approaches may be reflective of the reality of IP violations in the two countries, the size and structure of industry, and whether pirated goods are sold mostly in domestic or foreign markets.
69. The commentary on India in 2001 and 2002 is word for word the same except for two sentences. In 2001 the Report says "India's copyright legislation is generally strong, but poor enforcement allows rampant piracy. Indeed, piracy of motion pictures, music, software, books and video games is widespread; videos and VCDs are often available on the street before titles even open in cinemas." 2001 Special 301 Report, *supra* note 42, at 19. In 2002 the Report says, "in addition, India's copyright law, which is generally consistent with international standards, was weakened by amendments enacted in 2000 that undermine protection for computer programs. Enforcement against piracy remains a growing concern for U.S. copyright industries, especially given that pirated imports are entering the market from Southeast Asia and that there is growing Internet piracy." 2002 Special 301 Report, *supra* note 46, at 21.
70. 2001 Special 301 Report, *supra* note 41, at 19; *and* 2002 Special 301 Report, *supra* note 43, at 21.

fails to provide patent protection for pharmaceutical and agricultural chemical products and the compulsory licensing system seems overly broad."[71] Each Report differs slightly in their other industry specific analysis. The 2001 Report was concerned with the lack of enforcement of IP protections for media oriented products, like "motion pictures, music, software, books and video games"[72] which, in the case of films, are available in India often before they enter theaters. The 2002 Report mentioned concern over goods entering the American market and for general internet piracy.[73]

In 2003, the USTR Report moved away from optical media goods, with the USTR noting a concern over piracy of copyrighted books, particularly fiction and some textbooks, and the other counterfeit goods like auto parts, pharmaceuticals, and consumer goods and apparel that apparently saturate the market.[74] By 2004 the Report returned to optical media piracy and pirated pharmaceuticals.[75] The general critique noted inadequacies in copyright law as well a number of perceived procedural inadequacies[76] and ineffective enforcement.[77] A similar critique to 2004 was offered in 2005, for optical media piracy, but the 2005 Report continued to comment that while India had improved, in their eyes, "its IPR regime in some respects, [and its] protection of intellectual property in many areas remained weak due in part to inadequate laws and to ineffective enforcement."[78] The 2006 Report combined the optical media industry specific concern, with a system wide one, "urging" India to improve its entire intellectual property regime "by providing stronger protection for copyrights, trademarks, and patents, as well as protection against unfair commercial use of undisclosed test and other data submitted by pharmaceutical companies seeking marketing approval for their products."[79]

In the last two Reports, 2007 and 2008, the trends follow a similar model to previous years with a two-sided critique of both the system as a whole and of particular sectors. In 2007, the highlighted sector was

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71. 2001 SPECIAL 301 REPORT, *supra* note 43, at 19; *and* 2002 SPECIAL 301 REPORT, *supra* note 46, at 21.
72. 2001 SPECIAL 301 REPORT, *supra* note 43, at 19.
73. 2002 SPECIAL 301 REPORT, *supra* note 46, at 21.
74. OFFICE OF THE U.S. TRADE REPRESENTATIVE, REPORT TO CONGRESS ON SECTION 301 DEVELOPMENTS REQUIRED BY SECTION 309(A)(3) OF THE TRADE ACT OF 1974, at 13-14 (2003) http://www.ustr.gov/Document_Library/Reports_Publications/2003/2003_Special_301_Report/Section_Index.html?ht= [hereinafter *2003 Special 301 Report*].
75. *See* 2004 SPECIAL 301 REPORT, *supra* note 17, at 16.
76. *Id.* ("Protection of foreign trademarks remains difficult due to procedural barriers and delays.").
77. *Id.* ("while India has improved its IPR regime, protection of intellectual property in some areas remains weak due to inadequate laws and ineffective enforcement.").
78. 2005 SPECIAL 301 REPORT, *supra* note 5, at 27.
79. 2006 SPECIAL 301 REPORT, *supra* note 27, at 28.

