

The Influence of the WTO over China's Intellectual Property Regime

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Abstract

This article commences with a brief history of China's intellectual property policy and international relations over the past 150 years. China's engagement with the western construct of intellectual property rights is strongly aligned with China's international trade relations. In particular, this article will consider the influence of the enquiries into transparency that followed China's first review after accession to the WTO and then the dispute resolution process initiated by the United States specifically on issues of intellectual property enforcement. Despite the numerous international treaties and agreements on intellectual property rights that exist and to which China acceded in the early days of the Open Door Policy period, it was the need to become a member of the WTO and with that the expectation of compliance with the prescriptive requirements found in the *WTO Agreement on Trade Related Aspects of Intellectual Property Rights* ('the TRIPS Agreement') that provided the greatest influence on the shaping of China's intellectual property regime today. Recent developments highlight a counterpoint in China's engagement with the TRIPS Agreement. This is indicated in China's willingness to align itself with the views of developing nations in the way that the TRIPS Agreement is interpreted and this is most evident in the recent *Patent Law* amendments which demonstrate China's desire to be an innovator, not a copier.

I Introduction

This article commences with a brief history of China's intellectual property policy and international relations over the past 150 years. China's engagement with the western construct of intellectual property rights is strongly aligned with China's international trade relations. The first round of international trade relations when intellectual property rights were dealt with was experienced from the 1800s and into the early 1900s and effectively ended with the establishment of the People's Republic of China. The second round is marked by the Open Door Policy era in the lead-up to World Trade Organization ('WTO') membership. Once achieved, the ongoing sparring with western intellectual

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property export nations through the forum of the WTO demonstrates the influence of that forum.

In particular, this article will consider the influence of the enquiries into transparency that followed China's first review after accession to the WTO and the dispute resolution process initiated by the United States specifically on issues of intellectual property enforcement. China has been a party to many more disputes¹ in the forum of the WTO that are not dealt with here. This article argues that despite the numerous international treaties and agreements on intellectual property rights that exist and to which China acceded in the early days of the Open Door Policy period, it was the need to become a member of the WTO and with that the expectation of compliance with the prescriptive requirements found in the *WTO Agreement on Trade Related Aspects of Intellectual Property Rights*² that have provided the greatest influence on the shaping of China's intellectual property regime today. China participated in the negotiations for the TRIPS Agreement during the Uruguay Round of the General Agreement on Tariffs and Trade ('GATT'),³ yet it took another five years before China was seriously considered for membership of the WTO. The TRIPS Agreement represents a model of legal transplant that has been designed to effect neoliberal globalisation. The *TRIPS Agreement* has certainly accelerated both the uptake and the harmonisation or standardisation of intellectual property laws worldwide regardless of cultural, economic or political differences. Equally, the forum of the WTO has enabled the *TRIPS Agreement* to be subject to development taking into account the interests of a growing number of developing countries. Recent developments highlight a counterpoint in China's engagement with the *TRIPS Agreement*. This is indicated in China's willingness to align itself with the views of developing nations in the way that the *TRIPS Agreement* is interpreted: most evident in the recent *Patent Law* amendments, demonstrating China's desire to be an innovator not a copier. However, the last section of this article warns that China still has some way to go before it realises this desire but is certainly on its way.

II China's International Intellectual Property Relations Round One

China's engagement with intellectual property regimes seems to revolve around foreign influence, namely meeting the demands or expectations of foreign powers with which China traded and from which China sought investment. Accordingly, it is not surprising to discover that a degree of trademark protection was included in various commercial agreements and treaties China entered into with several nations including Britain, the US and Japan, during the late 1800s

¹ China has been involved in 25 disputes; sometimes as complainant but more often as defendant. See Wenhua Ji and Cui Huang, 'China's Experience in Dealing with WTO Dispute Settlement: A Chinese Perspective' (2011) 45 (1) *Journal of World Trade* 1, 3.

² *Agreement on Trade-Related Aspects of Intellectual Property Rights* 33 ILM 81 (opened for signature 15 April 1994, entered into force 1 January 1995) ('*TRIPS Agreement*').

³ Ching Cheong and Ching Hung Yee, *Handbook on China's WTO Accession and its Impacts* (World Scientific, 2003) 131.

and early 1900s.⁴ Similarly, suggestions in the late 1800s that China's then 'backwardness' in science and technology was due to the lack of a patent system⁵ led to the promulgation, in 1898, of China's alleged first patent legislation, the *Reward Regulations for Promoting Technology Development Zhenxing Gongyi Geijiang Zhangcheng*.⁶ Despite having given the world 'the inventions of gunpowder, the compass, and printing' during the Song dynasty (960–1279),⁷ this new law was born out of a backdrop of China's westernisation movement in the 1860s, its position of disadvantage in relation to the foreign powers that over time partitioned China between Russia, Britain and Germany, followed by '[t]he failure of the Sino-Japanese War of 1894–1895'.⁸

Meanwhile, the late 19th century witnessed the international recognition of the importance of intellectual property rights with the establishment of two significant pieces of international law, the *Paris Convention for the Protection of Industrial Property 1883*,⁹ and the *Berne Convention for the Protection of Literary and Artistic Works 1886*.¹⁰ This came after the 1800s had been marked by the British Empire's free trade policies while nations focused on protecting nationals to the exclusion of foreigners. Cross-border infringement became enough of a problem to bring about international action in the form of these conventions. Some nations dealt with the issue of cross-border infringement through bilateral agreements granting reciprocal rights. However, a truly effective arrangement required a multilateral agreement such as the conventions provided. By the end of the 19th century, the US was a party to the *Paris Convention* but not a member of the *Berne Convention*. Instead it enacted separate legislation to protect foreign copyright holders on a reciprocal basis.¹¹ Yu explains that at this time the United States coerced China into a treaty over reciprocal protection of patents, trademarks and copyright with Britain and Japan adopting similar arrangements.¹² This was a necessary step as China resisted membership of both multilateral treaties, the *Paris*

⁴ William P Alford, *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization* (Stanford University Press, 1995) 36–42.

⁵ Proposed in *Shen Bao*, the leading newspaper in China in 1896, cited in Liwei Wang, 'The Chinese Traditions Inimical to the Patent Law' (1993) 14 *Northwestern Journal of International Law & Business* 15, 19.

⁶ Ibid.

⁷ Columbia University, *China's 'Golden Age': the Song, the Mongols, and the Ming Voyages and Korea under the Mongols* (12 October 2009) East Asian Curriculum Project — Asia for Educators <http://afe.easia.columbia.edu/webcourse/key_points/kp_6.htm>.

