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The Middle Kingdom and the Intellectual Property World

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PETER K. YU*

The Middle Kingdom and the Intellectual Property World

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INTRODUCTION

Massive piracy and counterfeiting have been perennial problems for China. Although these problems existed long before China reestablished trade and diplomatic ties with the outside world in the late 1970s,¹ they continue to haunt China today—even after the

* Copyright © 2011 Peter K. Yu, Kern Family Chair in Intellectual Property Law and Director, Intellectual Property Law Center, Drake University Law School; Wenlan Scholar Chair Professor, Zhongnan University of Economics and Law. An earlier version of this Article was delivered as the keynote opening address at the *Oregon Review of International Law* Symposium on “China’s Role in Regulating the Global Information Economy” and at the Colloquium on China and International Law at the University of Chicago Law School. The Author would like to thank Tom Ginsburg and Eric Priest for their kind invitations and hospitality; Sharon Barner, Mark Cohen, Rob Faris, Eric Priest, and Mark Wu for their valuable comments and suggestions. He is also grateful to Linzey Bachmeier and Lindsey Purdy for excellent research and editorial assistance.

¹ See WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 34–55 (1995) (discussing intellectual property problems in the late Qing and Republican periods).

country has joined the World Trade Organization (WTO).² In a recent report, the International Trade Commission estimated that “firms in the U.S. [intellectual property]-intensive economy that conducted business in China in 2009 reported losses of approximately \$48.2 billion in sales, royalties, or license fees due to IPR [intellectual property right] infringement in China.”³ One therefore cannot help but wonder why China remains such a rogue player in the international intellectual property arena.⁴

Contrary to conventional wisdom, China has been quite compliant with international intellectual property norms. Out of the twenty-four treaties administered solely by the World Intellectual Property Organization (WIPO),⁵ China is a member of fifteen⁶—close to two-thirds of the total number available for ratification and two more than the United States.⁷ While the WTO Dispute Settlement Body has

² See OFFICE OF THE U.S. TRADE REP., 2005 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 95 (2005) [hereinafter 2005 NTE REPORT] (noting the intellectual property enforcement problems in China).

³ U.S. INT’L TRADE COMM’N, PUBLICATION NO. 4226, CHINA: EFFECTS OF INTELLECTUAL PROPERTY INFRINGEMENT AND INDIGENOUS INNOVATION POLICIES ON THE U.S. ECONOMY xiv (2011) (internal cross reference omitted), available at <http://www.usitc.gov/publications/332/pub4226.pdf>.

⁴ See James V. Feinerman, *Chinese Participation in International Legal Order: Rogue Elephant or Team Player*, in CHINA’S LEGAL REFORMS 198, 201 (Stanley Lubman ed., 1996) (asking whether China will be a “rogue elephant” or a team player).

⁵ See *WIPO-Administered Treaties*, WORLD INTEL. PROP. ORG., <http://www.wipo.int/treaties/en/> (last visited Oct. 5, 2011) (providing a list of all twenty-four WIPO-administered treaties).

⁶ See discussion *infra* Part I. The eight agreements to which China is not a signatory are: (1) the Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (“Brussels Convention”); (2) the Hague Agreement Concerning the International Registration of Industrial Designs; (3) the Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration; (4) the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods; (5) the Nairobi Treaty on the Protection of the Olympic Symbol; (6) the Patent Law Treaty; (7) the Rome Convention; and (8) the Vienna Agreement Establishing an International Classification of the Figurative Elements of Marks. See *Contracting Parties*, WIPO, http://www.wipo.int/treaties/en/SearchForm.jsp?search_what=C (select “China” in the “Select Contracting Party” drop-down menu and perform a search) (last visited Oct. 5, 2011).

⁷ Except for the Brussels Convention and the Patent Law Treaty, the United States did not sign those WIPO-administered treaties to which China is not a signatory. The United States also failed to join three agreements to which China is a signatory: (1) the Locarno Agreement Establishing an International Classification for Industrial Designs; (2) the Washington Treaty on Intellectual Property in Respect of Integrated Circuits; and (3) the Madrid Agreement Concerning the International Registration of Marks. See *Contracting Parties*, WIPO, http://www.wipo.int/treaties/en/SearchForm.jsp?search_what=C (select “United States of America” in the “Select Contracting Party” drop-down menu and perform a search) (last visited Oct. 5, 2011).

recently found China in violation of the Agreement on Trade-Related Aspects of Intellectual Property Rights⁸ (TRIPS Agreement),⁹ the country quickly remedied the problems by amending both its Copyright Law and Customs Regulations.¹⁰ China's quick remedial actions stand in sharp contrast to the United States' continued refusal to implement the panel recommendations in two adverse WTO decisions concerning the TRIPS Agreement.¹¹

This Article scrutinizes China's participation in the international intellectual property regime and its role in both the WTO and WIPO. Part I discusses China's engagement with international intellectual property norms before its accession to the WTO in December 2001. It points out that China is not the "norm breaker" one typically infers from its disappointing record of intellectual property protection. Instead, the country should be viewed as a "norm taker," having accepted most of the WIPO-administered intellectual property treaties available for ratification.

Parts II to IV identify three distinct phases in which China engages with international intellectual property norms following its accession to the WTO. These Parts examine in detail the three possible roles China can play in this area: (1) norm taker; (2) norm shaker; and (3) norm maker.¹² These Parts show that, although China began primarily

⁸ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 108 Stat. 4809, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement].

⁹ See Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights* ¶ 8.1, WT/DS362/R (Jan. 26, 2009) [hereinafter Panel Report].

¹⁰ See Peter K. Yu, *The TRIPS Enforcement Dispute*, 89 NEB. L. REV. 1046, 1091–92, 1097–98 (2011) (discussing the amendments to Article 4 of the Chinese Copyright Law and Article 27 of the Chinese Customs Regulations).

¹¹ See Appellate Body Report, *United States—Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R (Jan. 2, 2002); Panel Report, *United States—Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/R (Aug. 6, 2001); Panel Report, *United States—Section 110(5) of the U.S. Copyright Act*, WT/DS160/R (June 15, 2000); see also Peter K. Yu, *Are Developing Countries Playing a Better TRIPS Game?*, 16 UCLA J. INT'L L. & FOREIGN AFF. (forthcoming 2011) (discussing the United States' failure to implement these panel reports); cf. John H. Jackson, *The Impact of China's Accession to the WTO*, in CHINA AND THE WORLD TRADING SYSTEM: ENTERING THE NEW MILLENNIUM 19, 28 (Deborah Z. Cass et al. eds., 2003) [hereinafter CHINA AND THE WORLD TRADING SYSTEM] ("[W]ho says the United States and the European Union are always very good citizens? In relation to China's handling of treaty obligations, China's record is not perfect, but it is also not any worse than that of any of the other WTO members.").

¹² Other commentators have used variations of this quadripartite breaker-taker-shaker-maker formula to analyze China's compliance with international economic law or public international law. See, e.g., Henry Gao, *China's Ascent in Global Trade Governance:*

as a norm taker, it has slowly added the roles of a norm shaker and a norm maker in later phases. While China will continue to play different roles in the near future, the predominant role it plays will vary from phase to phase. This Article concludes with some brief observations concerning China's impact on the future development of the international intellectual property regime.

I PRE-WTO ERA

Commentators have identified three distinct phases in which developing countries participated in the international intellectual property regime.¹³ The first phase began during the colonial era, when developing countries were still colonies, protectorates, or dependent territories of major European powers. By virtue of this subservient relationship, developing countries took on obligations accepted by the controlling powers.¹⁴ Commitments made under such arrangements included obligations arising from the Paris Convention for the Protection of Industrial Property¹⁵ (Paris Convention) and the Berne Convention for the Protection of Literary and Artistic Works¹⁶ (Berne Convention), the two cornerstones of the international intellectual property regime.

The second phase began when developing countries adjusted their international intellectual property relationship in view of their

From Rule Taker to Rule Shaker and, Maybe Rule Maker?, in MAKING GLOBAL TRADE GOVERNANCE WORK FOR DEVELOPMENT: PERSPECTIVES AND PRIORITIES FROM DEVELOPING COUNTRIES 153 (Carolyn Deere Birkbeck ed., 2011).

¹³ See, e.g., CAROLYN DEERE, THE IMPLEMENTATION GAME: THE TRIPS AGREEMENT AND THE GLOBAL POLITICS OF INTELLECTUAL PROPERTY REFORM IN DEVELOPING COUNTRIES 34 (2009) (noting that "developing countries participated in the international [intellectual property] system through three phases, from the colonial era up until the close of the Uruguay Round"); Ruth L. Okediji, *The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System*, 7 SING. J. INT'L & COMP. L. 315, 320–41 (2003) (identifying three distinct periods of intellectual property multilateralism: (1) The Era of Imperialism/Colonialism, 1500s–1945; (2) The Era of Formalism, 1945–1990s; and (3) The Era of Consolidation, 1994–current).

¹⁴ See SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND 1107–10 (2d ed. 2006) (discussing the Berne Convention in relation to foreign colonies, protectorates, and other dependent territories); Okediji, *supra* note 13, at 320–25 (discussing the extension of intellectual property obligations from metropolitan states to their colonies).

¹⁵ Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305 (revised at Stockholm July 14, 1967).

¹⁶ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 25 U.S.T. 1341, 828 U.N.T.S. 221 (revised at Paris July 24, 1971).

newfound independence.¹⁷ Such adjustment led to a wide variety of pro-development initiatives, such as the drafting of the Protocol Regarding Developing Countries to the Berne Convention,¹⁸ the formation of WIPO as a United Nations specialized agency, the establishment of the draft International Code of Conduct on the Transfer of Technology under the auspices of the United Nations Conference on Trade and Development (UNCTAD),¹⁹ and efforts to revise the Paris Convention.²⁰

In an earlier article, I described these initiatives collectively as the “Old Development Agenda.”²¹ Although developing countries obtained some moderate success with this agenda, the protection of their interests remained rather limited. Despite considerable efforts, they were unable to adjust protection levels based on their needs, interests, conditions, and priorities.²² They also failed to secure more transfer of technology and knowledge, and greater protection against abuse of rights and restraints on trade.

The third phase began when developing countries joined their more developed counterparts in the negotiation of the TRIPS Agreement.²³ Many commentators consider this agreement a “sea change” or

¹⁷ As Sam Ricketson and Jane Ginsburg recount in relation to the Berne Convention: [I]n the years immediately following [World War II], the process of decolonization brought into existence a large number of new independent states, notably in Africa and Asia. The majority of these had previously been subject to the provisions of the Berne Convention as dependent territories of metropolitan states that were members of the Berne Union. The question which therefore faced these new states was whether they would now continue as members in their own right, or would withdraw from the Union.

RICKETSON & GINSBURG, *supra* note 14, at 885.

¹⁸ Protocol Regarding Developing Countries to the Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886 (revised at Stockholm July 14, 1967).

¹⁹ Draft International Code of Conduct on the Transfer of Technology, United Nations Conference on Trade and Development, U.N. Doc. TD/CODE TOT/33 (1981).

²⁰ See generally Peter K. Yu, *A Tale of Two Development Agendas*, 35 OHIO N.U. L. REV. 465, 468–511 (2009) (providing a detailed discussion of these pro-development initiatives).

²¹ *Id.* at 468.

²² See *id.* at 477–84 (noting the limited success in efforts to establish the Stockholm Protocol to the Berne Convention); *id.* at 497–505 (noting the limited success in efforts to negotiate the International Code of Conduct on the Transfer of Technology).

²³ See generally DANIEL GERVAIS, *THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS* 3–27 (3d ed. 2008) (describing the origins and development of the TRIPS Agreement); JAYASHREE WATAL, *INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES* 11–47 (2001) (recounting the negotiation process for the TRIPS Agreement); Peter K. Yu, *TRIPs and Its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369, 371–79 (2006) (examining four different accounts of the origins of the TRIPS Agreement).

“tectonic shift” in international intellectual property law.²⁴ The Agreement’s impact on developing countries is indeed far-reaching. For the first time, it introduced comprehensive norms concerning a large variety of intellectual property areas in a single multilateral agreement.²⁵ Among the rights implicated are copyrights and related rights, trademarks, geographical indications, industrial designs, patents, plant variety protection, layout designs of integrated circuits, and the protection of trade secrets and other forms of undisclosed information.²⁶

Unlike other developing countries, China’s path of norm engagement in the international intellectual property regime did not follow these three distinct phases. Such deviation was not caused by the incompatibilities between the Confucian culture and intellectual property rights, a topic of considerable scholarly interest.²⁷ Instead, China’s lack of participation in the international intellectual property

²⁴ See, e.g., FREDERICK M. ABBOTT ET AL., INTERNATIONAL INTELLECTUAL PROPERTY IN AN INTEGRATED WORLD ECONOMY 3 (2007) (stating that “[t]he TRIPS Agreement represented a sea change in the international regulation of IPRs”); Charles R. McManis, *Teaching Current Trends and Future Developments in Intellectual Property*, 52 ST. LOUIS U. L.J. 855, 856 (2008) (noting that “the field of international intellectual property law underwent a tectonic shift with the promulgation of the [TRIPS Agreement]”).

²⁵ See Peter K. Yu, *Teaching International Intellectual Property Law*, 52 ST. LOUIS U. L.J. 923, 930–31 (2008).

²⁶ See TRIPS Agreement arts. 9–39. Because the TRIPS Agreement incorporates by reference the Paris Convention, it arguably could implicate rights concerning trade names, utility models, and various forms of unfair competition. *Id.* art. 2.1 (“Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967).”).

²⁷ See, e.g., ALFORD, *supra* note 1, at 19–29 (discussing how the Confucian culture prevented intellectual property protection from taking root in imperial China); Peter K. Yu, *Piracy, Prejudice, and Perspectives: An Attempt to Use Shakespeare to Reconfigure the U.S.-China Intellectual Property Debate*, 19 B.U. INT’L. L.J. 1, 16–21 (2001) [hereinafter Yu, *Piracy, Prejudice, and Perspectives*] (discussing Confucianism as a partial impediment to improving intellectual property protection and enforcement in China). Although Confucianism has been widely cited in legal literature as an explanation for copyright piracy and counterfeiting in China, recent literature and historical and empirical evidence suggest that commentators may have overstated the impact of Confucianism on China’s reception of international intellectual property norms. See Peter K. Yu, *Intellectual Property and Asian Values*, 16 MARQ. INTELL. PROP. L. REV. (forthcoming 2012); see also Ken Shao, *The Global Debates on Intellectual Property: What If China Is Not a Born Pirate?*, 2010 INTELL. PROP. Q. 341 (questioning the impact of Confucianism on intellectual property protection and enforcement in China); Shi Wei, *Cultural Perplexity in Intellectual Property: Is Stealing a Book an Elegant Offense?*, 32 N.C. J. INT’L L. & COM. REG. 1, 4 (2006) (pointing out that “current mainstream legal epistemology incorrectly links China’s enforcement problem to Confucian values”); Peter K. Yu, *Four Common Misconceptions About Copyright Piracy*, 26 LOY. L.A. INT’L & COMP. L. REV. 127, 131–34 (2003) (explaining why copyright piracy is not merely a cultural problem).

arena was the result of autarky and isolationist policies practiced by Mao Zedong and other Chinese leaders following the founding of the People's Republic of China in 1949.²⁸

Having been born at the end of dynastic rule in imperial China and having experienced a long period of exploitation, unfair treatment, and humiliation by foreign powers,²⁹ the founding Chinese leaders unsurprisingly questioned the legitimacy and expediency of the contemporary international legal order.³⁰ At that time, many leaders harbored “a burning desire to restore China’s rightful position under the sun, to achieve the big power status denied it since the Opium War, and to revive the national confidence and self-respect that had been lost during a century of foreign humiliation.”³¹ It is therefore no surprise that China declined to actively participate in an international regime that demanded the surrender of some of the sovereignty it had painfully regained.³²

²⁸ See Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-first Century*, 50 AM. U. L. REV. 131, 198 (2000) [hereinafter Yu, *From Pirates to Partners*] (“During the Mao era, China made a similar mistake by withdrawing completely from the global economy. Practicing self-reliance and import substitution, China sought to produce domestically those products it traditionally imported.”); accord Feinerman, *supra* note 4, at 186 (noting China’s “isolation which was by turns self-imposed and externally enforced”).

²⁹ See generally IMMANUEL C.Y. HSÜ, *THE RISE OF MODERN CHINA* 139–219, 295–350, 387–406 (6th ed. 2000) (providing an in-depth discussion of the “century of humiliation”).

³⁰ CHIU HUNGDAH, *THE PEOPLE’S REPUBLIC OF CHINA AND THE LAW OF TREATIES* 72–74 (1972) (noting the debate among Communist Chinese writers in the late 1950s over the treatment of two separate systems of international law—one bourgeois and the other socialist).

³¹ HSÜ, *supra* note 29, at 660–61.

³² See James Li Zhaojie, *Commentary on “China and the International Legal System: Challenges of Participation,”* in CHINA’S LEGAL SYSTEM: NEW DEVELOPMENTS, NEW CHALLENGES 162, 163 (Donald C. Clarke ed., 2008) [hereinafter CHINA’S LEGAL SYSTEM] (“China’s policy of integrating with the international system . . . follows a sovereignty-centered and state-empowering model.”). As one commentator observes, China’s effort to manage its engagement with the outside world involves the following tensions:

- To join “the club” of leading nation-states, but on China’s own terms of membership;
- To participate in international “regimes” without sacrificing national “sovereignty”;
- To garner the benefits of advanced technologies without accepting their “negative” consequences;
- To encourage entrepreneurial flair and market flexibility without absorbing the materialistic self-indulgence and cultural decadence that seem to come with modern capitalism (in short, to take what is deemed “good” from the outside world, and to filter out what is “bad”).