pharmaceuticals and the general critique focused on inadequate IPR protection and enforcement relating to copyright, trademark and patent protections.[80] In 2008 the USTR was concerned with the counterfeit of distilled liquor trademarks and noted that copyright laws and general IPR enforcement needed improvement.[81]

Unlike similar critiques of China, the United States expresses the reason for many of their concerns in India. The USTR believes, or at least expresses belief, that the lack of piracy enforcement is a "growing concern for U.S. copyright industries, especially given the pirated imports are entering the market from Southeast Asia."[82] In 2005 the USTR reported, "copyright piracy is rampant, and the U.S. copyright industry estimates that lost sales resulting from piracy in India of U.S. motion pictures, sound recordings, musical compositions, computer programs, and books totaled approximately $500 million in 2004."[83] The Reports express concerns for these goods going elsewhere,[84] but the concern over the goods entering American markets seems to drive many of the comments. Perhaps in part because the Reports focus on specific industries and goods rather than particular markets, they are able to discuss the challenges posed by Indian pirated and counterfeit goods entering American markets, something they do not do for China.

In these ways, the commentary on India remains less in depth than that on China, but both countries are critiqued at multiple levels. They are each critiqued for their laws, as well as the enforcement of the laws, but this critique is focused on different areas, with China's commentary on individual markets, cities and provinces, and India's on specific goods and sectors. The following section draws from the general critiques in the reports to outline two aspects of the changes demanded.

III. THE NATURE OF THE DEMANDS BEING MADE

The demands made in the USTR reports are not always immediately visible. The reports "survey" IP right infringements and the state of IPR across the globe, but don't always make outright demands. As articulated above, they note where the U.S.A. sees the major concerns with China's and India's intellectual property regimes. These articulated concerns are in reality

80. *See* 2007 Special 301 Report, *supra* 60, at 26 ("The United States continues to urge India to improve its IPR regime by providing stronger protection for copyrights, trademarks, and patents, as well as protection against unfair commercial use for data generated to obtain marketing approval.").
81. 2008 Special 301 Report, *supra* 43, at 35-36.
82. 2002 Special 301 Report, *supra* 46, at 21.
83. 2005 Special 301 Report, *supra* 5, at 28.
84. *E.g.,* 2003 Special 301 Report, *supra* 75, at 14 (There are "extensive public health and safety risks posed by counterfeit goods to the Middle East, Southern Africa and Europe.").

demands because of the consequences attached if China and India do not address the problems listed by the USTR Reports. That being said, the reports also make explicit demands. This section of the paper looks at two trends in the nature of the specific demands being made. The first half of the section argues that the reports increasingly push for greater, stricter, and more frequent criminal laws and consequences for IP rights infringement, both in addition to, and in place of, civil laws and remedies. The second half of the section notes that many of the demands made in the report are not only often to the disadvantage of local populations, but often violate the sovereign rights of nation to determine their own political processes.

A) Criminal Sanctions for IP Violations

This section outlines how the trend of criminal sanctions has developed with respect to India and China in the USTR Reports. In the first few years of the 21st century the Reports included minimal commentary on criminal sanctions for IP rights infringements in China, yet the amount and the severity of the commentary increased year to year. In 2001, the Report was concerned not with the availability of criminal sanctions, but that "criminal actions are rarely filed" and the "legal thresholds for prosecution are too high" to deter piracy.[85] In 2003, the USTR Report made a serious legislative and structural challenge to China's IPR regime claiming, "China remains one of the last countries in the world that fails to use, in practice, its criminal law to go after commercial copyright pirates and trademark counterfeiters."[86] In 2004 the Report went even further, criticizing China for "significant deficiencies in" the "application and interpretation of its Criminal Code."[87]

By the middle of the decade the Reports became more focused on criminal sanctions, often demanding China reduce thresholds for criminal sanctions and change its legal culture and institutions to encourage IPR infringements to be brought as criminal rather than civil actions. In the 2005 Report, following a demand made in 2004,[88] China released "new judicial interpretations on the IPR sections of their Criminal Code lowering the

85. 2001 Special 301 Report, *supra* 43, at 15. *See also* 2002 Special 301 Report, *supra* 46, at 17 ("Criminal investigations and sanctions are rare (*i.e.*, administrative fines imposed are nominal), and very few cases are referred to criminal prosecution. The thresholds for initiating criminal cases for IPR infringements remain very high. The United States urges China to ensure that U.S. trademark and copyright holders can enforce their rights through criminal prosecutions and to ensure that the Supreme People's Court amend its interpretations of China's Criminal Code to allow more effective prosecution of cases and the imposition of deterrent sentences.").