⁸ Wang, above n 5.

⁹ *Paris Convention for the Protection of Industrial Property* of 20 March 1883, as revised at Brussels on 14 December 1900, at Washington on 2 June 1911, at The Hague on 6 November 1925, at London on 2 June 1934, at Lisbon on 31 October 1958, at Stockholm on 14 July 1967 and as amended on 28 September 1979 ('*Paris Convention*').

¹⁰ *Berne Convention for the Protection of Literary and Artistic Works* of 9 September 1886, completed at Paris on 4 May 4 1896, revised at Berlin on 13 November 1908, completed at Berne on 20 March 1914, revised at Rome on 2 June 1928, at Brussels on 26 June 1948, at Stockholm on 14 July 1967, and at Paris on 24 July 1971, and amended on 28 September 1979 ('*Berne Convention*').

¹¹ Peter K Yu, 'The Sweet and Sour Story of Chinese Intellectual Property Rights', in Graham Dutfield and Uma Suthersanen (eds), *Technology, Progress and Prosperity: A History of Intellectual Property and Development* (Palgrave Macmillan, forthcoming 2012) 3.

¹² Ibid. The treaty with the US was a commercial treaty signed in 1903.

and *Berne Conventions*. Next steps would be the enactment of laws in China to acknowledge its obligations to provide intellectual property rights protection.

The *Copyright Law of the Qing Dynasty 1910* (also known as the ‘Author’s Right in the Qing Empire’) was arguably China’s first copyright legislation and it, too, was subject to external pressures, this time to improve protection for foreign workers.¹³ However, the Qing dynasty came to an end before the law was implemented.¹⁴ With the newly-established Republic of China came the 1912 *Provisional Regulations of the Reward for Handicraft* and the granting of hundreds of patents even before the *Patent Law* was promulgated in 1945.¹⁵ Meanwhile, another copyright law was enacted in 1928 under the *Kuomintang* (Nationalist Party) government but with minimal domestic impact.¹⁶ China resisted growing international expectations to participate in multilateral and bilateral arrangements concerning copyright during this time.¹⁷ Then, with the events leading up to the establishment of the People’s Republic of China, copyright, and indeed all other forms of intellectual property, disappeared until the last quarter of the 20th century.¹⁸

The last 60 years of intellectual property policy in China can be divided into the Maoist era and the Open Door Policy era. What distinguishes these two periods is the stark contrast in ideologies. Mao utilised ‘Confucian morality’ as a basis for ‘communist morality’, which in turn was utilised as a means of ‘scorning commercial profit’ while simultaneously demonstrating commitment to ‘the development of science and technology’.¹⁹ Meanwhile, the Open Door Policy era adopted the western tradition of acknowledging individual exclusionary ownership rights over intellectual property and, indeed, other forms of property.

During the Maoist era, there was emphasis on the collective and accordingly state ownership of property rights. Despite a commitment to scientific and technological development, the Maoist era is defined by ‘the ideological grounding of the Chinese Communist Party (CCP) in Marxism-Leninism’.²⁰ Socialist ideals and Confucian tradition and morality prevailed such that the state retained ownership of inventions, thereby preventing inventors from benefiting from their efforts to the exclusion of others. This was achieved through the *Regulations on Awards for Inventions*, issued in November 1963 by the Chinese government. Specifically, art 23 of the *Regulations* stated:

¹³ Patricia Blazey and YiJun Tian, ‘Intellectual Property Law in China’, in Patricia Blazey and Kai-Wah Chan (eds), *The Chinese Commercial Legal System* (Thomson, 2008) 321, 323.

¹⁴ Chengsi Zheng and Michael Pendleton, *Copyright Law in China* (CCH, 1991) 17.

¹⁵ Wang, above n 5, 20.

¹⁶ June Cohan Lazar, *Protecting Ideas and Ideals: Copyright Law in the People’s Republic of China* (1996) 27 *Law and Policy in International Business* 1185, 1187.

¹⁷ Blazey and Tian, above n 13, 323.

¹⁸ Lazar, above n 16, 1186–7.

¹⁹ Wang, above n 5 at 56–9.

²⁰ Andrea Wechsler, ‘Intellectual Property Law in the PR China: A Powerful Economic Tool for Innovation and Development’, (Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper Series No 09-02, 2008) 9.

all inventions are the property of the state, and no one or unit may claim monopoly over them. All units throughout the country (including collectively owned units) may make use of the inventions essential to them.

Meanwhile, copyright, during this period, was eventually stamped out. The Cultural Revolution demonstrated that even rationales for copyright law based on Marxism-Leninism were no longer acceptable. Instead, Wechsler tells us that 'all administrative orders and internal regulations governing plagiarism and remuneration were abolished' at this time.²¹

Since the advent of the Open Door policy at the end of 1978, the development of laws in China has converged with the legal traditions of Europe, and more recently the US, in a concerted effort to comply with international expectations. This is most evident in the development of intellectual property laws in China and marks a very different attitude to that shown at the beginning of the 20th century. China recognised the necessity to embrace commercial laws, the hallmark of market economies, in order to attract foreign investment and begin its own economic transformation.

With the push towards membership of the WTO came the need to further develop these intellectual property laws in order to comply with the requirements of the *TRIPS Agreement*. Since China's accession to the WTO, the intellectual property regime has undergone further change and further criticisms with the greatest pressures emanating from foreign interests determined to ensure greater protection of their rights (a not dissimilar situation to that faced by China at the end of the 19th century).

III China's Intellectual Property Policy during the Open Door Policy Era

The Open Door Policy is synonymous with the leadership of Deng Xiaoping. Following his accession to power in August of 1977, Deng introduced the 'Four Modernisations' and discussed them in many of his speeches.²² He firmly believed that making use of the advanced technologies and achievements from around the world was necessary to expand the economy and achieve these four modernisations: industry; agriculture; national defence; and science and technology.²³ It was then that China began to embrace an all encompassing intellectual property rights system, unlike the previous attempts almost a century before. One of the key drivers for this was the interest in attracting foreign investment and foreign technology. But even before the introduction of intellectual property regimes during this period, the encouragement of inventions through a reward mechanism became a priority with the adoption of *Regulations on Awards for Inventions* in 1978 upon the establishment of the Open Door

²¹ Ibid 13.

²² See the series of English excerpts from Deng's speeches in *Selected Works of Deng Xiaoping Volume II (1975-1982)*, News of the Communist Party of China <<http://english.cpc.people.com.cn/mediafile/200607/05/F2006070515261400629.swf>>.

²³ Wang, above n 5 at 16.