In the late 1970s, however, China began to realize that the self-reliance and import substitution policies had left the country economically poor and technologically backward.³³ As Henry Kissinger recounts: “On Mao’s death, America’s total trade with China amounted to \$336 million, slightly lower than the level of America’s trade with Honduras and one-tenth of America’s trade with Taiwan, which had approximately 1.6 percent of China’s population.”³⁴

Following Mao’s death and the demise of the infamous Gang of Four, Deng Xiaoping and his fellow leaders reopened the country to foreign trade.³⁵ In addition to normalizing the country’s diplomatic relationships with the outside world,³⁶ China adopted new policies to develop world-class strengths in agriculture, industry, science and technology, and national defense, known collectively as the “Four Modernizations.”³⁷

To promote trade with the outside world, China and the United States signed the Agreement on Trade Relations Between the United States of America and the People’s Republic of China in 1979.³⁸ Calling for reciprocal protection of copyrights, patents, and trademarks, this agreement “marked the beginning of Western intellectual property protection in post-Mao China.”³⁹ Article VI(3) of the Agreement provided that “each Party shall seek, under its laws and with due regard to international practice, to ensure to legal or natural persons of the other Party protection of patents and

Frederick S. Tipson, *China and the Information Revolution*, in CHINA JOINS THE WORLD: PROGRESS AND PROSPECTS 231, 232 (Elizabeth Economy & Michel Oksenberg eds., 1999).

³³ See Yu, *From Pirates to Partners*, *supra* note 28, at 198 (“By the late 1970s, China had concluded that this self-reliant policy was ineffective. It had led to high-cost, ineffective domestic production, and China remained a backward country with limited foreign technology and capital.”).

³⁴ HENRY KISSINGER, ON CHINA 333 (2011). For comparison purposes, the total volume of trade between China and the United States amounted to \$456.8 billion in 2010. *US-China Trade Statistics and China’s World Trade Statistics*, US-CHINA BUS. COUNCIL, <https://www.uschina.org/statistics/tradetable.html> (last visited Sept. 28, 2011).

³⁵ See HSÜ, *supra* note 29, at 858–69 (discussing the “open door” policy adopted in December 1978).

³⁶ See *id.* at 785–802 (discussing China’s efforts to normalize its diplomatic relationships with the outside world).

³⁷ See *id.* at 803–14 (discussing the Four Modernizations).

³⁸ Agreement on Trade Relations Between the United States of America and the People’s Republic of China, U.S.-China, July 7, 1979, 31 U.S.T. 4652 [hereinafter 1979 Agreement].

³⁹ Yu, *From Pirates to Partners*, *supra* note 28, at 136.

trademarks equivalent to the patent and trademark protection correspondingly accorded by the other Party.”⁴⁰ Article VI(5) further stipulated that “each Party shall take appropriate measures, under its laws and regulations and with due regard to international practice, to ensure to legal or natural persons of the other Party protection of copyrights equivalent to the copyright protection correspondingly accorded by the other Party.”⁴¹

A year after the signing of this agreement, China became a member of WIPO.⁴² In 1982, China promulgated its first trademark law, which was followed two years later by a patent law.⁴³ Although a contentious debate erupted over the expediency of patent protection and the appropriateness of establishing private rights in a socialist environment, Chinese leaders eventually concluded that having stronger intellectual property protection would be in the country’s best interest.⁴⁴ In 1985, China joined the Paris Convention,⁴⁵ which lays out the international intellectual property norms in both the patent and trademark areas. Four years later, China also joined the Madrid Agreement Concerning the International Registration of Marks⁴⁶ (Madrid Agreement), which streamlines the trademark application process in member states.

Compared with patents and trademarks, China’s path to join the international copyright family has been much longer and more arduous.⁴⁷ Due in large part to China’s strong information control policy⁴⁸ and its continued reluctance to introduce private rights into a socialist environment,⁴⁹ the country did not establish a new copyright

⁴⁰ 1979 Agreement, *supra* note 38, art. VI(3).

⁴¹ *Id.* art. VI(5).

⁴² *Contracting Parties*, WIPO, http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=1 (last visited Sept. 19, 2011).

⁴³ See Yu, *From Pirates to Partners*, *supra* note 28, at 136.

⁴⁴ For discussions of the challenges in developing the 1984 Patent Law, see generally ALFORD, *supra* note 1, at 67–74; David Ben Kay, Comment, *The Patent Law of the People’s Republic of China in Perspective*, 33 UCLA L. REV. 331 (1985).

⁴⁵ *Contracting Parties*, WIPO, http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=2 (last visited Sept. 19, 2011).

⁴⁶ *Contracting Parties*, WIPO, http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=21 (last visited Sept. 19, 2011).

⁴⁷ See ALFORD, *supra* note 1, at 77 (quoting Wang Hanbin, the vice president of the National People’s Congress, as describing the drafting of the 1990 Copyright Law as “the most complicated”).

⁴⁸ See Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 27, at 28–32 (discussing the Chinese censorship and information control policy).

⁴⁹ See ALFORD, *supra* note 1, at 70 (discussing the uneasiness of introducing private intellectual property rights into a socialist environment).

system until the early 1990s.⁵⁰ Although American firms had been fairly patient in the first few years following China's reopening,⁵¹ they became increasingly concerned about the widespread piracy and counterfeiting problems in China.

Beginning in the mid-1980s, these firms began to pressure the U.S. government to take more proactive actions to protect their intellectual property interests in China.⁵² The timing of their demands could not have been better; the United States already had a huge trade deficit, and the industries were working closely with their European and Japanese counterparts to push for the establishment of the TRIPS Agreement in the Uruguay Round of Trade Negotiations (Uruguay Round).⁵³

On May 19, 1989, amidst student protests in Tiananmen Square, China and the United States signed its first ever memorandum of understanding (MOU) concerning the protection of intellectual property rights.⁵⁴ Although this MOU called for stronger protection of computer software, commentators seldom mentioned this document, due largely to the unrelated sanctions the United States and the international community imposed on China shortly after the Tiananmen incident.⁵⁵

⁵⁰ See Yu, *From Pirates to Partners*, *supra* note 28, at 141.

⁵¹ See *id.* at 137 (“In the beginning, the United States was willing to compromise its intellectual property rights, because the country was eager to lure China into the ‘family of nations.’”).

⁵² See Warren H. Maruyama, *U.S.-China IPR Negotiations: Trade, Intellectual Property, and the Rule of Law in a Global Economy*, in CHINESE INTELLECTUAL PROPERTY LAW AND PRACTICE 165, 186 (Mark A. Cohen et al. eds., 1999) (“At a 1985 meeting to the U.S.-China Joint Committee on Commerce and Trade (JCCT), the U.S. for the first time expressed concerns about weak Chinese IPR standards. In 1987, the U.S. put IPR protection on the agenda for U.S.-China market access talks.”).

⁵³ For detailed discussions of the private sector's active involvement in the development of the TRIPS Agreement, see generally DUNCAN MATTHEWS, *GLOBALISING INTELLECTUAL PROPERTY RIGHTS: THE TRIPS AGREEMENT* (2002); SUSAN K. SELL, *PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS* (2003).

⁵⁴ Memorandum of Understanding Between the People's Republic of China and the United States, U.S.-China, May 19, 1989, *reprinted in PRC Agrees to Push for Copyright Law that Will Protect Computer Software*, WORLD INTELL. PROP. REP., July 1989, at 151.

⁵⁵ See Joseph A. Massey, *The Emperor Is Far Away: China's Enforcement of Intellectual Property Rights Protection, 1986–2006*, 7 CHI. J. INT'L L. 231, 235 (2006); Peter K. Yu, *Intellectual Property, Economic Development, and the China Puzzle*, in INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS PLUS ERA 173, 186 (Daniel J. Gervais ed., 2007) [hereinafter Yu, *China Puzzle*]; see also ALFORD, *supra* note 1, at 121 (criticizing the United States for giving more priority to intellectual property protection than to human rights protection in negotiating the 1989 MOU).

Despite these sanctions and a turbulent relationship with the United States,⁵⁶ China enacted its first Copyright Law in 1990.⁵⁷ A year later, China promulgated a separate set of computer software regulations.⁵⁸ Although these enactments succeeded in improving China's relationship with the United States, they were too little, too late for American rights holders.

In April 1991, the United States designated China as a Priority Foreign Country through the Section 301 process.⁵⁹ To increase its leverage, the U.S. administration threatened to impose retaliatory tariffs of \$1.5 billion on Chinese textiles, shoes, electronic instruments, and pharmaceuticals.⁶⁰ China quickly responded with countersanctions of a similar amount on American commodities, such as aircraft, cotton, corn, steel, and chemicals.⁶¹ Hours before the deadline for imposing sanctions, both countries averted a potential trade war⁶² by signing a second MOU.⁶³

Pursuant to this new MOU, China amended both its copyright and patent laws.⁶⁴ China also joined the Berne Convention,⁶⁵ the Geneva Convention for the Protection of Producers of Phonograms Against

⁵⁶ See ANDREW MERITHA, *THE POLITICS OF PIRACY: INTELLECTUAL PROPERTY IN CONTEMPORARY CHINA* 42 (2005) ("One outcome of the worldwide condemnation of the PRC [following the Tiananmen incident] was that 'it was impossible to get the USTR to even talk to China between June 1989 and autumn 1990.'" (quoting documented but undisclosed interview)).

⁵⁷ See Yu, *From Pirates to Partners*, *supra* note 28, at 141.

⁵⁸ See *id.*

⁵⁹ OFFICE OF THE U.S. TRADE REP., 1995 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 47, 54 (1995) [hereinafter 1995 NTE REPORT].

⁶⁰ Sheryl WuDunn, *Nonstate Plants in China at Risk in U.S. Talks*, N.Y. TIMES, Jan. 14, 1992, at A9.

⁶¹ David Holley, *China Warns of Trade War with U.S. over Patents, Copyrights*, L.A. TIMES, Jan. 8, 1992, at A6.

⁶² Stuart Auerbach, *China, U.S. Reach Trade Accord; Beijing Agrees to Curb Piracy of Products, Safeguarded Material*, WASH. POST, Jan. 17, 1992, at A24; Keith Bradsher, *U.S. and China Reach Accord on Copying*, N.Y. TIMES, Jan. 17, 1992, at D1.

⁶³ Memorandum of Understanding on the Protection of Intellectual Property, Jan. 17, 1992, U.S.-China, T.I.A.S. No. 12036 (1995).

⁶⁴ See Yu, *From Pirates to Partners*, *supra* note 28, at 142. "The amended copyright statute protects computer software programs as literary works for fifty years; removes formalities on copyright protection; and extends protection to all works originating in a Berne Convention country, including sound recordings in the public domain." *Id.* at 143. "The new patent law extends the duration of patent protection from fifteen to twenty years; affords protection to all chemical inventions, including pharmaceuticals and agrichemical products; and sharply restricts the availability of compulsory licenses." *Id.* at 142.

⁶⁵ *Contracting Parties*, WIPO, http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15 (last visited Sept. 19, 2011).

Unauthorized Duplication of Their Phonograms⁶⁶ (Phonograms Treaty), and the Patent Cooperation Treaty (PCT).⁶⁷ After a decade of reforms following the reopening of its market, China finally became a member of the international copyright family.

Although the U.S.-China intellectual property relationship improved considerably following the signing of the second MOU, the relationship quickly deteriorated. On June 30, 1994, the United States Trade Representative (USTR) again designated China as a Priority Foreign Country through the Section 301 process.⁶⁸ The next year, the U.S. administration threatened to impose 100 percent tariffs on over \$1 billion worth of Chinese imports, ranging from plastic picture frames to cellular telephones.⁶⁹ In retaliation, China issued a counter-threat of 100 percent tariffs on American-made compact discs, cigarettes, alcoholic beverages, and other products.⁷⁰ China also announced its intention to suspend negotiations with American automakers over the creation of joint ventures in China for manufacturing minivans and passenger cars, one of the top trade priorities of the Clinton administration.⁷¹

As with the encounter three years ago, China and the United States again reached an agreement in the eleventh hour.⁷² With a repeat pattern and another follow-up “agreement” in 1996,⁷³ the back and forth negotiations between the two countries have created what I have described as the “cycle of futility.” In this cycle, China and the United

⁶⁶ *Contracting Parties*, WIPO, http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=18 (last visited Sept. 19, 2011).

⁶⁷ *Contracting Parties*, WIPO, http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=6 (last visited Sept. 19, 2011).

⁶⁸ 1995 NTE REPORT, *supra* note 59, at 54.

⁶⁹ Martha M. Hamilton, *U.S. to Hit China with Stiff Tariffs*, WASH. POST, Feb. 5, 1995, at A1.

⁷⁰ *Id.*

⁷¹ David E. Sanger, *President Imposes Trade Sanctions on Chinese Goods*, N.Y. TIMES, Feb. 5, 1995, at A1.

⁷² Agreement Regarding Intellectual Property Rights, Feb. 26, 1995, U.S.-China, 34 I.L.M. 881 (1995). This agreement appeared in the form of an “exchange of letters” with an attached action plan.

⁷³ Trade Compliance Center, *People’s Republic of China Implementation of the 1995 Intellectual Property Rights Agreement—1996* (June 17, 1996), available at http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005361.asp. This “agreement” appeared in the form of a report on intellectual property enforcement actions China conducted based on the 1995 Agreement. “The document included neither significant new terms [in the intellectual property area] nor terms that improved market access of American products; instead, it merely reaffirmed China’s commitment to protect intellectual property rights made under the intellectual property agreement signed the year before.” Yu, *China Puzzle*, *supra* note 55, at 187.

States “repeatedly threatened each other with trade wars, only to back down in the eleventh hour with a compromise that did not provide sustained improvements in intellectual property protection.”⁷⁴

While this futile cycle had undercut the efforts by the U.S. government to strengthen intellectual property protection in China, the latter did not slow down its participation in the international intellectual property regime. By the end of the 1990s, China had joined the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks (Nice Agreement), the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure (Budapest Treaty), the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (Madrid Protocol), the Locarno Agreement Establishing an International Classification for Industrial Designs (Locarno Agreement), the Strasbourg Agreement Concerning the International Patent Classification (Strasbourg Agreement), and the International Convention for the Protection of New Varieties of Plants (UPOV Convention) (See Table 1). China had also joined the Trademark Law Treaty, which still has not entered into force. It even signed the Washington Treaty on Intellectual Property in Respect of Integrated Circuits (Washington Treaty). Although that treaty has

⁷⁴ Peter K. Yu, *From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China*, 55 AM. U. L. REV. 901, 904 (2006) [hereinafter Yu, *From Pirates to Partners II*]. As I described earlier:

That cycle went as follows: The United States began by threatening China with trade sanctions (often with an ancillary threat of nonrenewal of China’s most-favored-nation status). China responded with threats of retaliatory sanctions of a similar amount. After several months of negotiations, both countries agreed to an eleventh-hour compromise that usually led to a written document. While intellectual property protection improved during the first few months immediately following the agreements, piracy and counterfeiting problems worsened once international attention was diverted. Within a short period of time, American businesses again complained to the U.S. government, and the cycle repeated itself.

Peter K. Yu, *Still Dissatisfied After All These Years: Intellectual Property, Post-WTO China, and the Avoidable Cycle of Futility*, 34 GA. J. INT’L & COMP. L. 143, 149 (2005); see also Yu, *From Pirates to Partners*, *supra* note 28, at 140–48 (discussing this “cycle of futility”).

since been incorporated into the TRIPS Agreement,⁷⁵ its obsolescence has made it difficult to obtain the needed ratifications.⁷⁶

TABLE 1. List of international treaties to which China has become a signatory

06/03/1980	WIPO Convention (in force)
03/19/1985	Paris Convention (in force)
10/04/1989	Madrid Agreement (Marks) (in force)
05/01/1990	Washington Treaty (signed, but not ratified)
10/15/1992	Berne Convention (in force)
04/30/1993	Phonograms Convention (in force)
01/01/1994	Patent Cooperation Treaty (in force)
08/09/1994	Nice Agreement (in force)
10/28/1994	Trademark Law Treaty (signed, but not in force)
07/01/1995	Budapest Treaty (in force)
12/01/1995	Madrid Protocol (in force)
09/19/1996	Locarno Agreement (in force)
06/19/1997	Strasbourg Agreement (in force)
04/23/1999	UPOV Convention (in force)
01/29/2007	Singapore Treaty (signed, but not in force)
06/09/2007	WIPO Copyright Treaty (in force)
06/09/2007	WIPO Performances and Phonograms Treaty (in force)

Source: Contracting Parties, WIPO, http://www.wipo.int/treaties/en/SearchForm.jsp?search_what=C (last visited Sept. 18, 2011).

In sum, before its accession to the WTO, China had signed most of the WIPO-administered treaties available for ratification. Out of all the treaties the United States had joined at that time, the only agreement China failed to sign was the Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by

⁷⁵ See TRIPS Agreement art. 35 (“Members agree to provide protection to the layout-designs (topographies) of integrated circuits . . . in accordance with Articles 2 through 7 (other than paragraph 3 of Article 6), Article 12 and paragraph 3 of Article 16 of the Treaty on Intellectual Property in Respect of Integrated Circuits . . .”).

⁷⁶ Cf. Leon Radomsky, *Sixteen Years After the Passage of the U.S. Semiconductor Chip Protection Act: Is International Protection Working?*, 15 BERKELEY TECH. L.J. 1049, 1052 (2000) (“[B]y the time [provisions protecting integrated circuit layouts] were in place, they were largely obsolete.”); Peter K. Yu, *Currents and Crosscurrents in the International Intellectual Property Regime*, 38 LOY. L.A. L. REV. 323, 378 (2004) (noting that the U.S. Semiconductor Chip Protection Act “was arguably obsolete by the time it was enacted”).