86. 2003 Special 301 Report, *supra* 75, at 10 -11.

87. 2004 Special 301 Report, *supra* 17, at 12.

88. *See id.* at 12 ("We expect the new judicial interpretations to address all of these issues and generate stronger criminal sanctions against commercial-scale counterfeiters and pirates.").

minimum threshold required for criminal convictions against IPR violators."[89] In 2006, the Report demands a standardization of "national IPR courts and prosecutors, providing faster trademark examination, and encouraging that the resources [be made] available to local administrative, police, and judicial authorities charged with protecting and enforcing IPR adequate to the task."[90] Just a year later, in 2007, the Report threatens that China's "safe harbors from criminal liability" are a large part of the reason the U.S.A. has requested WTO consultations.[91] By making this claim, the Report essentially demands that China enact legislation to change the legal system, or face serious trade sanctions.[92]

In its critiques of India, the USTR is slower to demand criminal sanctions for IPR infringements than in the case of China. Between 2000 and 2004 there is no mention of criminal sanctions for IPR infringements in India. However, in 2005, the Report lists the weak areas in India's IPR enforcement regime, including "border protection against counterfeit and pirated goods, police action against pirates, following up raids by obtaining convictions for copyright and trademark infringement, courts reaching dispositions and imposing deterrent sentences, and delays in court dispositions."[93] The Report claims that if India can make these improvements it will "strengthen" its IPR regime.[94]

Similar to the 2005 Report, the 2006 Report claims India needs to improve criminal sanctions and enforcement for IPR violations in many areas, most notably "border enforcement against counterfeit and pirated goods, police action against pirates and counterfeiters, judicial dispositions resulting in convictions for copyright and trademark infringement, and imposition of deterrent sentences."[95] In 2007 the Report again claims that "piracy of copyrighted works remain rampant" and that the criminal

89. 2005 SPECIAL 301 REPORT, *supra* 5, at 59.

90. 2006 SPECIAL 301 REPORT, *supra* 27, at 20. It is unclear from the Reports if China ever followed through on this demand, but the request for WTO consultations the following year, suggests the China did not.

91. *See* 2007 SPECIAL 301 REPORT, *supra* 60, at 19 ("The safe harbors from criminal liability created by China's high thresholds for criminal liability (*i.e.*, minimum values of volumes required to initiate criminal prosecutions, normally calculated on the basis of the infringer's actual or marked price) continue to be a major reason for the lack of an effective criminal deterrent. These safe harbors are among the matters on which the United States has request WTO consultations.").

92. By noting the exact physical markets and specific violators of IPR and pushing towards criminal sanctions, the reports are essentially creating a list of those to be prosecuted and the means by which they should be prosecuted.

93. 2005 SPECIAL 301 REPORT, *supra* 5, at 28.

94. Here, greater criminal sanctions and enforcement are seen as synonymous with a stronger IPR system, which does not have to be the case.

95. 2006 SPECIAL 301 REPORT, *supra* 27, at 47.

enforcement "regime remains weak."[96] The Report continues listing the same areas in need of improvement as 2005 and 2006.[97] Finally, India's supposed "weak" criminal system is again mentioned in the 2008 Report, focused specifically on the need for a greater police presence enforcing IPR infringements through criminal means and "stronger" border control.[98]

The implications of increased demands for criminal sanctions are not the subject of this paper, but it is noteworthy that it is a trend in the commentary for both China and India. Many other nations, particularly the U.S.A., make use of criminal sanctions for IP infringements.[99] However, criminal sanctions are often more severe than civil sanctions, as they can lead to the incarceration and severe restriction of freedom of violators. As countries do or do not respond to the other demands in the USTR Reports, it will be important to follow how the trend in demanding criminal sanctions progresses, and to examine the impact on individuals in India and China who do violate IP laws, which many hold to be already unjust.