Policy.²⁴ Another encouraging factor would have been the establishment of diplomatic relations with the US and the establishment of a US-China Bilateral Trade Agreement in 1979. Reminiscent of the coercive relationships at the turn of the 19th century discussed above?

Following this, China embarked upon a systematic program of acceding to the key international intellectual property conventions and agreements commencing with membership of the World Intellectual Property Organization ('WIPO') in 1980 and the key industrial property²⁵ convention, the *Paris Convention*, in 1984. The adoption of the Constitution of the People's Republic of China at the Fifth Session of the Fifth National People's Congress in 1982 led to the emergence of the first substantive laws covering intellectual property rights. The *Trademark Law of the People's Republic of China* ('*Trademark Law*') was adopted in 1982²⁶ and was soon followed by implementing provisions. Article 1 of the Trade Marks Law indicates several purposes of the regime beyond the mere protection of trade mark rights holders including consumer protection through quality guarantees and maintenance of reputation as well as 'promoting the development of the socialist market economy'.

The *Patent Law of the People's Republic of China* ('*Patent Law*') was adopted in 1984,²⁷ also followed by implementing provisions. The purpose of the *Patent Law* was stipulated in art 1:

This Law is enacted to protect patent rights for inventions-creations, to encourage invention-creation, to foster the spreading and application of inventions-creations, and to promote the development and innovation of science and technology, for meeting the needs of the construction of socialist modernization.²⁸

²⁴ Adopted 28 December 1978, available in English at: Regulations of the People's Republic of China on Awards for Inventions <<http://preview.english.mofcom.gov.cn/article/lawsdata/chineselaw/200211/20021100050646.html>>.

²⁵ Industrial property is the collective term covering patents, trademarks, designs and associated rights.

²⁶ *Trademark Law of the People's Republic of China* (adopted at the 24th Session of the Standing Committee of the Fifth National People's Congress on 23 August 1982, revised for the first time according to the *Decision on the Amendment of the Trademark Law of the People's Republic of China* adopted at the 30th Session of the Standing Committee of the Seventh National People's Congress, on 22 February 1993, and revised for the second time according to the *Decision on the Amendment of the Trademark Law of the People's Republic of China* adopted at the 24th Session of the Standing Committee of the Ninth National People's Congress on 27 October 2001) ('the *Trademark Law*').

²⁷ *Patent Law of the People's Republic of China* (adopted at the 4th Meeting of the Standing Committee of the Sixth National People's Congress on 12 March 1984. Amended in accordance with the Decision of the Standing Committee of the Seventh National People's Congress on Amending the *Patent Law* of the People's Republic of China at its 27th Meeting on 4 September 1992. Amended again in accordance with the Decision of the Standing Committee of the Ninth National People's Congress on Amending the *Patent Law* of the People's Republic of China adopted at its 17th Meeting on 25 August 2000) ('the *Patent Law*').

²⁸ State Intellectual Property Office of the People's Republic of China, *Patent Law of the People's Republic of China* (27 March 2002) <http://www.sipo.gov.cn/sipo_English/laws/lawsregulations/200804/t20080416_380327.html>.

Clearly, the *Patent Law* was perceived as part of the process necessary to achieve the objectives of the Open Door Policy era, namely the four modernisations referred to above.²⁹

Returning to the earlier timeline, after the 1984 *Patent Law*, there was a noticeable gap until the *Copyright Law of the People's Republic of China* ('*Copyright Law*') was adopted in 1990.³⁰ In addition to the purpose of protecting the rights of authors in their works, the *Copyright Law* has the purpose of:

encouraging the creation and dissemination of works which would contribute to the construction of socialist spiritual and material civilisation, and of promoting the development and prosperity of the socialist culture and science.³¹

Once again this is in keeping with the intent of the four modernisations. However, the words used emphasise that these types of works, namely ones that are aligned with socialist ideology, are encouraged under such a copyright regime. This implies censorship of works that are not in line with socialist ideology. Foreign works, for example, foreign films, undergo content review by State Council administrative agencies in order to obtain approval for circulation in China and may also be subject to government quotas. The WTO dispute brought by the US in 2007³² raised, among others, the issue of China's copyright legislation denying protection to those works that were accordingly prohibited from publication or distribution. This dispute before the WTO Panel was the pinnacle of the tension that developed between the US and China on intellectual property protection and enforcement from the early 1990s.³³

The international sparring between the US and China from 1991 to 1996 was predominantly concerned with China's failure to meet obligations in this field and resulted in China appearing in the Special 301 Priority Foreign Countries

²⁹ See the series of English excerpts from Deng's speeches, above n 22.

³⁰ *Copyright Law of the People's Republic of China* (Adopted at the Fifteenth Session of the Standing Committee of the Seventh National People's Congress on 7 September 1990, and revised in accordance with the *Decision on the Amendment of the Copyright Law of the People's Republic of China* adopted at the 24th Session of the Standing Committee of the Ninth National People's Congress on 27 October 2001) ('*Copyright Law*'); State Intellectual Property Office of the People's Republic of China, *Copyright Law of the People's Republic of China* (16 April 2002) <http://english.sipo.gov.cn/laws/relatedlaws/200804/t20080416_380362.html>.

³¹ *Ibid.*

³² WTO Dispute Resolution Action: *China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362.

³³ Simultaneously, the US brought another dispute against China to the WTO in relation to the restrictions placed on foreign content material which went beyond the Panel and on to the Appellate Body for final determination: *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R. Once again a mixed result but on the whole China was found to have regulations inconsistent with its obligations under the Protocol and was given until 19 March 2011 to implement the necessary amendments: see WTO, *Dispute DS363: China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (15 July 2011) <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm> (26 April 2011). As of 31 March 2011, the foreign film quotas remained at 20 per year: see Lee Hannon, 'Nation should be taken, not stirred' *China Daily* (online) 31 March 2011: <http://www.chinadaily.com.cn/bizchina/2011-03/31/content_12258494.htm>.