Satellite.⁷⁷ Meanwhile, China had joined the Madrid Agreement, the Locarno Agreement, and the Washington Treaty—three agreements the United States still has not joined.⁷⁸ Thus, as far as treaty membership is concerned, China is not a rogue player but a rather good citizen in the international intellectual property regime.

II

PHASE 1: TAKER

A. China as a Norm Taker

At the turn of this millennium, China actively revamped its intellectual property system, in part to prepare for its accession to the WTO.⁷⁹ The country amended its patent law in 2000 and its copyright and trademark laws the year after.⁸⁰ Although many of these “millennium amendments” were introduced as a response to the rapidly changing socio-economic and technological conditions in China, they also helped the country meet the standards required by the WTO.⁸¹

⁷⁷ See *supra* note 6.

⁷⁸ See *supra* note 7.

⁷⁹ As Xue Hong and Zheng Chengsi declare:

In general, China’s entry to the WTO significantly influenced the speed and scope of the development of the Chinese IP [intellectual property] law system. It is interesting to note that IP rights reforms kept pace with Chinese WTO negotiations. When the negotiations encountered obstacles, the IP rights reform slowed down; when the negotiations reached agreements to promote the accession process, the IP rights reform accelerated noticeably. Since China has become a member of the WTO, Chinese IP law reform has also peaked.

XUE HONG & ZHENG CHENGSI, CHINESE INTELLECTUAL PROPERTY LAW IN THE 21ST CENTURY xxxix (2002).

⁸⁰ Copyright Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 7, 1990, amended Oct. 27, 2001, effective Nov. 1, 2001); Patent Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 12, 1984, amended Aug. 25, 2000, effective July 1, 2001); Trademark Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 23, 1982, amended Oct. 27, 2001, effective Dec. 1, 2001).

⁸¹ As I wrote earlier:

While the amendments were undeniably introduced at a time when China prepared to enter the WTO, it is an overstatement, or a half-truth, to claim that the amendments were introduced primarily to conform the Chinese intellectual property system to WTO standards. Such a statement would ignore the important changes in the socialist market economy, the internal dynamics of the intellectual property lawmaking process, and contributions of the local stakeholders in the legal reforms.

Yu, *From Pirates to Partners II*, *supra* note 74, at 914.

During the Fourth WTO Ministerial Conference in Doha, Qatar, China was finally admitted to the international trading body.⁸² After fifteen years of arduous negotiations, the country formally became the WTO's 143rd member on December 11, 2001.⁸³ As part of its entry price, China took on not only obligations under the TRIPS Agreement but also additional WTO-plus commitments.⁸⁴ As a result, in the first few years following the accession, China focused its attention, energy, and resources primarily on playing the role of a norm taker—a role it has assumed and excelled at long before it joined the WTO.

In ensuing years, however, China slowly changed its approach to participation in the WTO. Such a change could be attributed to a large number of factors, including: a growing familiarity with WTO rules and procedures; a considerable increase in economic strength, industrial and scientific prowess, and research capabilities; more willingness to take on the role of a major power; greater success in resolving WTO-related problems within the country; and a new leadership and changing domestic elite politics. This Part focuses on the first phase of China's norm engagement, while the next two will discuss the two later phases.

In Phase 1, China's approach was similar to the approach it took before the WTO accession. Acting primarily as a norm taker,⁸⁵ the

⁸² See Symposium, *China and the WTO: Progress, Perils, and Prospects*, 17 COLUM. J. ASIAN L. 1, 2 (2003) [hereinafter *China and the WTO*] (remarks of the Author).

⁸³ *Members and Observers*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Sept. 19, 2011).

⁸⁴ See Samuel S. Kim, *China in World Politics*, in DOES CHINA MATTER? A REASSESSMENT: ESSAYS IN MEMORY OF GERALD SEGAL 37, 49 (Barry Buzan & Rosemary Foot eds., 2004) [hereinafter DOES CHINA MATTER?] ("In a few important areas, China assumed obligations that exceed normal WTO standards—the so-called WTO-plus commitments."); Julia Ya Qin, *China, India and WTO Law*, in CHINA, INDIA AND THE INTERNATIONAL ECONOMIC ORDER 167, 173–75 (Muthucumaraswamy Sornarajah & Wang Jiangyu eds., 2010) (outlining China's "'WTO-plus' rules").

⁸⁵ See, e.g., Margaret M. Pearson, *China in Geneva: Lessons from China's Early Years in the World Trade Organization*, in NEW DIRECTIONS IN THE STUDY OF CHINA'S FOREIGN POLICY 242, 242 (Robert S. Ross & Alastair Iain Johnston eds., 2006) ("The evidence . . . suggests that China is far from revisionist. Rather, for the most part, China has been a system maintainer, the exception being its behaviour on issues seen to impinge on its sovereignty and dignity."). It is worth noting that China plays the role of a norm taker in a more nuanced fashion. As Pitman Potter describes, China takes the norms by engaging in "selective adaptation" based on local conditions:

Applied to China, selective adaptation analysis permits understanding of local responses to international legal obligations. China's interpretation and implementation of international agreements in trade, such as the General Agreement on Tariffs and Trade (GATT) and agreements associated with the . . . WTO . . . , for example, will depend on the extent to which interpretive communities—comprising government officials, socio-economic and professional

country kept a rather low profile in the international intellectual property arena.⁸⁶ For example, when Brazil and Argentina made their now famous proposal for the establishment of the WIPO Development Agenda,⁸⁷ China declined to join them, even though it arguably was one of the major leaders in the developing world. Likewise, when developed countries advanced their proposals for higher enforcement standards at the Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS Council), China's protests were limited to the rejection of the developed countries' proposals and additional interventions explaining why enforcement discussions in the Council would be inappropriate or

elites, and other privileged groups exercising authority borne of political and/or professional position, specialized knowledge, and/or socio-economic status—assimilate norms of trade liberalization.

Influenced by their training and education, members of China's interpretive communities bring their perceptions about international law and relations to bear in responding to the requirements of international rule regimes. Perceptions contrasting China's colonial past and resulting weakness in foreign relations with its current strengths tend to encourage both a sense of grievance and of opportunities for correction and redress. Perception dynamics are also evident in academic and policy assessments of the international legal system that acknowledge the challenges posed by globalization for sovereignty imperatives of the nation-state generally, and focus on the intrusive nature of international regimes whose underlying norms are seen as a challenge to China. Such perceptions affect the reception of international legal standards by local interpretive communities, and ultimately China's responses of implementation.

Pitman B. Potter, *China and the International Legal System: Challenges of Participation*, in CHINA'S LEGAL SYSTEM, *supra* note 32, at 145, 147–48 (footnotes omitted); accord Wu Handong, *One Hundred Years of Progress: The Development of the Intellectual Property System in China*, 1 WIPO J. 117, 118–19 (2009) (discussing the stage of “selective arrangement in light of domestic development”); see also Tipson, *supra* note 32, at 232 (“Th[e] attempt to borrow selectively from outsiders is a familiar one in Chinese history.”).

⁸⁶ Cf. C. FRED BERGSTEN ET AL., CHINA'S RISE: CHALLENGES AND OPPORTUNITIES 224 (2008) [hereinafter BERGSTEN ET AL., CHINA'S RISE] (“To date . . . , China's interest in keeping a relatively low profile, focusing inward, and reassuring the world about the implications of its rise has led to a reluctance to take the lead in developing new global institutions or challenging old ones for fear of attracting unwanted attention and taking on new responsibilities that will create unnecessary distractions for itself.”); KISSINGER, *supra* note 34, at 490 (“Beijing's initial approach to the new era [presided by the fourth-generation leadership] was largely incremental and conservative. . . . Its foreign policy avoided dramatic moves, and its chief policymakers responded circumspectly to appeals from abroad for China to play a more visible international leadership role.”).

⁸⁷ WIPO, *Proposal to Establish a Development Agenda for WIPO*, WO/GA/31/11 (Aug. 27, 2004), available at http://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_31/wo_ga_31_11.pdf.

counterproductive.⁸⁸ China even balked when the United States proposed to “issue a joint statement [with China] in support of the Doha agenda.”⁸⁹

While policymakers, industries, and commentators at this stage had questioned China’s compliance with its WTO obligations at times,⁹⁰ there was no denying that China actively undertook reforms to facilitate greater compliance with WTO norms. Most Chinese officials also subscribed to the view that joining the WTO was a long and complicated process that required a lot of learning and continued improvement even after the accession.⁹¹

Similar to the first few years of China’s reopening in the late 1970s, the United States and its industries were rather patient. Despite industry complaints through the Section 301 process,⁹² the United States did not put China back on to the Priority Watch List until after April 2005, more than two years after the accession.⁹³ As the USTR acknowledged in the *2005 National Trade Estimate Report on Foreign Trade Barriers*, “China has made significant progress in its efforts to make its framework of laws, regulations and implementing rules WTO-consistent, [although] serious problems remain, particularly with China’s enforcement of intellectual property rights.”⁹⁴

⁸⁸ See Peter K. Yu, *TRIPS and Its Achilles’ Heel*, 18 J. INTELL. PROP. L. 479, 514–15 (2011) (recounting China’s strong opposition to enforcement-related discussions at the TRIPS Council).

⁸⁹ Qin, *supra* note 84, at 188.

⁹⁰ See Yu, *From Pirates to Partners II*, *supra* note 74, at 904.

⁹¹ See Pearson, *supra* note 85, at 257 (“With regard to China’s potential for leadership, Chinese diplomats have on most issues adopted a learning posture.”); see also Li Yahong, *The Wolf Has Come: Are China’s Intellectual Property Industries Prepared for the WTO?*, 20 UCLA PAC. BASIN L.J. 77, 104 (2002) (quoting Vivien Pik-Kwan Chan, *Chinese Economists Fear Favored West May Threaten Sovereignty*, S. CHINA MORNING POST, Nov. 13, 2001) (describing the concern of Long Yongtu, the chief negotiator for China’s entry into the WTO, that “[i]f jacking expertise and professionals qualified on international rules may make China] . . . ‘a blind man riding a blind horse’ within the WTO”).

⁹² See generally Joe Karaganis & Sean Flynn, *Networked Governance and the USTR*, in MEDIA PIRACY IN EMERGING GOODS 75 (Joe Karaganis ed., 2011) (critically evaluating the USTR’s Section 301 process); Paul C.B. Liu, *U.S. Industry’s Influence on Intellectual Property Negotiations and Special 301 Actions*, 13 UCLA PAC. BASIN L.J. 87 (1994) (discussing the operation of the Section 301 process and its relation to U.S. trade negotiations).

⁹³ See USTR, OUT-OF-CYCLE REVIEW RESULTS 8 (2005), available at http://www.ustr.gov/archive/assets/Document_Library/Reports_Publications/2005/2005_Special_301/asset_upload_file195_7636.pdf.

⁹⁴ 2005 NTE REPORT, *supra* note 2, at 95; see also Massey, *supra* note 55, at 232 (“Today, after four bilateral US-China agreements on IPR protection (1989, 1992, 1995, and 1996) and China’s accession to the World Trade Organization . . . , piracy in China is

To be certain, by acceding to the WTO, China took on new obligations concerning the enforcement of intellectual property rights. Part III of the TRIPS Agreement, for example, contains twenty-one articles laying out the WTO-wide intellectual property enforcement norms.⁹⁵ Nevertheless, the vague, broad, and ambiguous nature of these norms⁹⁶ has made it difficult for the USTR to challenge China's WTO compliance on enforcement grounds.⁹⁷ That challenge was further exacerbated by the moratorium on non-violation complaints,⁹⁸ which has been in force since the inception of the international trading body.⁹⁹

no longer primarily the result of the Beijing government's own actions. Rather, the major continuing issue has been Beijing's failure to get its laws and international obligations adequately and effectively enforced." (footnotes omitted)).

⁹⁵ See TRIPS Agreement arts. 41–61.

⁹⁶ See Yu, *TRIPS and Its Achilles' Heel*, *supra* note 88, at 495 (“[T]he TRIPS Agreement now contains many result-oriented terms that are vague, broad, and undefined. Examples of these terms are “effective”, “reasonable”, “undue”, “unwarranted”, “fair and equitable”, and “not . . . unnecessarily complicated or costly.”” (quoting UNCTAD–ICTSD, *RESOURCE BOOK ON TRIPS AND DEVELOPMENT* 576 (2005))).

⁹⁷ See Yu, *From Pirates to Partners II*, *supra* note 74, at 931–38 (discussing the difficulties of challenging China before the WTO Dispute Settlement Body on enforcement grounds).

⁹⁸ Commentators have noted the usefulness of non-violation complaints for launching a WTO challenge against China based on inadequate enforcement of intellectual property rights. See Susy Frankel, *Challenging TRIPS-Plus Agreements: The Potential Utility of Non-Violation Disputes*, 12 J. INT'L ECON. L. 1023, 1059 (2009) (“Given the lack of detail in the enforcement provisions the US argument was really more of a non-violation complaint. The essence of what the USA was really complaining about was that a benefit it expected from the TRIPS Agreement was better levels of enforcement.”); Daniel Stewart & Brett G. Williams, *The Impact of China's WTO Membership on the Review of the TRIPs Agreement*, in *CHINA AND THE WORLD TRADING SYSTEM*, *supra* note 11, at 363, 367 (“On the basis of the possibility of claims on enforcement issues, one may expect that China will join those countries which seek an extension of the moratorium on non-violation complaints.”); see also Daniel Gervais, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, 103 AM. J. INT'L L. 549, 549 (2009) (noting that the WTO panel's analysis in China may have “blurred both the traditional distinction between ‘as such’ and ‘as applied’ claims and the line separating TRIPS violations from non-violations”).

⁹⁹ Non-violation complaints provide WTO members with a helpful recourse against the impairment of benefits in the event that a WTO member is unable to show any substantive violation. Instead of focusing on the legality of a contested measure, this type of complaint allows countries to focus on “the protection of expectations arising from reciprocal tariff and market access concessions (in the GATT context) or from a Member's specific commitments (in the GATS context).” UNCTAD–ICTSD, *supra* note 96, at 655. Nevertheless, due to the unprecedented nature of using the trade-based dispute settlement process in the intellectual property context, a moratorium has been imposed on non-violation complaints since the adoption of the TRIPS Agreement. See Peter K. Yu, *The Objectives and Principles of the TRIPS Agreement*, 46 HOUS. L. REV. 979, 1029–30 (2009); William New & Catherine Saez, *Multilateral Trading System Under Scrutiny at*

Moreover, the U.S. administration understood the importance of providing China with the time and wiggle room needed to conform its system to WTO norms. Given the substantial changes China had already undertaken in the run-up to the WTO accession,¹⁰⁰ an impatient push for greater reforms that ignored China's resources and institutional capacities would have been counterproductive anyway. Such a push was unlikely to result in meaningful protection to intellectual property rights holders. In fact, greater patience could have served the United States' long-term interests in promoting free trade by providing China with the needed guidance as it made a transition to full compliance with WTO rules.¹⁰¹

To complicate matters even further, in the first few years of China's WTO membership, the world was still recovering from the aftermath of the U.S. terrorist attacks on September 11, 2001. At that time, the WTO was also undergoing a period of adjustment and soul-searching following the launch of the Doha Development Round of Trade Negotiations (Doha Round).¹⁰² In the same ministerial conference that admitted China to the international trading body, the WTO members adopted the Declaration on the TRIPS Agreement and Public Health¹⁰³ (Doha Declaration). Paragraph 6 of the Declaration specifically instructed the TRIPS Council to devise an "expeditious solution" to enable countries with insufficient or no manufacturing capacity to import generic versions of on-patent pharmaceuticals.¹⁰⁴ In addition, Paragraph 7 extended the formal introduction of patent protection for pharmaceuticals and of protection for undisclosed clinical trial data to January 1, 2016.¹⁰⁵

A few years later, shortly before the Sixth WTO Ministerial Conference in Hong Kong, the WTO members further extended the transitional period for all TRIPS obligations to July 1, 2013, for those

WTO Ministerial, INTELL. PROP. WATCH (Nov. 30, 2009), <http://www.ip-watch.org/weblog/2009/11/30/multilateral-trade-system-under-scrutiny-at-wto-ministerial/>.

¹⁰⁰ See Shi Guangsheng, *Introduction: Working Together for a Brighter Future Based on Mutual Benefit*, in CHINA'S PARTICIPATION IN THE WTO 15, 15 (Henry Gao & Donald Lewis eds., 2005) ("After joining the WTO, China first and foremost sorted out over 2,300 laws and regulations nationwide.").

¹⁰¹ See Yu, *From Pirates to Partners II*, *supra* note 74, at 942–45 (noting China's need for guidance as it made a transition to full compliance with WTO rules).

¹⁰² See Yu, *A Tale of Two Development Agendas*, *supra* note 20, at 512–15 (discussing the Doha Round).

¹⁰³ World Trade Organization, Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2 (2001), 41 I.L.M. 755 (2002).

¹⁰⁴ *Id.* ¶ 6.

¹⁰⁵ *Id.* ¶ 7.

least developed countries that had yet to meet the stated requirements.¹⁰⁶ That extension provided these poor countries with an additional transitional period of seven and a half years. Building on efforts facilitated by the Doha Declaration, developing countries also successfully pushed for the adoption of a protocol to formally amend the TRIPS Agreement by introducing a new Article 31*bis*.¹⁰⁷ If ratified by two-thirds of the WTO membership,¹⁰⁸ the amendment will enter into effect. The new provision will likely increase the access to essential medicines in the developing world.