B) Demands that Undermine National Sovereignty and Democratic Reform

The USTR Reports show a trend towards imposing demands on China and India to reorient their political systems in ways that are anti-democratic and contrary to the principle of sovereign independence. These demands infringe upon the sovereignty of China and India to develop and enforce their own IPR regimes that reflect their particular needs and the needs of their populations. This trend manifests itself in several ways, from demanding outcomes in court cases, to dictating levels of transparency. In these cases, the USTR undermines the integrity of policy and law-making institutions, as well as the rule of law (or any future attempt at rule of law) in the country. This section focuses solely on the demands made on China because they are more numerous and more clearly specified within the reports.

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96. 2007 Special 301 Report, *supra* 60, at 26.
97. *See id.*
98. 2008 Special 301 Report, *supra* 43, at 35-36.
99. There are several instances where violations of IP rights in the United States have criminal penalties. *See e.g.* 17 U.S.C. § 506 (discussing criminal violations of copyright laws); 18 U.S.C. § 2319A (dealing specifically with the criminal offense of "unauthorized fixation or and trafficking in sound recordings and music videos of live musical performances"); 18 U.S.C. § 2320 (outlining the crime of trafficking in counterfeit goods or services). In addition TRIPS Article 61 articulates when criminal sanctions should be applied in IP rights violations. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments – Results of the Uruguay Round vol. 31; 33 I.L.M. 81, art. 61 (1994) ("Members shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines

One demand placed on China asks that a judicial decision that sets specific standards for criminal sanctions be promulgated. The 2004 USTR Report contains a detailed list of commitments made by China at the Joint Copyright Cooperative Treaty meetings. At these meetings, the Report claims that Vice Premier Wu "announced that China would undertake a series of near-term actions with the objective of significantly reducing its level of IPR infringement."[100] Among these actions, the Report claims that China would "promulgate a judicial interpretation before the end of the year from the Supreme People's Court and the Supreme People's Procuratorate" that "appropriately lowers thresholds for applying criminal sanctions for acts of IPR infringements" and "stipulates guidelines for applying criminal sanctions for the import, export, storage, and transport of counterfeit and pirated products and for online piracy."[101] The Report goes on to say that this "new judicial interpretation is an attempt to remedy China's failure to make effective use of its criminal enforcement regime to address IPR issues."[102]

This demand for judicial reform is of a different nature than the usual demands within the reports. While the reports generally demand that courts be more vigilant and stringent in their interpretations of legal IPR apparatuses, in 2004 the Report specifies an outcome for a decision supposedly in the hands of the judiciary.[103] Whether or not China has an independent judiciary is not the issue at hand. What is significant, rather, is that the USTR is demanding a foreign country to do something that violates the independence of the judiciary and undermines any attempt to establish rule of law in China.

In addition to interfering with the functioning of judicial institutions, the reports make demands of the legislative process in China. For example, highlighting the importance of transparency, the 2006 Report moves from the general comment that "transparency in rulemaking is also a continuing problem" to stating that "government entities responsible for drafting rules

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sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed willfully and on a commercial scale.").