Report. It led to the establishment of a Memorandum of Understanding with the US on intellectual property rights in 1992³⁴ as well as China joining the *Berne Convention* and the *Universal Copyright Convention*³⁵ also in 1992. This period saw the introduction of regulations to improve protection of software,³⁶ to deal with punishment of criminal copyright infringement,³⁷ the introduction of the *Law Against Unfair Competition of the People's Republic of China* in 1993,³⁸ and the establishment of Intellectual Property Courts. However, it was not until 1996–97 that more effective measures were introduced to combat copyright piracy and only after China appeared as a priority foreign country for a third time in the US Special 301 Report.³⁹

As can be imagined, during this period the US actively blocked China's membership of the WTO on the basis of China's intellectual property rights deficiencies; in other words, a failure to meet the requirements of the *TRIPS Agreement*. However, in 1999, China agreed to the *TRIPS Agreement*, and then embarked on harmonising its intellectual property laws with TRIPS.⁴⁰ In 2000 China amended the *Patent Law* to become more aligned with TRIPS, and in 2001 proceeded to do the same with the *Copyright Law* and the *Trademark Law* before being allowed to join the WTO in December of that year — only after accepting a

³⁴ People's Republic Of China Intellectual Property Rights Memorandum Of Understanding — 1992 Memorandum Of Understanding Between The Government Of The People's Republic Of China And The Government Of The United States Of America On The Protection Of Intellectual Property, at <http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005362.asp>.

³⁵ Universal Copyright Convention, with Appendix Declaration relating to Articles XVII and Resolution concerning Article XI 1952, (UNESCO) Geneva, opened for signature 6 September 1952, <http://portal.unesco.org/en/ev.php-URL_ID=15381&URL_DO=DO_TOPIC&URL_SECTION=201.html> .

³⁶ *Regulations on the Protection of Computer Software 1991*, effective 1 October 1991, then repealed on 1 January 2002 when the new *Regulations on Computer Software Protection 2002* became effective.

³⁷ *Decision of the Standing Committee of the National People's Congress Concerning Punishment of the Crime of Copyright Infringement* (1994).

³⁸ *Law Against Unfair Competition of the People's Republic of China* (adopted at the Third Session of the Standing Committee of the Eighth National People's Congress on 2 September 1993. Promulgated by Order No 10 of the President of the People's Republic of China on 2 September 1993, and effective on 1 December 1993).

³⁹ This is an annual report prepared pursuant to s 182 and under the Special 301 provisions of the *Trade Act of 1974* 19 USC 12 as amended. The United States Trade Representative ('USTR') has the obligation to 'identify those countries that deny adequate and effective protection for intellectual property rights ('IPR') or deny fair and equitable market access for persons that rely on intellectual property protection' (see Annex 1, 'Statutory Background on Special 301', *2009 Special 301 Report*). China is currently (and for many years has been) under the Priority Watch List and therefore the focus of bilateral attention in order to deal with the identified IPR problems. The significance of the Special 301 mechanism is that it provides the US with the power to coerce the implementation of stronger intellectual property protection by the offending state through the threat of trade restrictions and may go as far as invoking the WTO dispute settlement processes even where the country is recognised as TRIPS-compliant. It should be noted that China appeared in the Special 301 Watch List in 1992 and 1995, the Priority Watch List in 1989, 1990, and 2006 to 2011, as a Priority Foreign Country in 1991, 1994 and 1996, underwent section 306 monitoring (to ensure compliance with the commitments made to the United States under bilateral intellectual property agreements) each year since 1997, and was the subject of an out-of-cycle review in 2005.

⁴⁰ Blazey and Tian, above n 13, 326.

lengthy Protocol of implementation⁴¹ resulting in further amendment of the *Copyright Law* in 2002.

Such development in the Chinese legal system demonstrates the concept of 'legal transplants',⁴² (also known as 'diffusion') where borrowing or 'importing' laws from foreign sources assists in achieving desired outcomes. Mousourakis points out that a

legislator must first consider whether the rule has proved efficient in its country of origin when dealing with the specific problem at hand and then...whether it will produce the desired effects in the country contemplating its adoption.⁴³

However, modifications may be required to account for differences in the political, social, cultural and economic environment.⁴⁴ China uses this argument in responding to the disputes raised in the WTO against its intellectual property system (mentioned above and to be dealt with later in this article).

Meanwhile, becoming a party to an international agreement or convention exemplifies legal transplant on a global scale. In fact, the requirement to comply with the *TRIPS Agreement* as part of joining the WTO demonstrates how legal transplantation is used in achieving global harmonisation. However, Mousourakis reminds us that 'legal integration and harmonization require reasonably transferable [legal] models' but that 'law is more than simply a body of rules or institutions; it is also a social practice within a legal community' and that 'this social practice...shapes the actual meaning of the rules and institutions, their relative weight, and the way they are implemented and operate in society'.⁴⁵ This is evident in the issues that China has experienced in enforcing intellectual property rights.

With so much international coercion to constantly improve the intellectual property regime in China, the legal framework in which intellectual property rights are protected would rival any advanced economy. However, as Schiappacasse points out, the 'excellent laws on the books' have not translated to a successful enforcement regime.⁴⁶ This is problematic not just because the US has documented the extensive piracy by Chinese manufacturers of the products of US industries in the Special 301 Reports. Rather, China agreed to *the Protocol* on its accession to the WTO which specified (through the *Report of the Working Party on the Accession of China*) that efforts would be made in relation to the enforcement regimes for intellectual property rights.

⁴¹ *Protocol on the Accession of the People's Republic of China*, (WT/L/432) (23 November 2001) ('*the Protocol*').

⁴² This term was coined by the legal scholar, Alan Watson, in his book: Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press, 1974).

⁴³ George Mousourakis, 'Transplanting Legal Models across Culturally Diverse Societies: A Comparative Law Perspective' (2010) 57 *Osaka University Law Review* 87, 89.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.* 90.

⁴⁶ Mikhaelle Schiappacasse, 'Intellectual Property Rights in China: Technology Transfers and Economic Development' (2004) *Buffalo Intellectual Property Law Journal* 164, 179.

IV Compliance with the TRIPS Agreement

The establishment of the WTO in 1995⁴⁷ demonstrated a multilateral desire to converge trade principles in order to reduce distortions and impediments to international trade. Intellectual property rights were recognised as playing a significant role in the promotion of international trade. Accordingly, the *WTO Agreement* also requires members to be bound to another agreement, found in Annex 1C, namely, the *TRIPS Agreement* which was concluded in December 1993 having been part of the Uruguay Round of the General Agreement on Trade and Tariffs (GATT).⁴⁸

The *TRIPS Agreement* provides international rules for the availability, scope, use and enforcement of intellectual property rights and for dispute prevention and settlement. It recognises and reinforces the operation of the pre-existing intellectual property conventions⁴⁹ and '[desires] to establish a mutually supportive relationship...[with the World Intellectual Property Organization and]...other relevant international organisations'.⁵⁰ Members are able to implement more extensive protections than the *TRIPS Agreement* so long as the provisions of the *TRIPS Agreement* are not contravened.⁵¹ Meanwhile, Members are given the freedom to 'determine the appropriate method of implementing the provisions of...[the *TRIPS Agreement*]...within their own legal system and practice'.⁵² In doing so, the objectives of the *TRIPS Agreement* at art 7 need to be considered:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

Getting this balance right goes to the core of the tension between the monopoly rights established through intellectual property regimes and the desire to engender free trade among nations. But ultimately, the effectiveness of the enforcement regime will mark the success of a member's intellectual property regime even after complying with the principles and standards harmonised under the *TRIPS Agreement*. The enforcement provisions of the *TRIPS Agreement* are found in pt 3, comprising five sections covering arts 41 to 61. The general obligation is found in art 41 reproduced below:

1. Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against

⁴⁷ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) ('*The WTO Agreement*').