B. A Low Profile

Given China's considerable struggle with the protection and enforcement of intellectual property rights, it is easy to understand why the country accepted the role of a norm taker, rather than a norm shaker or a norm maker. Interestingly, China's norm taker role was not limited to the international intellectual property area. Except for some sensitive areas, where sovereignty was involved, China has consistently assumed a low profile in international regimes and multilateral organizations. Thus, apart from its continued struggle with piracy and counterfeiting, China's behavior in this phase can be attributed to several additional factors.

First, the primary focus of the Chinese leadership is domestic, rather than international.¹⁰⁹ Since its accession to the WTO, China has experienced a large number of domestic problems, including decreasing control by the state, decentralization of the central government, significant losses suffered by inefficient state-owned enterprises, a widening gap between the rich and the poor and between urban and rural areas, massive urban migration, widespread and massive unemployment, rampant corruption, and growing unrest

¹⁰⁶ Press Release, WTO, Poorest Countries Given More Time to Apply Intellectual Property Rules (Nov. 29, 2005), available at http://www.wto.org/english/news_e/pr05_e/pr424_e.htm.

¹⁰⁷ General Council, *Amendment of the TRIPS Agreement*, WT/L/641 (Dec. 8, 2005), available at http://www.wto.org/english/tratop_e/trips_e/wt1641_e.htm; see also Peter K. Yu, *The International Enclosure Movement*, 82 IND. L.J. 827, 872–86 (2007) (discussing the origins and content of the proposed Article 31*bis* of the TRIPS Agreement).

¹⁰⁸ As of this writing, slightly more than a third of the 153 WTO member states, including the United States, India, Japan, China, and members of the European Union, have ratified the proposed amendment. See *Members Accepting Amendment of the TRIPS Agreement*, WTO (Mar. 15, 2011), http://www.wto.org/english/tratop_e/trips_e/amendment_e.htm.

¹⁰⁹ See ROBERT G. SUTTER, CHINA'S RISE IN ASIA: PROMISES AND PERILS 53 (2005).

in both the cities and the countryside.¹¹⁰ Compared with these domestic problems, intellectual property piracy and counterfeiting was not of a sufficiently high priority on the national policy agenda.

As Robert Sutter explains, against a background of social and economic uncertainties brought about by China's accession to the WTO, the Asian financial crisis, and growing political dissent, "foreign affairs generally remained an area of less urgent policy priority."¹¹¹ This approach can be traced back to Beijing's gradual shift in focus in the past three decades away from policies dominated by political ideologies, anti-imperialism activities, support for armed insurgencies, and export of Maoism.¹¹² Today, China's policies have "a more pragmatic orientation that place[s] priority on raising the living standards of the Chinese people and building up China's comprehensive national power through economic development."¹¹³

As a result of these policy priorities, China kept a rather low profile in the WTO, regardless of whether the issue concerned intellectual property protection or dumping. As Professor Gao observes, "[b]e it in the informal green room meetings, the formal meetings of the various committees and councils or the grand sessions of the Ministerial Conferences, China has generally been reticent."¹¹⁴ According to Professor Gao, keeping such a low profile in the WTO could be beneficial to China, at least in the first few years of its accession:

As a newly-acceded Member, China is required to undertake a lot of commitments, many of which are more onerous than those of existing WTO members. It is already a humongous challenge for China to try to implement these commitments. After having been in the spotlight for fifteen years, what China needs now is some quiet breathing space. Shouldering a leadership role would put China

¹¹⁰ See *China and the WTO*, *supra* note 82, at 3.

¹¹¹ SUTTER, *supra* note 109, at 53.

¹¹² See David Shambaugh, *Return to the Middle Kingdom? China and Asia in the Early Twenty-First Century* [hereinafter Shambaugh, *Return to the Middle Kingdom?*], in *POWER SHIFT: CHINA AND ASIA'S NEW DYNAMICS* 23, 24 (David Shambaugh ed., 2005) [hereinafter *POWER SHIFT*].

¹¹³ C. FRED BERGSTEN ET AL., *CHINA: THE BALANCE SHEET: WHAT THE WORLD NEEDS TO KNOW NOW ABOUT THE EMERGING SUPERPOWER* 120 (2006) [hereinafter BERGSTEN ET AL., *THE BALANCE SHEET*].

¹¹⁴ Henry S. Gao, *China's Participation in the WTO: A Lawyer's Perspective*, 11 *SING. Y.B. INT'L L.* 41, 69 (2007) [hereinafter Gao, *China's Participation in the WTO*]; accord Pearson, *supra* note 85, at 242 ("Beijing is in no great hurry to take on a central leadership role in the WTO, despite willingness to posture on some issues."); Qin, *supra* note 84, at 188 ("Although China . . . has voiced its support for the developing country members on most of the issues, it has shunned taking any leadership role.").

back on the front stage again and encourage other Members to pressure China to make more concessions.¹¹⁵

Second, China was cognizant of the need to cultivate goodwill among its neighbors and to respond to concerns about the security and economic threats that had emerged as a result of its rise in power.¹¹⁶ From developing concepts such as “peaceful rise” (*heping jueqi*) and “peace and development,”¹¹⁷ to the emphasis on the need to develop a harmonious, multipolar world,¹¹⁸ to the establishment of “early harvest programs” in bilateral and regional trade agreements to benefit less powerful neighbors,¹¹⁹ Chinese leaders were eager to “reassure the world that [China would] pursue a different development path than did Germany and Japan in the late nineteenth and early twentieth centuries—a path based not on aggressive changes to the international order, but instead on benevolent principles of mutual benefit.”¹²⁰

To a great extent, the active development of the “benevolent power” image by the present Chinese leadership reminds one of Deng Xiaoping’s plea for practicing self-restraint in the early 1990s. As he reportedly said after the Tiananmen incident: “[W]atch and analyze developments calmly; secure our own positions; deal with change with confidence; conceal our capacities; be good at keeping a low profile; never become the leader.”¹²¹

¹¹⁵ Gao, *China’s Participation in the WTO*, *supra* note 114, at 70.

¹¹⁶ For discussions of the so-called China threat, see generally CHINA’S FUTURE: CONSTRUCTIVE PARTNER OR EMERGING THREAT (Ted Galen Carpenter & James A. Dom eds., 2000); BILL GERTZ, THE CHINA THREAT: HOW THE PEOPLE’S REPUBLIC TARGETS AMERICA (2000); STEVEN M. MOSHER, HEGEMON: CHINA’S PLAN TO DOMINATE ASIA AND THE WORLD (2000); PETER NAVARRO, THE COMING CHINA WARS: WHERE THEY WILL BE FOUGHT AND HOW THEY CAN BE WON (2007).

¹¹⁷ Kurt M. Campbell, *Foreword* to CHINA AND THE DEVELOPING WORLD: BEIJING’S STRATEGY FOR THE TWENTY-FIRST CENTURY ix, x (Joshua Eisenman et al. eds., 2007) [hereinafter CHINA AND THE DEVELOPING WORLD].

¹¹⁸ See BERGSTEN ET AL., THE BALANCE SHEET, *supra* note 113, at 129; KISSINGER, *supra* note 34, at 500.

¹¹⁹ See Peter K. Yu, *Sinic Trade Agreements*, 44 U.C. DAVIS L. REV. 953, 996–97, 1007–08 (2011).

¹²⁰ BERGSTEN ET AL., THE BALANCE SHEET, *supra* note 113, at 121; see also Shambaugh, *Return to the Middle Kingdom?*, *supra* note 112, at 29–41 (discussing factors affecting Beijing’s new proactive diplomacy around its periphery). See generally STEVE CHAN, CHINA, THE US AND THE POWER-TRANSITION THEORY: A CRITIQUE (2008) (explaining why China is unlikely to provoke the United States despite its rising power).

¹²¹ Teng Chung-chian, *Hegemony or Partnership: China’s Strategy and Diplomacy Toward Latin America*, in CHINA AND THE DEVELOPING WORLD, *supra* note 117, at 84, 88 (“[W]atch and analyze developments calmly [*lengjing guanacha*]; secure our own positions [*chenzhuo yingfu*]; deal with change with confidence [*wenzhu zhenjiao*]; conceal

Like Deng, Chinese leaders have stated frequently and explicitly that China is not interested in achieving “regional hegemony or international leadership (except perhaps in the context of promoting the interests of the developing world).”¹²² According to Wen Jiabao, the current Chinese premier, China is more correctly seen as “a friendly elephant”¹²³ (*youhao de daxiang*)—a well-crafted image that is appropriate for a “status quo power” that poses no threat to its neighbors despite its enormous size.¹²⁴ It is therefore, no surprise that China was somewhat reluctant to develop a higher profile in the international intellectual property regime.

Third, while China was undergoing rapid economic transformation, it experienced corresponding transformation in the political arena. The political makeup of China’s top leadership today is somewhat different from what it was during the country’s formative years. At that time, Mao Zedong and, later, Deng Xiaoping were China’s paramount leaders; the decision-making process was highly centralized.

By the time the third- and fourth-generation leadership emerged—with Jiang Zemin and Hu Jintao at the helm, respectively—the decision-making process had become more decentralized. As a result, leaders could not ignore the political implications of their policies.

our capacities [*taoguang yanghui*]; be good at keeping a low profile [*shanyu shouzhuo*]; never become the leader [*juebu dantou*].”). In the context of China’s foreign policy, the oft-misinterpreted phrase “*taoguang yanghui*” has been particularly controversial. See Verna Yu, “*China Threat*” Hangs on a Phrase, S. CHINA MORNING POST, Oct. 2, 2010, at 4.

¹²² BERGSTEN ET AL., *THE BALANCE SHEET*, *supra* note 113, at 121; see also William W. Keller & Thomas G. Rawski, *Asia’s Shifting Strategic and Economic Landscape*, in *CHINA’S RISE AND THE BALANCE OF INFLUENCE IN ASIA* 3, 6 (William W. Keller & Thomas G. Rawski eds., 2007) (“Some may suggest that China’s policy of economic engagement and commercial diplomacy in Asia is merely tactical, a ‘charm offensive’ designed to buy time until China is economically and militarily powerful enough to exert regional hegemony.”); Robert I. Rotberg, *China’s Quest for Resources, Opportunities and Influence in Africa*, in *CHINA INTO AFRICA: TRADE, AID, AND INFLUENCE* 1, 2 (Robert I. Rotberg ed., 2008) [hereinafter *CHINA INTO AFRICA*] (“Despite what Washington may believe, China is not using its engagement with Africa primarily to humble the United States or Europe, or to score political points in the ongoing battle for global hegemony.”); Xiang Lanxin, *An Alternative Chinese View*, in *CHINA’S EXPANSION INTO THE WESTERN HEMISPHERE: IMPLICATIONS FOR LATIN AMERICA AND THE UNITED STATES* 44, 44 (Riordan Roett & Guadalupe Paz eds., 2008) (“[I]n Washington there is a growing suspicion that China has a well-thought-out design or grand strategy to undermine the traditional U.S. dominance in [Latin America]. In reality, however, China has yet to define the nature of its relationship with [the region].”).

¹²³ DAVID C. KANG, *CHINA RISING: PEACE, POWER, AND ORDER IN EAST ASIA* 131 (2007).

¹²⁴ *Id.* at 80.

While intellectual property protection was undoubtedly important to the country's economic growth, the leaders cautiously avoided actions that would be viewed by their opponents or the larger public as kowtows to foreign interests.¹²⁵

Their cautious approach was understandable. Toward the end of President Jiang's leadership, for example, he and Premier Zhu Rongji were heavily criticized for their friendly policies toward the United States.¹²⁶ If Jiang and Zhu could be criticized by fellow leaders, one could only imagine how much more difficult it would be for the next generation of leaders to make decisions.

Thus, when the fourth-generation leaders assumed key positions following the Sixteenth National Party Congress in November 2002, less than a year after China's WTO accession,¹²⁷ this group of new and young leaders were unsurprisingly wary of their participation in the international intellectual property debate—or, for that matter, the discussion of any international matters. After all, reformist leaders needed to consolidate power first before they could make bold moves in the international arena, which could draw severe criticism from their more conservative counterparts.¹²⁸

¹²⁵ As Margaret Pearson observes:

[T]he domestic political backlash to WTO accession and the political need for leaders to respond to the idea that China had been “sold out” by the stringent concessions to which its negotiators agreed are significant for China's behavior in WTO. After accession, it became de rigueur in China to indicate that the country would not just incur obligations from WTO membership but also would “gain rights and benefits.” . . . [T]he need to respond to domestic criticism about China's weakness in its WTO negotiations, the need to stand up to the United States in particular, and the need to use the “rights” afforded China by membership are key to many of the public position China has taken at the WTO.

Pearson, *supra* note 85, at 246.

¹²⁶ See, e.g., Doyle McManus, *Report Sharpens Edginess with China*, L.A. TIMES, May 26, 1999, at A18 (reporting that “[a]fter the bombing of China's embassy in Belgrade, many Chinese criticized [Premier] Zhu [Rongji] and President Jiang Zemin—who have staked their foreign policy agenda on building a ‘strategic partnership’ with the United States—for cozying up to a country that they believe is eager to keep China down”).

¹²⁷ As Henry Kissinger points out, the fourth-generation leadership “represented the first generation of top officials without personal experience of the revolution, the first leaders in the Communist period to take office through constitutional processes—and the first to assume positions of national responsibility in a China unambiguously emerging as a great power.” KISSINGER, *supra* note 34, at 488. For in-depth discussions of the fourth-generation leadership, see generally CHINA'S NEW RULERS: THE SECRET FILES (Bruce Gilley & Andrew Nathan eds., 2d ed. 2003); LI CHENG, CHINA'S LEADERS (2001); THE NEW CHINESE LEADERSHIP: CHALLENGES AND OPPORTUNITIES AFTER THE 16TH PARTY CONGRESS (Yun-han Chu et al. eds., 2004).

¹²⁸ See Lee H. Hamilton, *Introduction* to BEYOND MFN: TRADE WITH CHINA AND AMERICAN INTERESTS 1, 7 (James R. Lilley & Wendell Lewis Willkie eds., 1994) (“[I]f

Fourth, when China joined the WTO, it made significant concessions in its accession agreements with the European Union, the United States, and other WTO member states. As a result, many of the obligations China assumed under those accession agreements are WTO-plus.¹²⁹ In the intellectual property arena, for example, China was required to comply with the TRIPS Agreement from the inception of its membership, even though other middle-income countries, such as Brazil and India, benefited from the transitional period.¹³⁰ Taking full advantage of that period, India did not offer patent protection for pharmaceutical products until 2005, four years after China's accession.¹³¹ These WTO-plus commitments therefore rendered China's position closer to that of the developed world, notwithstanding the fact that the country continued to identify itself as "the world's largest developing country" and accrued strategic benefits by playing a leading role in the developing world.¹³²

Fifth, the Chinese economy is highly complex, and developments have been highly uneven—both geographically and across economic and technological sectors.¹³³ As I have noted, such developments have

Deng Xiaoping should die in the near future, there is some question whether his successors will be willing or able to take on tough policy issues while they jockey for political position. . . . It took Deng Xiao-ping over two years to achieve a dominant position after the death of Mao Zedong."); *China and the WTO*, *supra* note 82, at 14 (remarks of Jerome Cohen, Professor of Law, New York University School of Law) ("[I]t is only when somebody achieves power at the top of the Chinese system that he may be free to say things that he did not feel he could say as number five, or four, or three, or two."); *see also id.* at 4 (remarks of the Author) ("[R]ecent retirement of third-generation Chinese leaders, including Jiang Zemin, Zhu Rongji, and Li Peng, . . . could spark an internal battle over leadership succession."); Yu, *The TRIPS Enforcement Dispute*, *supra* note 10, at 1107 ("In China, the reformists are constantly challenged by their more conservative counterparts, who are uncomfortable with the country's rapid socio-economic changes and the resulting social ills.").

¹²⁹ *See* sources cited *supra* note 84.

¹³⁰ *See* TRIPS Agreement art. 65(2).

¹³¹ *See* Yu, *The International Enclosure Movement*, *supra* note 107, at 863.

¹³² BERGSTEN ET AL., *THE BALANCE SHEET*, *supra* note 113, at 129.

¹³³ As I observed earlier:

Although the subsequent founding of the People's Republic of China in 1949 helped centralize the country to a certain extent, strategic planning in the country's formative years and the rapid economic development in China within the past two decades have led to greater economic development in certain parts of China at the expense of others. In Deng Xiaoping's words, "some people have to get rich first." As a result, there are now enormous disparities across the country in the levels of wealth and income, the purchasing power of local consumers, and the stages of economic and technological development.

Peter K. Yu, *Three Questions that Will Make You Rethink the U.S.-China Intellectual Property Debate*, 7 J. MARSHALL REV. INTEL. PROP. L. 412, 421–22 (2008) (footnotes

resulted in the country's taking a somewhat "schizophrenic" position in the international intellectual property arena.¹³⁴ While China prefers to have stronger protection of intellectual property rights in entertainment, software, semiconductors, and selected areas of biotechnology, it remains reluctant to increase protection for pharmaceuticals, chemicals, fertilizers, seeds, and foodstuffs. Such preferences were the combined result of a huge population, the country's continued economic dependence on agriculture, the leaders' worries about public health issues, and the general concerns about the people's overall well-being.¹³⁵ As a result of its "schizophrenic" preferences, China is likely to be on the side of the developing world with respect to some issues, but on the side of the developed world with respect to others.