100. 2004 Special 301 Report, *supra* 17, at 11.
101. *Id.* at 28.
102. *Id.* at 12. While these demands were not originally made by the United States directly on China, by placing them into the reports, they make China liable if they do not succeed in promulgating the decision desired.
103. Many courts, such as the Canadian Supreme Court and the International Court of Justice, allow for advisory opinions, where courts are asked to determine the legality of a certain question even if no case or controversy is at issue. However, here the government is not demanding simply that the court advise on a matter, but what that advice should be.

often refuse to make drafts widely available for public comment and instead limit their 'consultations' to pre-selected industry and trade associations."[104] The Report then continued to say that the USTR "welcomed" being given drafts of legislation in the past to comment upon and would be happy to provide this support again.[105] In fact the Report explicitly complains that the U.S.A. was provided "no opportunity to comment on ... the customs transfer rules or the rules to strengthen crackdowns on trademark infringement crimes."[106] Requesting an opportunity for the USTR to comment on laws before they are enacted further reveals the desire of the USTR, and of the United States more broadly, to be intimately involved in China's domestic policy-making processes on intellectual property.

IV. CONCLUSIONS

The USTR Reports highlight changes that the United States Executive Branch, the United States Trade Representative, and parties who petition the USTR would like to see in the IP regimes of countries across the globe. This paper has looked at the trends over the last nine years in the types of problems and demands made on India and China in relation to their IP regimes. For both India and China, the USTR has noted systemic problems with IP laws and their enforcement. With China, the reports have increasingly demanded the enforcement of IP rights in specific locales, including particular markets, cities and provinces. In India, the reports were more concerned with specific industries, commenting on the pirating of optical media and pharmaceutical goods. Both countries have faced pressure to instigate criminal sanctions, and China has been confronted with demands that threaten its sovereign independence.

These trends in demands point to two broad themes. First, there has been a move in the reports towards greater specificity in the enforcement of IP norms and regulations. This specificity comes in a number of ways. The Reports target their critiques at more specific nodes of prioritization, noting industries, markets and geographic areas where the USTR would like enforcement to be greater and the policing of IP infringements increased. The Reports also suggest more specific enforcement tools or mechanisms to be deployed, highlighting criminal sanctions as an appropriate remedy for a number of IP infringements. This demand for greater specificity in

104. 2006 Special 301 Report, *supra* 27, at 24. The Report further notes "the United States also continues to welcome and encou rage increased efforts by U.S industry to enhance transparency through monitoring of IPR enforcement in China and its results in the Chinese market." *Id.*

105. *Id.*

106. *Id.* at 25.

enforcement might be a result of the USTR's system wide critiques being unsuccessful in the past.

Demanding greater enforcement in specific arenas might be seen as an effort more likely to yield success, as it doesn't require changing laws or legal processes. It also engages a different set of players – rather than lobbying politicians to create new legislation the USTR can work directly with police and prosecutors, bypassing any complicated political arrangements. Indeed, by noting specific markets, the USTR is able to begin the police work of other nations by identifying culprits. The specificity might also be the result of a change in USTR policy towards being more concerned with stopping IP violations that are occurring than creating legal mechanisms to expand the scope of what is even considered an IP violation in India and China through legislation. It could further be an indication of the USTR's exasperation with the lack of affirmative steps in India and China and the hope that a new approach might produce better results.

Secondly, the USTR has demanded increased sanctions for those that violate IP rights through the institution of criminal sanctions and creation of new IP laws that lead to new possibilities for IP violations, and thus new sanctions. Even if other nations like the U.S.A. have criminal sanctions for IP infringements, it is still extremely important to note that demanding a switch from civil to criminal sanctions is dramatic and very significant. Rather than simply paying fines for violations, if the USTR's plans are implemented, individuals in India and China will face incarceration for violations of IP laws. This is especially problematic when one considers that many of the new IP laws posed are not responses to demands by citizens in India and China, but responses to international pressures, from parties like the USTR itself.

By identifying the demands made on China and India since 2000, this paper hopes to set the stage for future research. India and China are two emerging and powerful economies. How they react and what they change in their legal systems based on the types of demands the USTR makes of them will point to the effectiveness of the Reports in achieving American aims in changing IP policy, or at least the effectiveness of the demanded policies in these two very important economies. Noting the demands on India and China and the trends in these demands may also provide information on what type of demands the USTR might place on future emerging powerful markets. Finally, the trends in the reports speak to what the USTR sees as the major concerns for the future of IP policy globally, and the implications this will have for national IP regimes in all countries.