⁴⁸ Commencing in 1986.

⁴⁹ See Part I of the *TRIPS Agreement*.

⁵⁰ See the preamble or recitals to the *TRIPS Agreement*.

⁵¹ *TRIPS Agreement* art. 1. This would seem to be aimed at those jurisdictions that have not taken such a liberal view of the breadth of subject matter capable of protection. In this regard, consider *European Patent Convention* art 53(b) that prohibits the patenting of plant and animal varieties and developing nations that have refused to afford patent protection to pharmaceuticals.

⁵² *TRIPS Agreement* art 1.

any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

2. Procedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.
3. Decisions on the merits of a case shall preferably be in writing and reasoned. They shall be made available at least to the parties to the proceeding without undue delay. Decisions on the merits of a case shall be based only on evidence in respect of which parties were offered the opportunity to be heard.
4. Parties to a proceeding shall have an opportunity for review by a judicial authority of final administrative decisions and, subject to jurisdictional provisions in a Member's law concerning the importance of a case, of at least the legal aspects of initial judicial decisions on the merits of a case. However, there shall be no obligation to provide an opportunity for review of acquittals in criminal cases.
5. It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.

It is arguable that China's IPR system has failed against the majority of the principles found in art 41 of the TRIPS Agreement. However, concerted efforts have been made in more recent times to address China's enforcement inadequacies as will be discussed in VI below. Meanwhile, transparency, a requirement under the Protocol, was also considered to be inadequate by a number of countries, with steps being taken under art 63.3 of the *TRIPS Agreement*, requesting China to provide details about its intellectual property laws and regulations, judicial decisions and administrative rulings.

V Transparency and Article 63 of the TRIPS Agreement

The *Report of the Working Party on the Accession of China to the WTO*⁵³ (the Report) led to the adoption of the Protocol,⁵⁴ a decision of the WTO on 10 November 2001. The Protocol established China's commitments to the WTO, one of which is to improve the transparency of its regulatory regimes in accordance with the requirements of pt 1 para 2(C). The commitments are threefold:

⁵³ *Report of the Working Party on the Accession of China*, WT/ACC/CHN/49 (1 October 2001) ('the Report').

⁵⁴ *The Protocol*, WT/L/432 (23 November 2001) (Decision of 10 November 2001).

1. that only published and readily available (to other WTO members) laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPS or the control of foreign exchange that shall be enforced;
2. that such laws be published regularly in an official journal with a reasonable time allowed for comment before implementation; and
3. that there be an enquiry point established to enable individuals, businesses and WTO members to have access to such information.⁵⁵

The *TRIPS Agreement* deals with transparency in art 63. Specifically, art 63.1 provides:

Laws and regulations, and final judicial decisions and administrative rulings of general application, made effective by a Member pertaining to the subject matter of this Agreement (the availability, scope, acquisition, enforcement and prevention of the abuse of intellectual property rights) shall be published, or where such publication is not practicable made publicly available, in a national language, in such a manner as to enable governments and right holders to become acquainted with them...

While this provision only requires China to publish its laws in Mandarin, China confirmed that it would provide translations into one of the official languages of the WTO, namely English, French and Spanish.⁵⁶

The Protocol required that, pursuant to section 18, China would submit to annual reviews of the implementation of its WTO commitments for eight years following accession. The intellectual property related reviews were conducted by the Council for Trade-Related Aspects of Intellectual Property Rights ('TRIPS Council') and China was required to provide information as requested under Annex 1A of the Protocol:

VI. TRADE-RELATED INTELLECTUAL PROPERTY REGIME (to be notified to the Council for Trade-Related Aspects of Intellectual Property Rights)

(a) amendments to Copyright, Trademark and *Patent Law*, as well as relevant implementing rules covering different areas of the TRIPS Agreement bringing all such measures into full compliance with and full application of the TRIPS Agreement and the protection of undisclosed information

(b) enhanced IPR enforcement efforts through the application of more effective administrative sanctions as described in the Report.

It is through this mechanism that China submitted its information on 24 October 2005⁵⁷ and also provided a White Paper, 'New Progress in China's Protection of Intellectual Property Rights'.⁵⁸

⁵⁵ *The Protocol pt 1* [2(C)].

⁵⁶ *Report The Report* [334].

⁵⁷ *Transitional Review Mechanism of China: Communication from China*, IP/C/W/460 (11 November 2005).

⁵⁸ WTO TRIPS Council, *Transitional Review Under Section 18 Of The Protocol On The Accession Of The People's Republic Of China: report to the General Council by the Chair*, IP/C/39 (21 November 2005) 2.

In response, the US, Switzerland and Japan requested China to provide detailed information regarding its enforcement efforts during the period 2001–05. These requests were made under art 63.3 of the *TRIPS Agreement*:

Each Member shall be prepared to supply, in response to a written request from another Member, information of the sort referred to in paragraph 1. A Member, having reason to believe that a specific judicial decision or administrative ruling or bilateral agreement in the area of intellectual property rights affects its rights under this Agreement, may also request in writing to be given access to or be informed in sufficient detail of such specific judicial decisions or administrative rulings or bilateral agreements.