In fact, the complex internal economic conditions have made it difficult for China to develop an effective national strategy. After all, strategies that work for major cities, like Beijing, Shanghai, and Guangzhou, may not work for the countryside.¹³⁶ Likewise, strategies that work for the prosperous coastal areas may not work for the poor rural west. Indeed, one of the biggest challenges for China is to come up with solutions that respond well to the country's complex and divergent conditions and varying research and development capabilities.

To complicate matters even further, rapid globalization and the increasing activities taken by the private sector, sub-state actors, and individuals have resulted in developments that include limited or no state action.¹³⁷ As Chris Alden points out, sub-state actors in China,

omitted). See generally Yu, *China Puzzle*, *supra* note 55, at 203–13 (discussing the wide regional and sectoral disparities in China).

¹³⁴ See Peter K. Yu, *International Enclosure, the Regime Complex, and Intellectual Property Schizophrenia*, 2007 MICH. ST. L. REV. 1, 25–26 (explaining why intellectual property developments in China should not be analyzed as if the country were homogeneous).

¹³⁵ See *id.* at 26.

¹³⁶ See Yu, *From Pirates to Partners II*, *supra* note 74, at 963 (“[O]ne needs to recognize China as a ‘country of countries,’ rather than a homogenous one.”).

¹³⁷ See David Shambaugh, *Introduction: The Rise of China and Asia's New Dynamics*, in *POWER SHIFT*, *supra* note 112, at 1, 16 (noting in a model where its “core actor . . . is not the nation-state but a plethora of nonstate actors and processes—many of which are difficult to measure with any precision—that operate at the societal level”). As one commentator observes:

[A]fter two decades of reform in China, of decentralisation and privatisation, Chinese strategies and presence in Africa are more of a mix of government initiatives and the endeavours of private enterprises and individuals. The ability of the Chinese government to regulate its enterprises and citizens aboard is limited,

such as provincial governments and municipal authorities, have undertaken major initiatives to establish formal and informal ties in South Africa, the Democratic Republic of Congo, Namibia, Angola, and Nigeria.¹³⁸ It is also not uncommon to find friendship agreements or sister-city relationships between cities and provinces in China and other parts of the world,¹³⁹ not to mention the large number of Chinese tourists and students who help boost their country's visibility while establishing ties at the sub-state level.¹⁴⁰ The country's national strategy, therefore, is more complex than one would expect from a government that many have viewed simplistically as monolithic.

Finally, China joined the WTO at a time when the country had yet to take a more assertive role in international regimes and multilateral organizations. Although China reestablished trade and diplomatic ties with the outside world more than three decades ago, it initially harbored a strong mistrust toward multilateral organizations. In fact it did not actively participate in multilateral organizations until the mid-to-late 1990s.¹⁴¹ As Derek Mitchell describes:

especially in this era of neoliberal globalisation. Therefore, it is important to appreciate that China is a heterogeneous grouping of various collective actors, i.e., the government, state enterprises, private enterprises and the public in general, and that the interests among the various actors within each sector might well differ.

Luk Tak Chuen, *Regulating China? Regulating Globalisation?*, in *CHINA'S NEW ROLE IN AFRICA AND THE SOUTH: A SEARCH FOR A NEW PERSPECTIVE* 13, 14 (Dorothy-Grace Guerrero & Firoze Manji eds., 2008).

¹³⁸ See CHRIS ALDEN, *CHINA IN AFRICA: PARTNER, COMPETITOR OR HEGEMON?* 29 (2007).

¹³⁹ See, e.g., DEPT. OF FOREIGN AFFAIRS & TRADE (AUSTL.), *ACT'S TRADE WITH CHINA 1 (2008)*, available at http://www.dfat.gov.au/geo/china/fta/china_states.pdf; DEPT. OF FOREIGN AFFAIRS & TRADE (AUSTL.), *NORTHERN TERRITORY'S TRADE WITH CHINA 2 (2008)*, available at http://www.dfat.gov.au/geo/china/fta/china_states.pdf; DEPT. OF FOREIGN AFFAIRS & TRADE (AUSTL.), *NSW'S TRADE WITH CHINA 2 (2008)*, available at http://www.dfat.gov.au/geo/china/fta/china_states.pdf; DEPT. OF FOREIGN AFFAIRS & TRADE (AUSTL.), *QUEENSLAND'S TRADE WITH CHINA 2 (2008)*, available at http://www.dfat.gov.au/geo/china/fta/china_states.pdf; DEPT. OF FOREIGN AFFAIRS & TRADE (AUSTL.), *TASMANIA'S TRADE WITH CHINA 2 (2008)*, available at http://www.dfat.gov.au/geo/china/fta/china_states.pdf; DEPT. OF FOREIGN AFFAIRS & TRADE (AUSTL.), *VICTORIA'S TRADE WITH CHINA 2 (2008)*, available at http://www.dfat.gov.au/geo/china/fta/china_states.pdf; DEPT. OF FOREIGN AFFAIRS & TRADE (AUSTL.), *WESTERN AUSTRALIA'S TRADE WITH CHINA 2 (2008)*, available at http://www.dfat.gov.au/geo/china/fta/china_states.pdf.

¹⁴⁰ See Eric Heginbotham, *Evaluating China's Strategy Toward the Developing World*, in *CHINA AND THE DEVELOPING WORLD*, *supra* note 117, at 189, 202.

¹⁴¹ See *id.* at 189; see also BERGSTEN ET AL., *CHINA'S RISE*, *supra* note 86, at 223 ("As China has begun to think and act globally, it has had to adapt to an international system traditionally dominated and developed by the major Western powers. China is generally comfortable with the world's major international institutions such as the United Nations and the World Trade Organization With a professed commitment to international law,

Previously, China had been suspicious of multilateral structures that could potentially constrain Beijing's sovereignty and independent action, but its perspective changed as Beijing became reassured of its ability to safeguard its sovereign interests in multilateral environments, and it gradually came to appreciate the international system's benefits in addressing transnational challenges such as piracy, drug trafficking, terrorism, and infectious disease. China further recognized the value of being at the table to shape the rules, rather than having the rules imposed upon it. Today, China is a member of more than 130 inter-governmental organizations, and has signed more than 250 international multilateral treaties.¹⁴²

As China takes on a greater leadership role in the international community, it has become more adept at and confident in handling international affairs through the multilateral process.¹⁴³ Its participation in international organizations also increases as a result.

III

PHASE 2: TAKER AND SHAKER

A. *China as a Norm Shaker*

In Phase 2, China continues to serve as a norm taker, similar to Phase 1. Nevertheless, the country also adds the new role of a norm shaker, seeking to test the boundaries and limits of international intellectual property norms. Having assumed this new role, China has become more actively involved in regime development while being

equality of states, and democratization of international affairs, and eager to reassure the world of its responsible conduct and peaceful rise, China views these institutions as helpful in promoting its strategic goals and principles.”); Lawrence Freedman, *China as a Global Strategic Actor*, in DOES CHINA MATTER?, *supra* note 84, at 21, 22 (“[U]ntil comparatively recently, [China] has shown disinterest and often distrust in international treaties and the principles of multilateralism, fearing them as means by which it could be put on the spot. Over time, as its interests began to coincide more with those of its neighbours, or at least as it began to assert this to be the case, China began to understand how international organizations could be used to protect interests and put pressure on others. As a result it became more willing to sign up to international treaties and agreements . . .”).

¹⁴² BERGSTEN ET AL., *THE BALANCE SHEET*, *supra* note 113, at 139–40. For book-length discussions of China's participation in international organizations, see generally GERALD CHAN, *CHINA AND INTERNATIONAL ORGANIZATIONS: PARTICIPATION IN NON-GOVERNMENTAL ORGANIZATIONS SINCE 1971 (1989)*; CHINA JOINS THE WORLD, *supra* note 32; HAROLD K. JACOBSON & MICHEL OKSENBERG, *CHINA'S PARTICIPATION IN THE IMF, THE WORLD BANK, AND GATT: TOWARD A GLOBAL ECONOMIC ORDER (1990)*.

¹⁴³ See Zhang Yunling & Tang Shiping, *China's Regional Strategy*, in POWER SHIFT, *supra* note 112, at 48, 59 (“Today, we can perhaps argue that China has largely completed its painful search for a national identity, thus becoming more confident of its relationships and its position in the region.”).

more eager to explore its interests at both the multilateral and nonmultilateral levels.

Within the WTO dispute settlement process, China often sat on the side of the respondent; it has yet to use the process aggressively. Since 2003, however, “China started to participate in almost all WTO cases as a third party.”¹⁴⁴ While participation in this process is costly and time-consuming, it has enabled China to play a much better “WTO game.”¹⁴⁵ The knowledge it acquired has come in handy when a complaint was filed against China, as in *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*.¹⁴⁶ Such knowledge has also become more useful as China becomes more active in filing complaints against other WTO member states.

Unlike other trade areas, in the intellectual property area China’s participation in the Doha Round was rather limited.¹⁴⁷ The only major document it advanced at the WTO was the November 2006 submission to the Committee on Technical Barriers to Trade.¹⁴⁸ Highlighting the problematic overlap between patent protection and the development of standards, the submission declared: “[I]ncluding IPR into standards may have serious impact on the international standards setting efforts and the corresponding implementations. As TBT Agreement aims at boosting production efficiency and facilitating international trade by encouraging the adoption of

¹⁴⁴ Gao, *China’s Participation in the WTO*, *supra* note 114, at 73.

¹⁴⁵ See Yu, *The TRIPS Enforcement Dispute*, *supra* note 10, at 1107–08 (“In addition to human resources, litigation capital, and legal capacities, a successful player will need more finely-honed skills and a deeper knowledge of the different facets of this game. The more a country plays the WTO game, the more familiar and better it will become.”); see also Qin, *supra* note 84, at 193–94 (noting that “Chinese trade lawyers . . . through representing China as a third party in scores of other WTO disputes, have gained much knowledge and experience in the WTO adjudication system.”).

¹⁴⁶ Request for Consultations by the United States, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/1 (Apr. 16, 2007) [hereinafter WTO Complaint]; see also discussion *infra* text accompanying notes 156–67. For detailed analyses of this dispute, see generally Yu, *The TRIPS Enforcement Dispute*, *supra* note 10; Peter K. Yu, *TRIPS Enforcement and Developing Countries*, 26 AM. U. INT’L L. REV. 727 (2011).

¹⁴⁷ See Qin, *supra* note 84, at 188 & n.94 (noting that China has submitted more than thirty proposals and position papers as part of the Doha Round negotiations).

¹⁴⁸ Communication from the People’s Republic of China, *Intellectual Property Right (IPR) Issues in Standardization*, G/TBT/W/251/Add.1 (Nov. 9, 2006) [hereinafter *TBT Committee Submission*]. For media reports on the submission, see generally *China Seeks Dialogue on Link Between Standards, IPR in WTO*, INSIDE US-CHINA TRADE, Nov. 15, 2006; William New, *China Leads Developing Country Push for Balance in IP and Standards*, INTELL. PROP. WATCH (Apr. 24, 2007), <http://www.ip-watch.org/weblog/index.php?p=599>.

international standards, such objectives can be frustrated and therefore international trade retarded.”¹⁴⁹ China further “propose[d] that international standard setting bodies, as well as Members, provide the Committee with relevant information regarding practices and experience on their IPR policies in standardization for Members’ understanding and reference.”¹⁵⁰ Although this submission was not as high-profile as, say, a proposal before the TRIPS Council, the submission suggests China’s growing interest in shaping, or shaking, international intellectual property norms.

Earlier that year, China also joined a group of developing countries in cosponsoring a proposal to introduce a new Article 29*bis* into the TRIPS Agreement.¹⁵¹ The amended provision sought to create an obligation to disclose in patent applications the source of origin of the biological resources and traditional knowledge used in inventions.¹⁵² Although the United States and Japan remain in strong opposition to this disclosure approach,¹⁵³ the proposal has received wide support from a large number of developing countries.¹⁵⁴ The proposal is also consistent with Article 26 of the recently amended Chinese Patent Law, which requires patent applicants to disclose the traditional knowledge and genetic resources used in their inventions.¹⁵⁵

In April 2007, the United States filed its first TRIPS complaint against China over the lack of protection and enforcement of

¹⁴⁹ *TBT Committee Submission*, *supra* note 148, ¶ 13.

¹⁵⁰ *Id.* ¶ 21.

¹⁵¹ See Communication from Brazil, China, Colombia, Cuba, India, Pakistan, Peru, Thailand, and Tanzania, *Doha Work Programme—The Outstanding Implementation Issue on the Relationship Between the TRIPS Agreement and the Convention on Biological Diversity*, WT/GC/W/564/Rev.2 (July 5, 2006) [hereinafter Article 29*bis* Proposal].

¹⁵² See *id.* ¶ 2 (requiring patent applicants to “disclose the country providing the resources and/or associated traditional knowledge, from whom in the providing country they were obtained, and, as known after reasonable inquiry, the country of origin”).

¹⁵³ See Emanuela Arezzo, *Struggling Around the “Natural” Divide: The Protection of Tangible and Intangible Indigenous Property*, 25 *CARDOZO ARTS & ENT. L.J.* 367, 388 (2007). See generally JOSHUA D. SARNOFF & CARLOS M. CORREA, ANALYSIS OF OPTIONS FOR IMPLEMENTING DISCLOSURE OF ORIGIN REQUIREMENTS IN INTELLECTUAL PROPERTY APPLICATIONS (2006), U.N. Doc. UNCTAD/DITC/TED/2004/14, available at http://www.unctad.org/en/docs/ditcted200514_en.pdf (discussing the advantages and disadvantages of the introduction of a disclosure requirement).

¹⁵⁴ William New, *WTO Biodiversity Amendment Backed; EU Seeks ‘New Thinking’ on GIs*, INTELL. PROP. WATCH (Oct. 26, 2007), <http://www.ip-watch.org/weblog/index.php?p=802>.

¹⁵⁵ Patent Law of the People’s Republic of China art. 26 (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 12, 1984, amended Dec. 27, 2008, effective Oct. 1, 2009) [hereinafter Amended Patent Law].

intellectual property rights.¹⁵⁶ Developed over more than two years,¹⁵⁷ the complaint focused on the following issues: (1) the high thresholds for criminal procedures and penalties in the intellectual property area; (2) the failure of the Chinese customs authorities to properly dispose of infringing goods seized at the border; (3) the denial of copyright protection to works that have not been authorized for publication or dissemination within China; and (4) the unavailability of criminal procedures and penalties for infringing activities that involved either reproduction or distribution, but not both.¹⁵⁸ By the time the WTO panel was established to address the complaint, the last claim had already been resolved.¹⁵⁹

Although China's respondent role in this dispute did not provide much room for "shaking" international intellectual property norms, it admirably defended its position before the WTO and succeeded in defeating half of the claims brought by the United States.¹⁶⁰ More importantly, even though the panel ultimately found its laws inconsistent with the TRIPS Agreement, China was able to score some important points that have the potential for influencing the future interpretation and implementation of the TRIPS Agreement.¹⁶¹

For example, the panel report underscores both the importance of having minimum standards and flexibilities in the TRIPS Agreement and the longstanding treatment of intellectual property rights as private rights.¹⁶² It also rejects the use of bilateral, plurilateral, or regional trade agreements to divine meaning in the TRIPS language.¹⁶³ In addition, the panel shows its appreciation of the divergent local market conditions in each WTO member while continuing the use of an evidence-based approach for resolving WTO

¹⁵⁶ WTO Complaint, *supra* note 146.

¹⁵⁷ See Yu, *From Pirates to Partners II*, *supra* note 74, at 904–05 (noting that trade groups have begun urging the USTR to file a WTO complaint against China concerning inadequate intellectual property protection since February 2005).

¹⁵⁸ See WTO Complaint, *supra* note 146.

¹⁵⁹ See Yu, *The TRIPS Enforcement Dispute*, *supra* note 10, at 1055.

¹⁶⁰ See Panel Report, *supra* note 9, ¶ 8.1.

¹⁶¹ See Yu, *TRIPS Enforcement and Developing Countries*, *supra* note 146, at 744–81 (identifying six areas in which the WTO panel report has enabled developing countries to score some important points in the interpretation of the TRIPS Agreement).

¹⁶² See *id.* at 744–54 (discussing the panel's emphasis on the importance of the TRIPS minimum standards and on the Agreement's recognition that "intellectual property rights are private rights").

¹⁶³ See *id.* at 754–57 (discussing the panel's refusal to treat subsequently-negotiated U.S. free trade agreements as subsequent agreements within the meaning of the Vienna Convention on the Law of Treaties).

disputes.¹⁶⁴ The panel's discussion of Article 41.5 also hints at its willingness to consider evidence in cases where resource demands in the area of intellectual property enforcement have exceeded those in other areas of law enforcement.¹⁶⁵ Compared with *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*,¹⁶⁶ the first TRIPS dispute between a developed country and a developing country, the U.S.-China dispute demonstrates the significant progress China and its developing country supporters have made.¹⁶⁷

A year after the release of this panel decision, China joined India in registering concerns about the development of TRIPS-plus enforcement standards at the June 2010 TRIPS Council meeting. Their timely interventions were made largely in response to the release of the draft text of the highly controversial Anti-Counterfeiting Trade Agreement¹⁶⁸ (ACTA) and in view of concerns over the ongoing, disturbing development of bilateral, plurilateral, and regional trade agreements.¹⁶⁹ As China explained, the TRIPS-plus enforcement standards could cause a wide variety of systemic problems within the international trading system.¹⁷⁰ For instance, the higher standards could spark potential legal conflicts with the TRIPS Agreement as well as with other WTO agreements.¹⁷¹ By increasing the complexity of intellectual property standards, they could also

¹⁶⁴ See *id.* at 757–63 (discussing the panel's appreciation of local conditions and its demands for substantive, as opposed to anecdotal, evidence).

¹⁶⁵ See *id.* at 778–81 (discussing the panel's interpretation of Article 41.5 of the TRIPS Agreement).

¹⁶⁶ Panel Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R (Sept. 5, 1997); Panel Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS79/R (Aug. 24, 1998).

¹⁶⁷ In this dispute, developing countries have played a much larger role. Argentina, Brazil, India, Mexico, Thailand, and Turkey all participated in the panel proceedings as third parties. Panel Report, *supra* note 9, ¶ 1.6. Except for India and Turkey, all of these countries also either provided a written submission to or made an oral statement before the WTO panel.

¹⁶⁸ Anti-Counterfeiting Trade Agreement, *opened for signature* May 1, 2011 [hereinafter ACTA], available at http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147937.pdf. ACTA is a plurilateral agreement that seeks to set a new and higher benchmark for intellectual property enforcement among like-minded countries. See generally Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA*, 64 SMU L. REV. 975 (2011) (discussing the serious concerns about ACTA).

¹⁶⁹ See TRIPS Council, *Minutes of Meeting* ¶¶ 250, 264, IP/C/M/63 (Oct. 4, 2010) [hereinafter TRIPS Council, *Minutes*].

¹⁷⁰ See *id.* ¶¶ 248–63. China's June 9 statement was reprinted as *The Problems with the "TRIPS plus" Enforcement Trend: China's View*, S. BULL., July 28, 2010, at 13.

¹⁷¹ See TRIPS Council, *Minutes*, *supra* note 169, ¶¶ 252–53.

make the international legal framework highly unpredictable, thereby posing barriers to legitimate trade.¹⁷²

Moreover, the TRIPS-plus standards may upset the delicate balance struck in the TRIPS Agreement through an arduous multiyear negotiation process.¹⁷³ The standards could also build harmful technological barriers while raising concerns about resource misallocation,¹⁷⁴ an issue previously raised in the recent U.S.-China TRIPS enforcement dispute.¹⁷⁵

To conclude its intervention, China advanced a proposal on specific safeguard principles against the ongoing push for TRIPS-plus enforcement standards.¹⁷⁶ These principles included:

- (i) the [intellectual property] chapter or provisions of [a regional trade agreement, free trade agreement] or regional agreement to which a WTO Member was party shall not be inconsistent with the TRIPS Agreement of WTO; (ii) the enforcement of IPRs shall not create distortive effects on legitimate international trade; and (iii) no WTO Member shall be restrained from the autonomy for utilizing its public enforcement resources.¹⁷⁷

Outside the WTO, China has had active participation in WIPO. In addition to those treaties China joined in the 1980s and 1990s,¹⁷⁸ China is now a member of the Singapore Treaty on the Law of Trademarks (Singapore Treaty), the WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty (See Table 1). The latter two treaties were key concerns of the United States and its intellectual property rights holders. As the USTR stated in the *2005 National Trade Estimate Report on Foreign Trade Barriers*, “[t]he United States considers the WIPO treaties to reflect many key international norms for providing copyright protection over the Internet, . . . [and] China’s accession to the WIPO treaties is an increasingly important priority for the United States.”¹⁷⁹

¹⁷² See *id.* ¶ 254.

¹⁷³ See *id.* ¶ 255.

¹⁷⁴ See *id.* ¶¶ 256–58.

¹⁷⁵ See Yu, *TRIPS Enforcement and Developing Countries*, *supra* note 146, at 727, 778–81 (discussing China’s arguments in relation to Article 41.5 of the TRIPS Agreement).

¹⁷⁶ See TRIPS Council, *Minutes*, *supra* note 169, ¶ 259.

¹⁷⁷ *Id.*

¹⁷⁸ See discussion *supra* Part I.

¹⁷⁹ 2005 NTE REPORT, *supra* note 2, at 96.

China has also been active in hosting intergovernmental conferences for WIPO, at both the international and regional levels.¹⁸⁰ The International Symposium on Geographical Indications in Beijing in June 2007 provides a good example.¹⁸¹ In addition, China for the first time obtained a senior leadership position within WIPO. In December 2006, Wang Binying, who joined the WIPO Bureau for Development Cooperation for Asia and the Pacific in 1992 as a senior program officer, became the first Chinese national to serve as the organization's assistant director general.¹⁸² Three years later, she was promoted to the deputy director general position, taking charge of matters related to trademarks, industrial designs, and geographical indications.¹⁸³

At the nonmultilateral level, the State Intellectual Property Office (SIPO) has also been quite active in developing professional ties with patent offices from around the world. In 2007, for example, SIPO officials met with their counterparts from the European Patent Office, the Japanese Patent Office, the Korean Intellectual Property Office, and the United States Patent and Trademark Office to discuss ways to "improv[e] the efficiency of their examination systems and to harmonize their office systems."¹⁸⁴ These so-called "IP5" discussions further strengthened SIPO's status as "a player in the top tier of patent offices that will dominate the emerging system of global patent administration."¹⁸⁵

¹⁸⁰ See *Search Meetings and Documents*, WIPO, http://www.wipo.int/meetings/en/archive_meeting.jsp (last visited Sept. 19, 2011) (select "China" in the "Select Country" drop-down menu and perform a search) (providing a list of WIPO meetings held in China); see also Pearson, *supra* note 85, at 257 ("Chinese attempts at leadership are primarily exhibited as a desire to host major meetings, such as they will do for the Olympics in 2008.").

¹⁸¹ See *Conferences, Meetings and Seminars*, WIPO, http://www.wipo.int/meetings/en/details.jsp?meeting_id=13243 (last visited Sept. 19, 2011) (providing information about the International Symposium on Geographical Indications).

¹⁸² Press Release, WIPO, Member States Approve Appointment of Top Management Team (June 20, 2006), available at http://www.wipo.int/pressroom/en/prdocs/2006/wipo_pr_2006_449.html.

¹⁸³ Press Release, WIPO, Member States Endorse Senior Appointments (June 16, 2009), available at http://www.wipo.int/pressroom/en/articles/2009/article_0016.html.

¹⁸⁴ PETER DRAHOS, *THE GLOBAL GOVERNANCE OF KNOWLEDGE: PATENT OFFICES AND THEIR CLIENTS* 236 (2010).

¹⁸⁵ *Id.* at 233; see also *id.* (noting that the Chinese Patent Office, and later SIPO, has served as an international searching authority for PCT purposes since 1994).

Taking the lead from the United States and the European Union,¹⁸⁶ China further established bilateral trade agreements with Chile, Pakistan, New Zealand, Singapore, Peru, and Costa Rica.¹⁸⁷ Additional agreements with Australia, the Common Market for Eastern and Southern Africa (COMESA), the Gulf Cooperation Council (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates), Iceland, South Africa, and the South Africa Customs Union (Botswana, Lesotho, Namibia, South Africa, and Swaziland) are under discussion.¹⁸⁸

In addition, China established a set of regional agreements with members of the Association of Southeast Asian Nations (ASEAN),¹⁸⁹ including a memorandum of understanding on cooperation in the intellectual property field.¹⁹⁰ China is also exploring greater economic cooperation with India, with the hope of eventually developing a regional trade agreement.¹⁹¹ If such developments continue, China may be able to greatly strengthen its collaboration on intellectual property matters within Asia. Together with India and ASEAN, China may even be able to develop a “normative community” that has enough political clout to rival the United States or the European Union.¹⁹²

¹⁸⁶ See generally FREE TRADE AGREEMENTS: US STRATEGIES AND PRIORITIES (Jeffrey J. Schott ed., 2004) (providing an excellent collection of articles discussing U.S. free trade agreements).

¹⁸⁷ See Yu, *Sinic Trade Agreements*, *supra* note 119, at 957–58.

¹⁸⁸ See *id.* at 958.

¹⁸⁹ Agreement on Investment of the Framework Agreement on Comprehensive Economic Co-operation Between China and ASEAN, ASEAN-China, Aug. 15, 2009, available at <http://fta.mofcom.gov.cn/inforimages/200908/20090817113007764.pdf>; Agreement on Trade in Services of the Framework Agreement on Comprehensive Economic Co-operation Between the Association of Southeast Asian Nations and the People’s Republic of China, ASEAN-China, Jan. 14, 2007, available at <http://www.asean.org/19346.htm>; Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Co-operation Between the Association of Southeast Asian Nations and the People’s Republic of China, ASEAN-China, Nov. 29, 2004, available at <http://www.asean.org/16646.htm>; Framework Agreement on Comprehensive Economic Co-operation Between ASEAN and the People’s Republic of China, ASEAN-China, Nov. 4, 2002, available at <http://www.asean.org/13196.htm>.

¹⁹⁰ Memorandum of Understanding Between the Association of Southeast Asian Nations (ASEAN) Secretariat and the Ministry of Agriculture of the People’s Republic of China on Cooperation in the Field of Intellectual Property, ASEAN-China, Dec. 21, 2009, available at <http://www.asean.org/15thsummit/Mou-China-IP-Eng.pdf>.

¹⁹¹ Jim Yardley, *Indian Leader in China Urges Closer Ties*, N.Y. TIMES, Jan. 16, 2008, at A8.

¹⁹² See Yu, *Intellectual Property and Asian Values*, *supra* note 27 (discussing the potential for linking China, India, and ASEAN together as a single normative community named Chindiasian); see also SIMON TAY, ASIA ALONE: THE DANGEROUS POST-CRISIS

Although intellectual property remains a non-crucial item in China's bilateral, plurilateral, and regional agreements and the intellectual property provisions in these agreements differ significantly,¹⁹³ these agreements do include provisions showing China's eagerness to shape intellectual property relationships with its trading partners. The agreement with New Zealand, for example, recognizes the protection of traditional knowledge and cultural expressions,¹⁹⁴ thereby paving the way for greater support of both the Article 29*bis* proposal, which China cosponsored, and the third and recent amendments to the Chinese patent law.¹⁹⁵ The agreement with Peru also includes an annex concerning the protection of twenty-two geographical indications originating from China (See Table 2), an intellectual property area that is just beginning to emerge in the country.

DIVIDE FROM AMERICA 150 (2010) (advancing the concept of "Asia's normative community").

¹⁹³ As I wrote earlier:

In the intellectual property area, there are significant variations among the different [sinic trade agreements]. The New Zealand–China Free Trade Agreement ("NZCFTA") includes a lengthy chapter on intellectual property protection. By contrast, the China-Singapore Free Trade Agreement, which was signed after the NZCFTA, does not mention intellectual property protection at all. Likewise, although the Chile-China Free Trade Agreement mentions the Doha Declaration on the TRIPS Agreement on Public Health and identifies as an important goal the prevention of abuse of intellectual property rights and restraints on competition, the NZCFTA omits both issues.

Yu, *Sinic Trade Agreements*, *supra* note 119, at 1011 (footnote omitted).

¹⁹⁴ See Free Trade Agreement Between the Government of New Zealand and the Government of the People's Republic of China art. 165, N.Z.-China, Apr. 7, 2008, available at <http://chinafta.govt.nz/1-The-agreement/2-Text-of-the-agreement/0-downloads/NZ-ChinaFTA-Agreement-text.pdf> ("Subject to each Party's international obligations, the Parties may establish appropriate measures to protect genetic resources, traditional knowledge and folklore.").

¹⁹⁵ See Article 29*bis* Proposal, *supra* note 151; Amended Patent Law, *supra* note 155, art. 26.

TABLE 2. List of Chinese geographical indications included in the China-Peru Free Trade Agreement

1. Anxi Tie Guanyin (Tieh-Kuan-Yin) Tea 安溪铁观音
2. Shaoxing (Yellow) Wine 绍兴酒
3. Fuling Pickled Mustard Tuber 涪陵榨菜
4. (Ningxia) Zhongning Matrimony Vine (宁夏) 中宁枸杞
5. Jingdezhen Porcelain 景德镇瓷器
6. Zhenjiang Aromatic Vinegar 镇江香醋
7. Pu'er Tea 普洱茶
8. (Xihu) Longjing Tea (西湖) 龙井茶
9. Kinghwa (Jinhua) Ham 金华火腿
10. Shanxi Mature Vinegar 山西老陈醋
11. Xuanwei Ham 宣威火腿
12. Longquan Celadon 龙泉青瓷
13. Yixing Dark-red Enameled Pottery 宜兴紫砂陶
14. Korla Fragrant Pear 库尔勒香梨
15. Min County Tang-Kuei (Chinese angelica root) 岷县当归
16. Wenshan Notoginseng 文山三七
17. Wuchang Rice 五常大米
18. Tongjiang White Fungus 通江银耳
19. Bama Miniature Pig 巴马香猪
20. Taihe Blackbone Chicken 泰和乌鸡
21. Fuding Shaddock 福鼎四季柚
22. (Nanjing) Cloud-pattern Brocade (南京) 云锦

Source: Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Republic of Peru, Annex 10, China-Peru, Apr. 28, 2009, available at http://fta.mofcom.gov.cn/bilu/annex/bilu_fujian10_en.pdf.

B. An Enhanced Profile

In Phase 1, China kept a rather low profile in the international intellectual property regime. In Phase 2, however, China is slowly adding the role of a norm shaker. This more assertive role is

consistent with the Chinese leadership's growing awareness of the economic and strategic importance of a well-functioning intellectual property system.¹⁹⁶ Such growing awareness was indeed the impetus behind the State Council's recent adoption of a pioneering National Intellectual Property Strategy.¹⁹⁷ Adopted in June 2008, this new strategy provides a comprehensive plan to improve the protection and management of intellectual property rights. Of particular emphasis is the active development of homegrown or self-driven intellectual property (*zizhu zhishi chanquan*).¹⁹⁸

Although this new strategy does not speak to China's role in the international intellectual property regime, it is not hard to understand why China needs to assume a more assertive role in that regime. First, a greater focus on international norm-setting will help China fight off external pressure from the European Union and the United States. Every year, the USTR's Section 301 process subjects China to heightened scrutiny. While the process focuses on questionable, self-reported data supplied by industry groups,¹⁹⁹ it is hard to ignore the heavy pressure the process has placed on the Chinese government and the harm the process's findings have inflicted on China's international reputation. Because the WTO does not allow a member state to pursue retaliatory actions until it has exhausted all of the remedies permissible under its rules,²⁰⁰ the Section 301 process is often used as a "shaming" tool, except in relation to issues lying outside the scope of the WTO, such as those found in TRIPS-plus trade and investment agreements.²⁰¹

¹⁹⁶ As President Hu Jintao remarked in the Group Study of the Political Bureau of the Central Committee of CPC in May 2006: "Strengthening the building of China's system of intellectual property right and vigorously upgrading the capacity of creation, management, protection and application regarding intellectual property are our urgent need[s] for the purpose of enhancing independent and self-driven innovation capabilities and building an innovation-oriented country." Wu, *supra* note 85, at 120; see also Yu, *From Pirates to Partners*, *supra* note 28, at 189–96 (discussing the need to convince Chinese leaders of the benefits of intellectual property protection).

¹⁹⁷ STATE COUNCIL, COMPENDIUM OF CHINA NATIONAL INTELLECTUAL PROPERTY STRATEGY (2008).

¹⁹⁸ See *id.* ¶ 7; see also Wu, *supra* note 85, at 121 (discussing the importance of "self-driven" intellectual property).

¹⁹⁹ See Peter K. Yu, *Enforcement, Economics and Estimates*, 2 WIPO J. 1, 7–8 (2010) (questioning the accuracy and reliability of industry-supplied figures).

²⁰⁰ See Panel Report, *United States—Sections 301–310 of the Trade Act of 1974*, WT/DS152/R (Dec. 22, 1999).

²⁰¹ See Vicki Allums, *Special 301: TRIPS-Plus—Alive and Kicking*, 5 J. MARSHALL REV. INTEL. PROP. L. 651 (2006) (discussing TRIPS-plus trade commitments in relation to the Section 301 process).

Moreover, as the recent WTO disputes between China and the United States have shown, China is likely to continue to face pressure from the United States through the WTO dispute settlement process. Although China has a strong preference for consultation and conciliation,²⁰² the United States embraces a legalistic approach and considers the WTO dispute settlement process a means to address disagreement and ensure rule compliance. In fact, the recent dispute on the lack of enforcement of intellectual property rights may represent only the beginning of a series of complaints that the United States (and its industries) intend to bring against China before the WTO Dispute Settlement Body.

Second, China has significant internal needs, and a well-functioning intellectual property system may help the country meet those needs.²⁰³ At the micro level, such a system will help provide the incentives needed for indigenous industries to develop. Indeed, it is no surprise that the new National Intellectual Property Strategy focuses considerably on homegrown intellectual property. At the

²⁰² Such preference is particularly clear in the first few years of China's membership. As Julia Qin observes:

In the first several years after accession, China showed a clear preference for handling trade conflicts through negotiation rather than WTO adjudication. . . . China settled the first WTO complaint against it through consultations, even though the legal issues involved were not clear-cut. When threatened with WTO litigation on several occasions during this initial period, China had opted to compromise so as to avoid formal WTO complaints.