The US and Japanese requests targeted the intellectual property rights cases identified by China in its report to the WTO for the period 2001–04 and the first half of 2005. Specifically, they requested the legal basis of these cases, details as to the remedies, provisional measures and whether there were repeat offenders, the location and year of the infringement and competent authority dealing with the case, what transfers of these cases were made to the crime authorities, such as the Public Security Bureau, whether the parties to these actions were nationals of other members or countries and details of the products infringed.⁵⁹ The Swiss request was more limited but once again concerned with enforcement issues, specifically the implementation of legal provision, remedies and provisional measures together with institutional aspects.⁶⁰

The request under art 63.3 essentially targeted information from China regarding the publication of '[l]aws and regulations, and final judicial decisions and administrative rulings of general application'.⁶¹ In October 2005 the USTR, Rob Portman, explained the justification for the action:

Based on all available information, piracy and counterfeiting remain rampant in China despite years of engagement on this issue. If China believes that it is doing enough to protect intellectual property, then it should view this process as a chance to prove its case...Our goal is to get detailed information that will help pinpoint exactly where the enforcement system is breaking down so we can decide appropriate next steps.⁶²

Lack of transparency has been cited as an acute problem in relation to the process of rule-making, and to obtaining sufficient information about enforcement activities in China.⁶³ The Special 301 Reports illustrate the concerns when infringement levels were quoted at 90 per cent in the April 2005 Special 301 Report,⁶⁴ while the April 2006 Special 301 Report was not much more encouraging indicating that levels of copyright piracy in China were between 85

⁵⁹ See *Request for Information Pursuant to Article 63.3 of the TRIPS Agreement: Communication from the United States*, IP/C/W/461 (14 November 2005); and *Request for Information Pursuant to Article 63.3 of the TRIPS Agreement, Communication from Japan*, IP/C/W/463, 14 November 2005.

⁶⁰ *Request for Information Pursuant to Article 63.3 of the TRIPS Agreement: Communication from Switzerland*, IP/C/W/462 (14 November 2005).

⁶¹ *TRIPS Agreement* art 63.1.

⁶² USTR, *Press Release 2005-65* (26 October 2005).

⁶³ USTR, 'Out of Cycle Review Results: China', *2005 Special 301 Report* (29 April 2005).

⁶⁴ *Ibid.*

and 93 per cent.⁶⁵ Estimated US business software losses in 2005 represented US\$1.27 billion,⁶⁶ piracy relating to the motion picture industry was said to have 'reached almost 100 per cent of the retail market in China'.⁶⁷ This is partly due to the censorship and quota system mentioned above. As legitimate copies of works are restricted from entering the market, the masses will find other (and much cheaper) ways to access restricted material, namely through pirated copies. Recent figures confirm this state of affairs for 2010: for the US\$1.5 billion total cinema box-office receipts in China, 45 per cent of which are attributed to the annual 20 approved foreign films, there is a corresponding US\$6 billion pirate DVD industry in China comprising predominantly foreign films.⁶⁸

China challenged the nature of the requests, requiring further clarification from each of the three nations on the basis that their requests lacked the specificity required by art 63.3 of the TRIPS Agreement. Each of the US, Switzerland and Japan noted in their response to China's request for clarification that no further specificity was required as China had already identified the cases to the TRIPS Council in successive reviews and particularly in China's white paper distributed to the Council immediately prior to the art 63.3 Requests.⁶⁹ Meanwhile, in early 2006, China stressed its fulfilment of WTO obligations under art 63 of the TRIPS Agreement, the efforts of its 'competent domestic IPR authorities' to make 'relevant information publicly available', and the use of 'bilateral exchange and cooperation activities with WTO members' to provide further information on their IPR legislation and enforcement.⁷⁰ However, China maintained that it was not in a position to provide any 'judicial decisions and administrative rulings of general application' required under art 63.1 as 'China does not follow the common law system'.⁷¹ The response by Switzerland, also a nation that does not follow the common law system, dismissed China's objection pointing out that:

Article 63 of the TRIPS Agreement being applicable to all WTO Members, we interpret Article 63.1 and 3 as referring to final judicial decisions in the sense of decisions which have become legally binding because they have either not been appealed or were rendered by the court of final instance.⁷²

It is arguable that China was not comfortable with the to and fro nature of exchange in this WTO forum and consequently reverted to bilateral mechanisms, inviting the US in March 2006 to participate in constructive discussions to improve

⁶⁵ USTR, *2006 Special 301 Report* (28 April 2006).

⁶⁶ *Ibid.*

⁶⁷ Susan Krause, 'Legislators Detail Concerns about Counterfeit Goods from China' *Washington File*, US Department of State, Office of International Information Programs (12 June 2006).

⁶⁸ Lee Hannon, 'Nation should be taken, not stirred', *China Daily* (online), 31 March 2011: <http://www.chinadaily.com.cn/bizchina/2011-03/31/content_12258494.htm>.

⁶⁹ IP/C/W/461/Add.1, 24 January 2006(US); IP/C/W/462/Add.1, 1 February 2006 (Switzerland); and IP/C/W/463/Add.1 24 January 2006 (Japan).

⁷⁰ *Response to a Request for Information Pursuant to Article 63.3 of the TRIPS Agreement: Communication from China*: IP/C/W/465 (23 January 2006); IP/C/W/466 (23 January 2006); and IP/C/W/467 (23 January 2006).

⁷¹ *Response to a Request for Information Pursuant to Article 63.3 of the TRIPS Agreement: Communication from China*: IP/C/W/465 (23 January 2006).

⁷² *Follow-up Request for Information Pursuant to Article 63.3 of the TRIPS Agreement: Communication from Switzerland — Addendum*, IP/C/W/462/Add.1 (1 February 2006).

IPR enforcement transparency. China and the US engaged, and continue to engage, through the Joint Commission on Commerce and Trade ('JCCT') and the JCCT Intellectual Property Rights Working Group (except during the suspension of negotiations during the dispute on enforcement of Intellectual Property Rights discussed in part VI below). This behaviour is in line with the view that China was more conciliatory as a defendant and reluctant as a complainant in its early engagement with WTO dispute resolution mechanisms.⁷³ China's concessions included making 'previously unavailable IPR criminal prosecution data' together with IPR enforcement statistics available to the public in both Chinese and English.⁷⁴ The next step was the creation of China's Action Plan of IPR Protection 2006⁷⁵ which also encompassed 2007.⁷⁶ This Action Plan was formulated by the National IPR Protection Working Group Office working together with other relevant government departments and covered four major spheres: copyright, patents, trademarks, and import/export.⁷⁷ Legislation and judicial interpretations of the Supreme People's Court were either to be revised and improved or newly formulated.⁷⁸ A number of enforcement and public awareness campaigns were devised and a service centre was established for the reporting of intellectual property violations.⁷⁹ Training programs, international exchanges and cooperation activities for personnel engaged in the protection of intellectual property also featured heavily in the Action Plan.⁸⁰ This would go some way toward meeting the requirements of pt 1 para 2(C) of the Protocol.