Qin, *supra* note 84, at 192 (footnote omitted); *cf.* CHIU, *supra* note 30, at 75–76 (noting that “Communist China consider[ed] “negotiation” the most appropriate method of settling questions of treaty interpretation” in the early days of the People's Republic). Nevertheless, China's “litigation avoidance” strategy began to change in 2006. *See* Qin, *supra* note 84, at 193. Professor Qin attributed this change to two different reasons:

First of all, the significance of the Chinese interests involved in [the post-2005 cases] makes compromises less palatable. The several pending complaints against China . . . challenge important aspects of the Chinese system, and the U.S. antidumping and countervailing duty determinations in the Chinese paper case may set a precedent that can potentially affect Chinese exports broadly. Second, it appears that there has been a change of mentality among Chinese decision-makers. In the past they were highly concerned about losing a WTO case, regarding the loss of WTO litigation as a matter of political defeat. But over time the decision-makers seem to have realized that China cannot always avoid WTO disputes through political manoeuvres and that it needs to embrace WTO litigation as a normal way of resolving disputes. Contributing to this change of mentality is the growing confidence of Chinese trade lawyers who, through representing China as a third party in scores of other WTO disputes, have gained much knowledge and experience in the WTO adjudication system.

Id. at 193–94.

²⁰³ *See* Yu, *China Puzzle*, *supra* note 55, at 193–202 (discussing the development of local intellectual property stakeholders and the shift toward an export-driven economy).

macro level, a well-functioning intellectual property system can help attract more foreign direct investment, which will be beneficial to the local economy.²⁰⁴ The growing investment, in turn, may lead to greater transfer of technology and knowledge, creation of more local jobs, accelerated development of human capital, and generation of increased tax revenues.²⁰⁵

Third, as the recent summit of the G-20 economies has shown, China is now in a position to assume greater leadership in the developing world.²⁰⁶ China is also playing increasingly important roles in such international fora as WIPO and the WTO.²⁰⁷ Indeed, it would be highly beneficial for China to develop a louder voice in both the developing world and the international community.²⁰⁸ As Peter Drahos cautions us, although Brazil and India historically have taken leadership roles in the developing world in the intellectual property arena, it is unclear whether they “are prepared to provide the general leadership on intellectual property issues that they once did.”²⁰⁹ If these countries fail to assume past leadership roles, China will be presented with an unprecedented opportunity to become more assertive at the international level. Even if China chooses not to provide visible leadership for developing countries, it could still work closely with Brazil and India to push for standards and policies that would benefit the developing world.²¹⁰

²⁰⁴ Commentators have widely noted the ambiguous relationship between intellectual property protection and foreign direct investment. *See id.* at 176–80 (providing a review of economic literature documenting such a relationship). Nevertheless, China has strong innovative capacity and more than a sufficiently large market. *See id.* at 180. It therefore possesses the two key prerequisite conditions needed to support such a relationship.

²⁰⁵ *See* Yu, *From Pirates to Partners*, *supra* note 28, at 192–93.

²⁰⁶ *See* Mark Landler & Stephen Castle, *Chinese and Saudis Loom Large at Summit*, INT’L HERALD TRIB., Nov. 15, 2008, at 1 (reporting about China’s significant role in the G-20 summit).

²⁰⁷ *See* Sungjoon Cho, *A Bridge Too Far: The Fall of the Fifth WTO Ministerial Conference in Cancún and the Future of Trade Constitution*, 7 J. INT’L ECON. L. 219, 235 (2004) (“[T]he ‘China factor’ enabled the creation of the G-21 [now commonly referred to as the G-20]. . . . [W]ith China in their ranks, the size and impact of this coalition became unprecedented.”).

²⁰⁸ *Cf.* Pearson, *supra* note 85, at 251 (“The PRC government used the occasion of its first major speech as a WTO member to declare it would serve as a ‘bridge’ between the developed and developing worlds.”); *id.* at 254 (“Th[e] effort to cover both sides of the developed-developing country agenda played out repeatedly throughout China’s early WTO tenure.”).

²⁰⁹ Peter Drahos, *Developing Countries and International Intellectual Property Standard-Setting*, 5 J. WORLD INTELL. PROP. 765, 765 (2002).

²¹⁰ *See generally* Peter K. Yu, *Building Intellectual Property Coalitions for Development*, in IMPLEMENTING THE WORLD INTELLECTUAL PROPERTY

Finally, a more assertive role in the international intellectual property arena can help China develop international norms that benefit the country in either its negotiation of future international intellectual property treaties or its resolution of intellectual property-related WTO disputes. International treaties are generally negotiated in the shadow of existing international norms.²¹¹ By developing norms that are beneficial to local development, China will pave the way for establishing international treaties that take account of local conditions. The development of these norms may also affect the interpretation of international treaties to which China is a party—either in the form of subsequent developments or through the development of customary international law.²¹² By clarifying or spelling out limits to the country’s international obligations, a greater role in international norm-setting activities would most certainly benefit China.

IV

PHASE 3: TAKER, SHAKER, AND MAKER

Phase 3 takes place when China assumes the additional role of a norm maker. With respect to norms that already exist, it is unclear when China will take on the new role of a norm maker, as opposed to staying in its role of a norm shaker. After all, norm shaking and norm making represent two sides of the same coin. A norm that has been

ORGANIZATION’S DEVELOPMENT AGENDA 79 (Jeremy de Beer ed., 2009) [hereinafter IMPLEMENTING WIPO’S DEVELOPMENT AGENDA] (discussing how the development of “intellectual property coalitions for development” can help less developed countries strengthen their collective bargaining position, influence negotiation outcomes, and promote effective and democratic decision-making in the international intellectual property regime).

²¹¹ See Yu, *The TRIPS Enforcement Dispute*, *supra* note 10, at 1109 (“In the shadow of [the WTO] panel report [on *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*], and the gains China has made in the criminal enforcement area, the country will now have a better negotiating position vis-à-vis the United States in future bilateral discussions.”); see also Gregory Shaffer, *Recognizing Public Goods in WTO Dispute Settlement: Who Participates? Who Decides? The Case of TRIPS and Pharmaceutical Patent Protection*, 7 J. INT’L ECON. L. 459, 477 (2004) (discussing how countries can negotiate trade rules “in the shadow of” the WTO dispute settlement process); see also Christina L. Davis, *Do WTO Rules Create a Level Playing Field? Lessons from the Experience of Peru and Vietnam*, in NEGOTIATING TRADE: DEVELOPING COUNTRIES IN THE WTO AND NAFTA 219, 220 (John S. Odell ed., 2006) (arguing that “the use of legal adjudication allows developing countries to gain better outcomes in negotiations with their powerful trade partners than they could in a bilateral negotiation outside of the institution”).

²¹² See Peter K. Yu, *Anticircumvention and Anti-anticircumvention*, 84 DENV. U. L. REV. 13, 56 (2006).

shaken up and transformed will necessarily result in the making of a new norm. Examples of when norm shaking and norm making may overlap are the introduction of a requirement for the disclosure of traditional knowledge and genetic resources, the strengthening of the protection for geographical indications in areas that go beyond just wines and spirits, and the adjustment of intellectual property enforcement standards based on enforcement capabilities, resource constraints, and local needs and conditions.²¹³

When the implicated norms have not been made or fully formalized, however, it is much easier to notice China's role as a norm maker. After all, there is no need to shake up old norms before new ones can be developed. If old norms are displaced, the displacement usually does not stem from a direct conflict between old and new norms in the same space. Rather, it takes place when the new norms spill over into areas into which old norms are expanding. Examples of areas in which new norms could be made are global climate change, protection for alternative forms of innovation, models that take into account the uneven economic and technological developments in developing countries, and new norms addressing abuse of rights and restraints on trade.²¹⁴

Given the murky distinction between norm shaking and norm making, it may be rather hard to determine conclusively whether Phase 3 has already begun. In fact, China could have a very long Phase 2, making Phase 3 only a possibility in the remote future.²¹⁵ In short, whether Phase 3 has already begun is a matter of interpretation. Nevertheless, challenges in demarcating periods and eras abound. For example, historians and social scientists have wondered whether a century includes exactly 100 years.²¹⁶ What is really important for our purposes is not to pinpoint exactly when Phase 2 will end and when Phase 3 will begin. Rather, we should think more about the role China will play in this final phase.

As I have noted elsewhere, once China has reached a "crossover point" where stronger protection is in its self-interest, it will demand

²¹³ See Yu, *Intellectual Property and Asian Values*, *supra* note 27.

²¹⁴ See *id.*

²¹⁵ Thanks to Mark Wu for pointing this out.

²¹⁶ See, e.g., ERIC HOBSBAWM, *THE AGE OF EXTREMES: A HISTORY OF THE WORLD, 1914–1991*, at ix (1996) (considering 1914–1991 as the "short twentieth century"); KISSINGER, *supra* note 34, at 502 (suggesting that "China's period of weakness and underachievement—one might call it China's 'long nineteenth century'—was officially drawn to a close" following the opening of the 2008 Beijing Olympics).

stronger protection of intellectual property rights.²¹⁷ Similar demands have already been made by the United States and Japan, both of which were once major pirating nations.

In the nineteenth century, the United States was heavily criticized for its lack of protection of foreign authors, ranging from Charles Dickens to Anthony Trollope to Gilbert and Sullivan.²¹⁸ Although the United States did not join the Berne Convention until 1989,²¹⁹ it had greatly improved its protection of foreign authors since the late nineteenth century, thanks to the emergence of a critical mass of local authors.²²⁰ Today, the United States actively champions the cause for greater protection of copyrighted works throughout the world.

Likewise, Japan was heavily criticized by the United States and other developed countries for free riding on the efforts of foreign inventors.²²¹ Japan and the United States were at the brink of a trade war in the late 1970s and early 1980s.²²² Notwithstanding these initial missteps, the protection of intellectual property rights dramatically

²¹⁷ Yu, *China Puzzle*, *supra* note 55, at 175 (“[H]istory suggests that China is now simply following the economic development paths of Hong Kong, Japan, Singapore, South Korea, Taiwan—or even Germany and the United States. It is only a matter of time before China is converted from a pirating nation to a country that respects intellectual property rights.”); *see also* Peter K. Yu, *The Global Intellectual Property Order and Its Undetermined Future*, 1 WIPO J. 1, 10–15 (2009) [hereinafter Yu, *Global Intellectual Property Order*] (discussing the existence of a “crossover point” where countries consider it to be in their self-interest the move from a pirating nation to one that strongly respects intellectual property rights).

²¹⁸ *See* Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 342 (2003).

²¹⁹ *See* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified in scattered sections of 17 U.S.C.). In the United States, the Berne Convention entered into force on March 1, 1989.

²²⁰ *See* Yu, *The Copyright Divide*, *supra* note 218, at 344.

²²¹ As Joseph Massey, the former Assistant USTR for Japan and China, writes:

Parts of Japan’s IPR regime played supporting roles in tilting the competitive playing field, inducing or in some cases compelling the transfer to Japanese rivals of key U.S. technologies. These included the government’s mandated cap on royalty payments, compulsory licensing policies, and patent procedures that enabled Japanese firms to surround foreign rivals’ core patents with peripheral patents as a means to compel cross-licensing. The result was all too often to deny the U.S. or other foreign firms the competitive advantage in the Japanese market that they would otherwise enjoy based on their technology.

Massey, *supra* note 55, at 233.

²²² *See* MICHAEL P. RYAN, PLAYING BY THE RULES: AMERICAN TRADE POWER AND DIPLOMACY IN THE PACIFIC 16–17 (1995) (providing a list of Section 301 trade disputes involving Japan from 1974 to 1989); JAYASHREE WATAL, INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES 24 (2001) (stating that Japan was identified as a priority foreign country under the Super 301 process for providing inadequate market access to U.S. goods and services).

improved in Japan in the past three decades. During the Uruguay Round, Japan was an indispensable ally of the United States and the European Communities in pushing for the establishment of the TRIPS Agreement.²²³ A few years ago, Japan even proposed an anti-counterfeiting treaty to provide a new and higher benchmark for the enforcement of intellectual property rights. This agreement has recently been adopted in the form of ACTA, with Japan serving as the treaty depositary.²²⁴

If China follows the precedents set by the United States and Japan, its economic and technological conditions will eventually reach a crossover point where the country considers it to be in its self-interests to provide stronger protection and enforcement of intellectual property rights. Once China has reached that point, it will not only offer stronger protection and enforcement within the country but will also demand other countries to do the same—similar to the European Union, the United States, and Japan. In fact, there is no guarantee that China will want the same intellectual property regime as the one enshrined in the TRIPS Agreement or other international intellectual property treaties.²²⁵ There is actually a very good chance that China may want something quite different from what we have today—“something that builds upon [its] historical traditions and cultural backgrounds and that takes account of [its] drastically different socio-economic conditions.”²²⁶

Consider, for example, the protection of copyrighted works in the digital environment. Such protection, or the lack thereof, is of great importance to China, a country with the world’s largest Internet population of 485 million users.²²⁷ As its Internet population continues to grow, the country will be able to exert more influence on developments in Internet law and policy across the world. As I have noted often, the important question about the Internet in China is not

²²³ See sources cited *supra* note 23.

²²⁴ See ACTA, *supra* note 168, art. 45.

²²⁵ See Yu, *Global Intellectual Property Order*, *supra* note 217, at 13.

²²⁶ *Id.*; see also JACOBSON & OKSENBERG, *supra* note 142, at 129 (noting the “process of mutual adjustment” in which China and international organizations allowed themselves to be influenced by each other); Jackson, *supra* note 11, at 19 (noting the need to understand “the impact of the accession of China on the WTO itself”).

²²⁷ CHINA INTERNET NETWORK INFORMATION CENTER, 28TH STATISTICAL SURVEY REPORT ON THE INTERNET DEVELOPMENT IN CHINA 5 (2011) [hereinafter CNNIC SURVEY REPORT], available at <http://www1.cnnic.cn/download/2011/cnnic28threport.pdf> (stating that China has an Internet population of more than 485 million in July 2011).

only how the Internet will change China but also how China will change the Internet.²²⁸

Notwithstanding the growing importance of Internet-related developments in China, the digital copyright norms it favors may be quite different from those found in the United States or other developed countries. To begin with, a substantial portion of Chinese Internet users are school- or college-age students,²²⁹ due in large part to the country's late economic development and relative technological backwardness. As the China Internet Network Information Center officially reported, Internet users aged below thirty made up of close to sixty percent of the total Internet population in July 2011.²³⁰ Because any law and policy relating to the Internet is likely to have a substantial impact on the future pillars of Chinese society,²³¹ the stakes for Internet law reforms may be higher than those for other type of intellectual property law reform.

Moreover, China continues to exert heavy control over the flow of information within society. Indeed, the country has been widely used as the poster child for Internet censorship,²³² even though such censorship occurs elsewhere,²³³ including many developed countries.²³⁴ Ironically from the intellectual property standpoint, and

²²⁸ This is one of the main themes of the Annual Chinese Internet Research Conference I cofounded in 2003.

²²⁹ See Wei Yanliang & Feng Xiaoqing, *Comments on Cyber Copyright Disputes in the People's Republic of China: Maintaining the Status Quo While Expanding the Doctrine of Profit-Making Purposes*, 7 MARQ. INTELL. PROP. L. REV. 149, 150–51 (2003) (discussing how most online infringers in China are poor students).

²³⁰ CNNIC SURVEY REPORT, *supra* note 227, at 19.

²³¹ See Peter K. Yu, *Digital Copyright Reform and Legal Transplants in Hong Kong*, 48 U. LOUISVILLE L. REV. 693, 705 (2010) [hereinafter Yu, *Digital Copyright Reform*] (discussing how criminalizing online file sharing can adversely impact “a large number of individuals, including youngsters who are the future pillars of society”).

²³² See Hillary Rodham Clinton, U.S. Sec’y of State, Internet Freedom, Address Delivered at the Newseum in Washington, D.C. (Jan. 21, 2010), available at http://www.foreignpolicy.com/articles/2010/01/21/internet_freedom?page=full.

²³³ See ACCESS DENIED: THE PRACTICE AND POLICY OF GLOBAL INTERNET FILTERING 155–65 (Ronald Deibert et al. eds., 2008) (examining Internet filtering in Asia); see *id.* at 240–44, 263–71, 286–99, 325–28, 338–59, 364–74, 390–94, 420–24 (documenting Internet filtering in Afghanistan, China, India, Iran, Malaysia, Myanmar, Nepal, North Korea, Pakistan, Singapore, South Korea, Thailand, and Vietnam).

²³⁴ See Rebecca MacKinnon, *The Green Dam Phenomenon*, WALL ST. J. ASIA, June 18, 2009, <http://online.wsj.com/article/SB124525992051023961.html> (“The Internet censorship club is expanding and now includes a growing number of democracies. Legislators are under growing pressure from family groups to ‘do something’ in the face of all the threats sloshing around the Internet, and the risk of overstepping is high.”); Christopher Rhoads & Loretta Chao, *Iran’s Web Spying Aided by Western Technology*,

disturbingly from the human rights standpoint, censorship regimes may provide the much-needed infrastructure to strengthen enforcement in the digital environment. China therefore may offer an interesting alternative model that does not exist in Western democracies, notwithstanding the fact that such a model may not sit well with the free speech, free press, and privacy values in the latter group of countries.²³⁵

Another example concerns the protection of alternative forms of innovation. The existing intellectual property system, as enshrined in the TRIPS Agreement and the Eurocentric Paris and Berne Conventions, focuses primarily on path breaking creations and innovations. However, sequential and cumulative innovations have been the driver of economic growth in many developing countries.²³⁶ For example, utility models or petty patents remain an important feature of the intellectual property systems in these countries.²³⁷ As Assafa Endeshaw describes:

[Within Asia, t]here are different approaches towards minor inventions and their terms of protection as well as that for patents. Thus Indonesia accords protection to small product improvements

WALL ST. J., June 22, 2009, at A1 (discussing Internet control in Britain, Germany, United States, and Australia).

²³⁵ See Yu, *The Graduated Response*, 62 FLA. L. REV. 1373, 1401–02 (2010) (discussing how the graduated response system would undermine the protection of free speech, free press, and privacy); Yu, *Digital Copyright Reform*, *supra* note 231, at 715 (discussing how the proposed disclosure and retention mechanism in Hong Kong’s digital copyright reform would chill speech).