In addition, the major courts dealing with IPR cases began to provide decisions online in the Chinese language but summaries of IPR cases in English could be obtained on the IPR dedicated website, *Intellectual Property Protection in China*.⁸¹ However, despite the promise of such action, the US, joined by several third parties including Australia, chose to utilise the dispute resolution mechanism of the WTO to target specific issues that arose time and again in relation to China's Intellectual Property regime. These are discussed in the next section. What is important to note is that by this stage of China's membership of the WTO it had already initiated two WTO cases as complainant and dealt with three as respondent (some with multiple complainants).⁸² China was therefore not unfamiliar with the

⁷³ Marcia Don Harpaz, 'Sense and Sensibilities of China and WTO Dispute Settlement' (2010) 44 *Journal of World Trade* 1155, 1155 and 1158-9.

⁷⁴ USTR, above n 63.

⁷⁵ National IPR Protection Working Group Office, *China's plan on IPR Protection Action 2006 (I)*, <http://www.chinaipr.gov.cn/policyarticle/policy/documents/200610/233867_1.html> at 12 March 2012 and State Office of Intellectual Property Protection of the PRC, *China's plan on IR Protection Action 2006 (II)*, <http://www.chinaipr.gov.cn/policyarticle/policy/documents/200610/233870_1.html> . WIPO Confirms their prior existence online at < http://www.wipo.int/ip-development/en/strategies/national_ip_strategies.html#china>.

⁷⁶ China's Action Plan on IPR Protection 2007, <<http://au.china-embassy.org/eng/sgjs/Topics123/t313573.htm>>; see also <http://english.people.com.cn/200704/24/eng20070424_369187.html>

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ *Ibid.* The promotion of enterprise self-discipline and the provision of services to rights holders were also dealt with in the Action Plan as was the plan to conduct countermeasure oriented research.

⁸¹ *Intellectual Property Protection in China* <<http://www.chinaipr.gov.cn>>.

⁸² Ji and Huang, above n 1, 4 and 13.

dispute settlement process of the WTO and so it was no surprise that this action turned out to be a coup for China. The WTO Panel decided that China was, on the whole compliant with the *TRIPS Agreement* but required further enhancements to its regime such as the issue with the scope of copyright protection mentioned above and in relation to a specific aspect of Customs enforcement.

VI WTO Dispute Resolution Action: WT/DS362

On 13 August 2007, pursuant to art 6 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*, the US requested the Dispute Settlement Body to establish a panel to investigate specific measures affecting the protection and enforcement of Intellectual Property Rights in China.⁸³ The Panel membership was determined on 13 December 2007 and met with the parties (China and the US) on 14–16 April and 18–19 June 2008. Several third parties⁸⁴ reserved their rights to participate in the proceedings and met with the Panel on 15 April 2008. The Panel provided its interim report to the parties on 9 October 2008 and final report on 13 November 2008 with the report being made available through the WTO on 26 January 2009. There were three key issues in dispute, namely, the thresholds for criminal procedures and penalties in relation to wilful trademark counterfeiting or copyright piracy, China's measures for disposing of confiscated goods that infringe intellectual property rights, and the denial of copyright and related rights protection and enforcement to works that have not been authorised for publication or distribution within China.⁸⁵

The decision of the Panel was somewhat mixed, exemplified by the determination in relation to customs measures. The remedies under art 59 of the *TRIPS Agreement*⁸⁶ were determined to not apply to goods being exported. Further, the US did not make out that the customs measures were inconsistent with art 59 as it incorporates the first sentence of art 46 — namely, permitting the infringing goods to be 'disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder' or be destroyed. However, the customs measures were considered inconsistent with art 59 with regard to the fourth sentence of art 46: '[i]n regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in exceptional cases, to permit release of the goods into the channels of commerce'.

⁸³ This was after having filed two complaints against China on 10 April 2007: one relating to the protection of intellectual property rights (Dispute Number 362) and the other relating to publications and audiovisual products (Dispute Number 363).

⁸⁴ Argentina, Australia, Brazil, Canada, the EU, India, Japan, Korea, Mexico, Chinese Taipei, Thailand and Turkey.

⁸⁵ WTO, *China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights: Report of the Panel*, WT/DS362/R (26 January 2009) 2–3.

⁸⁶ Article 59 — Remedies:

Without prejudice to other rights of action open to the right holder and subject to the right of the defendant to seek review by a judicial authority, competent authorities shall have the authority to order the destruction or disposal of infringing goods in accordance with the principles set out in Article 46. In regard to counterfeit trademark goods, the authorities shall not allow the re-exportation of the infringing goods in an unaltered state or subject them to a different customs procedure, other than in exceptional circumstances.

Meanwhile, the US did not make out that the criminal thresholds for infringement were inconsistent with the requirements of art 61 of the *TRIPS Agreement*: '[m]embers shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale'. However the Panel did find in favour of the US on the inconsistency present by art 4 of the *Copyright Law*: '[w]orks the publication or distribution of which is prohibited by law shall not be protected by this Law'. In other words, the first sentence of art 4 of the *Copyright Law* was found to be inconsistent with China's obligations under art 41.1 of the *TRIPS Agreement* and art 5(1) of the *Berne Convention*, as incorporated by art 9.1 of the *TRIPS Agreement*.

China has claimed to have satisfied the requirements of the Panel. The *Copyright Law* was amended, effective 1 April 2010, with art 4 having a different focus and no longer denying copyright protection to those works not sanctioned by the state:

When exercising its/his/her copyrights, a copyright holder may not violate the Constitution or laws, or harm the public interest. The state shall regulate the publication and transmission of works in accordance with the law.

This amendment maintains China's sovereign right to review, edit or prohibit content as a means of protecting public well-being while simultaneously not restricting copyright protection.⁸⁷ The Customs regulations were also amended in accordance with the Panel decision, effective 1 April 2010.⁸⁸ Among others, para 3 of art 27 was amended in relation to imported goods that infringe another's trademark(s). The power of Customs to auction off infringing goods has been restricted. Merely removing the infringing trademark(s) from imported seized goods, except under exceptional circumstances, is not enough to permit Customs to auction off such goods.⁸⁹ This restriction does not apply to exported counterfeit trademarked goods, nor does it apply to goods which infringe copyright or patents — they are still capable of being auctioned off by Customs if there is no charitable organisation that could use the items or the intellectual property owner does not wish to purchase the items.⁹⁰ As before the amendment, where there are infringing features which cannot be removed from the confiscated goods, Customs has the obligation to destroy such goods rather than allow them to be auctioned.⁹¹

These changes, while addressing the determinations of the WTO Panel, are but part of the overall strategy to improve IPR protection and enforcement in China. China's engagement with the forum of the WTO, from the initial stages of accession, followed by the annual implementation reviews to the disputes brought

⁸⁷ WTO, above n 85, Annex B at B-12.