²³⁶ See Hiroyuki Odagiri et al., *IPR and the Catch-Up Process in Japan*, in INTELLECTUAL PROPERTY RIGHTS, DEVELOPMENT, AND CATCH-UP: AN INTERNATIONAL COMPARATIVE STUDY 95, 126 (Hiroyuki Odagiri et al. eds., 2010) (“In indigenous sectors with mostly tiny firms [in Japan], many innovations occur in the form of practical devices rather than pure inventions.”); Jerome H. Reichman, *Intellectual Property in the Twenty-First Century: Will the Developing Countries Lead or Follow?*, 46 HOUS. L. REV. 1115, 1124 (2009) (distinguishing between “cumulative and sequential innovation” and “path-breaking innovation” and noting that “how to protect cumulative and sequential innovation—as distinct from path-breaking innovation—becomes an ever more pressing problem as more small-and medium-sized firms acquire a taste and capacity for such innovation”); see also SUZANNE SCOTCHMER, INNOVATION AND INCENTIVES 127–59 (2004) (discussing sequential innovation and the need to protect cumulative innovators).

²³⁷ See, e.g., Preston M. Torbert & Zhao Jia, *People’s Republic of China*, in INTELLECTUAL PROPERTY LAWS OF EAST ASIA 233, 238 (Alan S. Guterman & Robert Brown eds., 1997) (discussing utility models and designs in China); Jacinto D. Jimenez, *Philippines*, in INTELLECTUAL PROPERTY LAWS OF EAST ASIA, *supra*, at 270 (discussing designs and utility models in the Philippines); Joon K. Park, *South Korea*, in INTELLECTUAL PROPERTY LAWS OF EAST ASIA, *supra*, at 337, 337 (noting the adoption of the Utility Model Act in South Korea); Michael F. Fedrick, *Taiwan*, in INTELLECTUAL PROPERTY LAWS OF EAST ASIA, *supra*, at 389, 389–90 (discussing the utility model patent protection in Taiwan).

through a ‘Simple Patent’ (obviously a ‘petty patent’) for one time of five years. Vietnam, on the other hand, grants protection for ‘Utility Solutions’ for six years. By contrast, Malaysia recognizes ‘Utility Innovations’ for a period of five years but renewable for a further five. The Philippines recognizes design patents (which include utility models) and protects them for five years, too, but with a possibility of renewals for two consecutive periods of five years.²³⁸

In its 2010 annual report, SIPO reported that China had received 5,433,189 applications from 2003 to 2010.²³⁹ Out of these applications, utility models accounted for 1,650,389 applications, about a third of the total applications.²⁴⁰ The ratio between utility models applied by the locals and those applied by foreigners is about 99:1.²⁴¹

In recent years, a *shanzhai* culture has emerged in China, raising challenging questions about the acceptable boundaries of sequential and cumulative innovation.²⁴² While many intellectual property rights holders and commentators consider the *shanzhai* phenomenon highly undesirable, *shanzhai* products do offer some benefits, especially when the products provide improvements that otherwise would not occur. In a world where intellectual property rights holders are sometimes reluctant to undertake innovation, *shanzhai* products may provide the much-needed “work around” to further technological developments. In addition, *shanzhai* products may provide an efficient means for China to catch up with its more developed trading partners. By enabling citizens to avoid paying monopoly prices, those products may also allow the Chinese to appropriate the consumers’ surplus.²⁴³

²³⁸ ASSAFA ENDESHAW, *INTELLECTUAL PROPERTY IN ASIAN EMERGING ECONOMIES* 73 (2010).

²³⁹ STATE INTELLECTUAL PROP. OFFICE (CHINA), 2010 SIPO ANNUAL REPORT 90 (2010), available at <http://english.sipo.gov.cn/laws/annualreports/2010/>.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² “Originally, *shan zhai* was used to refer to a bandit stronghold outside government control [in imperial China]; today it is shorthand for a multitude of knockoffs, fakes, and pirated products. These include everything from mobile phones to medicine and movies to makeup, and they permeate China’s consumer markets.” EDWARD TSE, *THE CHINA STRATEGY: HARNESSING THE POWER OF THE WORLD’S FASTEST-GROWING ECONOMY* 79 (2010).

²⁴³ See Yu, *Enforcement, Economics and Estimates*, *supra* note 199, at 12 (“Because the infringing goods in these situations are of the same standard, or close to that standard, the unauthorised production of those goods may actually result in a consumers’ surplus: consumers are now getting the same products for a much lower price.”).

More importantly, the continued development of *shanzhai* products may suggest the existence of an alternative path of innovation.²⁴⁴ Like the Beijing Consensus,²⁴⁵ China's innovation models may attract the attention of other countries that are working hard to catch up with the developed world. Indeed, commentators have already begun to appreciate the different forms of innovation that are slowly emerging in China. While Zeng Ming and Peter Williamson discuss what they have called "cost innovation,"²⁴⁶ Tan Yinglan focuses his recent book on "process innovation."²⁴⁷

Moreover, like norms identified with the "Beijing Consensus," "China's growing influence on accepted international [intellectual property] norms and principles need not be explicit to have an

²⁴⁴ See TSE, *supra* note 242, at 79 ("The best *shan zhai* firms, which have established themselves not through thievery but through knockoffs and imitations, have also disrupted the status quo by inventing new and ingenious business strategies tailored specifically to local markets."); *id.* at 80 (noting that *shanzhai* firms "have short cycle times for new product introductions").

²⁴⁵ The "Beijing Consensus" is a term coined by former *Time* foreign editor Joshua Ramo. JOSHUA COOPER RAMO, *THE BEIJING CONSENSUS* (2004), available at <http://fpc.org.uk/fsblob/244.pdf>. As he explains:

[The Beijing Consensus] is simply three theorems about how to organise the place of a developing country in the world, along with a couple of axioms about why the physics is attracting students in places like New Delhi and Brasilia. The first theorem repositions the value of innovation. Rather than the "old-physics" argument that developing countries must start development with trailing-edge technology (copper wires), it insists that on the necessity of bleeding-edge innovation (fiber optic) to create change that moves faster than the problems change creates. In physics terms, it is about using innovation to reduce the friction-losses of reform.

The second Beijing Consensus theorem is that since chaos is impossible to control from the top you need a whole set of new tools. It looks beyond measures like per-capita GDP and focuses instead of quality-of-life, the only way to manage the massive contradictions of Chinese development. This second theorem demands a development model where sustainability and equality become first considerations, not luxuries. Because Chinese society is an unstable stew of hope, ambition, fear, misinformation and politics only this kind of chaos-theory can provide meaningful organization. . . .

Finally, the Beijing Consensus contains a theory of self-determination, one that stresses using leverage to move big, hegemonic powers that may be tempted to tread on your toes.

Id. at 11–12. For discussions of the Beijing Consensus, see generally *id.*; STEFAN A. HALPER, *THE BEIJING CONSENSUS: HOW CHINA'S AUTHORITARIAN MODEL WILL DOMINATE THE TWENTY-FIRST CENTURY* (2010).

²⁴⁶ See generally ZENG MING & PETER J. WILLIAMSON, *DRAGONS AT YOUR DOOR: HOW CHINESE COST INNOVATION IS DISRUPTING GLOBAL COMPETITION* (2007) (advancing the concept of cost innovation and discussing its global implications).

²⁴⁷ TAN YINGLAN, *CHINNOVATION: HOW CHINESE INNOVATORS ARE CHANGING THE WORLD* xii (2011).

impact.”²⁴⁸ As Derek Mitchell reminds us in the non-intellectual property context, “the Chinese development model has gained currency simply because of China’s apparent success, and the attractiveness of China’s hands-off standards-free policy to authoritarian leaders and even some populations tired of perceived heavy-handedness and condescension from Western aid donors.”²⁴⁹ Indeed, if China’s phenomenal success in the science and technology areas continues, one has to wonder whether countries will begin to consider China’s model as a viable alternative. If these countries do so, Europe and the United States will face a formidable alternative for the first time since the end of the Cold War.²⁵⁰

In sum, the opportunities for China to make new international intellectual property norms or shape them to its benefit remain wide open. If China moves into Phase 3 at full speed, the international intellectual property regime we will have in the future is likely to be very different from the one we have today.

CONCLUSION

This Article outlines the path of norm engagement China has taken in the international intellectual property arena. Although piracy and counterfeiting remain major problems within the country, China is not the traditional norm breaker one typically infers from its

²⁴⁸ BERGSTEN ET AL., CHINA’S RISE, *supra* note 86, at 225.

²⁴⁹ *Id.*; MARK LEONARD, WHAT DOES CHINA THINK? 122 (2008) (stating that, in recent years, “[g]overnment research teams from Iran to Egypt, Angola to Zambia, Kazakhstan to Russia, India to Vietnam and Brazil to Venezuela have been crawling around the Chinese cities and countryside in search of lessons from Beijing’s experience.”); RAMO, *supra* note 245, at 3 (“China is marking a path for other nations around the world who are trying to figure out not simply how to develop their countries, but also how to fit into the international order in a way that allows them to be truly independent, to protect their way of life and political choices in a world with a single massively powerful centre of gravity.”); Michael A. Glosny, *Stabilizing the Backyard: Recent Developments in China’s Policy Toward Southeast Asia*, in CHINA AND THE DEVELOPING WORLD, *supra* note 117, at 150, 167 (“For economically backward states with Communist or authoritarian political systems, such as Cambodia, Laos, Myanmar, and Vietnam, China’s development path has become an object of study and emulation.”); Ndubisi Obiorah et al., “Peaceful Rise” and Human Rights: China’s Expanding Relations with Nigeria, in CHINA INTO AFRICA, *supra* note 122, at 272, 289 (“China [had] become . . . a good model for Nigeria in its quest for an authentic and stable development ideology China [was] a lesson to Nigeria on the enormous good that a focused and patriotic leadership can do to realise the dreams of prosperity and security for the citizens.” (alterations in original) (footnote omitted) (quoting Ken Nnamani, Nigerian Senate President)).

²⁵⁰ *Cf.* LEONARD, *supra* note 249, at 134 (“For the first time since the end of the Cold War, Europe and America face a formidable alternative: the Chinese model.”).

disappointing record of intellectual property protection. Instead, the country has been a norm taker for most of its participation in the international intellectual property regime. As its strength, experience, and self-confidence grow, it slowly assumes the additional roles of a norm shaker and a norm maker.

Studying China's path of norm engagement is important because it enables us to ask important questions about the success and limitations of the international intellectual property regime. Can the TRIPS Agreement and other international intellectual property treaties provide meaningful protection to intellectual property rights holders in China? Are China's existing piracy and counterfeiting problems caused by its inadequate compliance with these agreements? Or are they caused instead by deficiencies in the agreements? Regardless of the reason, what could we do to improve the agreements to ensure greater protection of authors and inventors?

These are all questions important to intellectual property rights holders and their supportive governments. Indeed, the lack of success in using multilateral agreements to strengthen intellectual property protection and enforcement has led policymakers, industries, and commentators to push for greater use of nonmultilateral arrangements, including ACTA and the Trans-Pacific Partnership Agreement, which is still under negotiation.²⁵¹ Rights holders have also actively explored the use of extra-legal measures, such as restrictive contracts, technological measures, and private ordering, to obtain what they could not through international treaties.²⁵²

One question that policymakers, industries, and commentators have rarely explored is what will happen if the economic and technological conditions in China continue to improve to the point that the TRIPS Agreement and other international intellectual property treaties will favor China at the expense of the European Union, Japan, the United States, and other existing intellectual

²⁵¹ See *Trans-Pacific Partnership*, OFFICE OF THE U. S. TRADE REPRESENTATIVE, <http://www.ustr.gov/tpp> (last visited Sept. 19, 2011) (providing updated information about the Trans-Pacific Partnership Agreement). See generally Meredith Kolsky Lewis, *The Trans-Pacific Partnership: New Paradigm or Wolf in Sheep's Clothing?*, 34 B.C. INT'L & COMP. L. REV. 27 (2011) (discussing the Trans-Pacific Partnership Agreement).

²⁵² See Annemarie Bridy, *Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement*, 89 OR. L. REV. 81 (2010) (discussing the use of private ordering among intellectual property rights holders and Internet service providers); Peter K. Yu, *Five Disharmonizing Trends in the International Intellectual Property Regime*, in 4 INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE 73, 91–96 (Peter K. Yu ed., 2007) (discussing the trend of rights holders using mass-market contracts and technological protection measures).

property powers.²⁵³ This scenario seems far-fetched to many. However, given China's rapid economic rise and its many notable developments in the science and technology areas,²⁵⁴ it is only a matter of time before China becomes a major intellectual property power with a considerable amount of homegrown intellectual property.

Today, China is already among the top five countries filing patent applications through the PCT.²⁵⁵ In 2010, the number of PCT applications increased by 56.2% to 12,337, moving China to the fourth spot, behind only the United States, Japan, and Germany.²⁵⁶ With significant backing of the Chinese government and significant involvement of a large public sector, China may be able to catch up with the existing intellectual property powers more quickly than one expects. Indeed, if China successfully reaches the 2015 goals set by SIPO:

The annual quantity of applying for patents for inventions, utility models and designs [in the country] will reach 2 million. China will rank among the top two in the world in terms of the annual number of patents for inventions granted to the domestic applicants, and the quality of patents filed will further improve. The number of owning

²⁵³ As John Orcutt and Hong Shen recently observed, China has made the following notable achievements in space technology, biotechnology (including genomics and stem cell research), information technology, nanotechnology, and advanced energy technology:

- China is one of only three countries to put a person in space with its own rockets (and China recently conducted its first spacewalk).
- Chinese research teams helped to map the genome for rice and have since helped to extend genomic sequencing to other plants, as well as a variety of insects and parasites.
- China passed the United States as the leading exporter of information-technology goods in 2004.
- China has become a world leader in the field of nanotechnology—producing major nanotechnology breakthroughs (e.g., improved production of carbon nanotubes) and generating a significant portion of the world's nanotechnology publications and patents and new nanotechnology firms.
- China has long been a leader in nuclear technology and is positioned to become a leader in a number of other energy fields, including clean coal and hydropower.

JOHN L. ORCUTT & HONG SHEN, *SHAPING CHINA'S INNOVATION FUTURE: UNIVERSITY TECHNOLOGY TRANSFER IN TRANSITION* vii–ix (2011).

²⁵⁴ See Yu, *China Puzzle*, *supra* note 55, at 185–88 (tracing the development of the intellectual property regime in China); Yu, *From Pirates to Partners II*, *supra* note 74, at 975–99 (examining the progress China has made in the intellectual property area).

²⁵⁵ Press Release, World Intellectual Prop. Org., International Patent Filings Recover in 2010 (Feb. 9, 2011), available at http://www.wipo.int/pressroom/en/articles/2011/article_0004.html.

²⁵⁶ *Id.* The figures for the United States, Japan, and Germany are 44,855, 32,156, and 17,171, respectively.

patents every one million people and the number of overseas patent applications filed by Chinese applicants will double. The proportion of patent applications in industrial enterprises above designated size will reach 8% and the quantity of owning patent rights will significantly rise. . . . The patent transaction services will be established in major cities of China with annual patent transaction amounts reaching 100 billion yuan. . . . The patent examiner[s] will reach 9,000. . . . The talents in the patent service industry will be greater and the professional categories will be more complete, with certified patent agents reaching 10,000.²⁵⁷

Moreover, macroeconomic structures are constantly changing. In the near future, the economic structure of the United States—and for that matter, the European Union, Japan, or other existing developed countries—could depend more on innovation than existing forms of intellectual property rights. If firms like Apple, Google, and Facebook are, indeed, driving the U.S. economy, as opposed to, say, the U.S. film and pharmaceutical industries, one has to wonder how much the existing international intellectual property system will still benefit the United States.²⁵⁸

Finally, norms and values in the international intellectual property regime are highly dynamic. As with most areas in the international regulatory system, intellectual property norms are not developed in a vacuum. Virtually all international intellectual property agreements reflect compromises struck between and among key negotiating parties. Thus, the role China will play in the international intellectual property regime will also depend on the roles the European Union, India, Japan, South Korea, Switzerland, the United States, and others will play. The more we understand China's participation in the international intellectual property regime and its role in the WTO and

²⁵⁷ STATE INTELLECTUAL PROP. OFFICE (CHINA), NATIONAL PATENT DEVELOPMENT STRATEGY (2011–2020) 3 (2011), *translated at* <http://graphics8.nytimes.com/packages/pdf/business/SIPONatPatentDevStrategy.pdf>; *see also* Steve Lohr, *When Innovation, Too, Is Made in China*, N.Y. TIMES, Jan. 1, 2011, <http://www.nytimes.com/2011/01/02/business/02unboxed.html> (stating that USPTO Director David Kappos described SIPO's 2015 targets as “mind-blowing numbers”).

²⁵⁸ As Christopher May writes:

[A]s the balance of technical leadership starts to move, perhaps accelerated by the impact of the recession on research and innovation in the most-developed countries (the US, Europe, and Japan), it is not clear that those states that previously argued for robust protection of IPRs will necessarily find themselves so advantaged by the current settlement. If the TRIPs agreement and the work of WIPO has largely in the past privileged the interests and benefits of the technological leaders in the global economy, what happens when this leadership starts to shift?

Christopher May, *Afterword* to IMPLEMENTING WIPO'S DEVELOPMENT AGENDA, *supra* note 210, at 172.

WIPO, the clearer and more nuanced picture we will have of what the future will hold for this particular regime.