⁸⁸ Decree of the State Council of the People's Republic of China No.572, The Decision of the State Council on Amendment of the Regulations of the People's Republic of China on Customs Protection of Intellectual Property Rights, adopted at the 103rd executive meeting of the State Council on March 17, 2010, entered into force on April 1, 2010.

⁸⁹ *Regulations on Customs Protection of Intellectual Property Rights*, revised art 27 para 3.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

by significant WTO members, illustrates the significant influence the WTO has had over shaping law and policy in China. China's willingness to submit to the authority of the WTO panels has been said to demonstrate China's 'faith in western legal norms and institutions as well as respect for international rules, at the expense of its sovereignty, historically one of its most sacred policy goals',⁹² a far cry from China's international relations a century earlier. Through this legal transplant mechanism, China has achieved a developed, internationally comparable intellectual property regime in a relatively short space of time. The failings of the regime relate to the enforcement part of the equation and this is recognised in the *National Intellectual Property Strategy* to be considered in the following section along with other influences in developing China's intellectual property regime.

The *National Intellectual Property Strategy* was effectively a comprehensive action plan for IPR Protection finalised in 2008 followed by a process of implementation. In May 2009, several months after the decision of the WTO Panel in WT/DS362, the Deputy Director General of the State Intellectual Property Office visited Australia to inform the intellectual property profession and other stakeholders of the magnitude of this action plan.⁹³ This was significant, providing an intense strategy to deal with intellectual property enforcement in addition to its primary objective of developing innovation. The enforcement aspect of the plan that will be outlined in Part VII below.

VII The National Intellectual Property Strategy

As discussed above, in 2006 China entered into joint talks with the US and developed an action plan for improving transparency of intellectual property rights enforcement. However, while improvements have been achieved in overall levels of intellectual property enforcement, China remains one of the major nations engaged in piracy of intellectual property.⁹⁴ This remains so despite the paradigm shift that led to the development of the current *National Intellectual Property Strategy*.⁹⁵ Unlike previous intellectual property action plans designed to placate the major producers of intellectual property — the US, the EU and Japan — this strategy approached the issue from the perspective of encouraging home-grown innovation.

On 5 June 2008, the *National Intellectual Property Strategy* came into operation.⁹⁶ The purpose, contained in para (4), is ultimately 'to make China an innovative country' through promoting the nation's 'capacity in creation, utilisation, protection and administration of intellectual property' and thereby 'improve China's capacity for independent innovation'. The strategy is expected to

⁹² Harpaz, above n 73, 1156.

⁹³ The Faculty of Law at UTS hosted all three of the Sydney workshops and public addresses for Deputy Director General Zhang.

⁹⁴ See, eg, USTR, *Special 301 Report 2010* (30 April 2010) <http://www.ustr.gov/webfm_send/1906>.

⁹⁵ Current at the time of writing and supplemented by the *Action Plan on Intellectual Property Protection 2011*.

⁹⁶ State Council of the People's Republic of China, *Outline of the National Intellectual Property Strategy*, 5 June 2008, <http://www.gov.cn/english/2008-06/21/content_1023471.htm>.

aid in the improvement of the socialist market economy, increase market competitiveness of Chinese enterprises and strengthen the core competitiveness of China, standardise market order and 'encourage the society to be more creditworthy'.⁹⁷ Effectively, China should be able to open up further to the outside world in a way that is beneficial to both China and the rest of the world.

The guiding principles to be used in achieving this purpose bring us back to Deng Xiaoping. Paragraph (5) requires that the guidance of Deng Xiaoping Theory be followed as well as 'the important thought of "Three Represents", [and] comprehensively apply the Scientific Outlook on Development and abide by the policy of encouraging creation, effective application, legal protection and scientific administration'.⁹⁸ The strategic goal is for China to achieve a 'comparatively high level...of...creation, utilisation, protection and administration of [intellectual property rights]' by 2020.⁹⁹

In the Strategic Measures pt V, the task of improving intellectual property law enforcement is outlined in s 4. The first two strategies recognise the importance of improving the court system and judicial interpretation. These are found in paras 45 and 46 respectively:

(45) Improve the trial system for intellectual property, optimize the allocation of judicial resources and simplify remedy procedures...

(46) Judicial interpretation on intellectual property needs to be improved...¹⁰⁰

In both instances it is recognised that research is required to improve systems, institutions and knowledge from the granting of intellectual property rights through to the enforcement of those rights. This demonstrates that the cultural, institutional and social experiences of western nations with established enforcement regimes are not readily transplantable into the Chinese context but that further investigation is required to achieve similar standards.

The next two strategies recognise the significance of ensuring well-trained and well-resourced law enforcement personnel for both domestic needs and border control. These are found in paragraphs 47 and 48 respectively:

(47) Improve the overall competence of intellectual property law-enforcement personnel and reasonably distribute law-enforcement resources to improve the efficiency of law enforcement.

(48) Customs law enforcement and border protection of intellectual property need to be strengthened to maintain order in import and export and improve the reputation of China's export commodities.

⁹⁷ Ibid [4].

⁹⁸ Ibid [5]. Deng Xiaoping Theory encapsulates the merging of a market economy with a socialist political system; 'Three Represents' describes the more recent ideology of the Communist Party of China: 'It represents the development trends of advanced productive forces. It represents the orientations of an advanced culture. It represents the fundamental interests of the overwhelming majority of the people of China. [Espoused] by Jiang Zemin, former Chinese president, in 2000': China Through a Lens, *What is 'Three Represents' CPC Theory?* <<http://www.china.org.cn/english/zhuanti/3represents/68735.htm>>.

⁹⁹ State Council of the People's Republic of China, above n 96 [6].

¹⁰⁰ Ibid [45]-[46].

In each of the above strategies, steps have already been taken including investigating the establishment of a dedicated Intellectual Property Appeal Court, increased volume of criminal actions, improvements in customs law enforcement (partly due to the result of the findings of the WTO Dispute Resolution Committee in January 2009) including the joint EU-China action plan (see below), to mention a few. But the Strategy is much broader than just enforcement and trials. It encompasses legislative reform, of which there has been significant development in the last 18 months, institutional building, publicity campaigns, training and education, international exchange and cooperation, plans for promoting enterprise intellectual property rights protection, providing services for the rights owners, and special research projects. Section 8 is concerned with developing an intellectual property culture:

(63) Set up a working mechanism for publicizing information about intellectual property that is led by the government and supported by the media, in which the public widely participates. ...

(64) Offer intellectual property courses in higher education institutions and ...introduce education on intellectual property into the quality-based education to students of such institutions. ...¹⁰¹

This is ambitious but then China has managed to transition from a nation with no property rights to one which recognises and protects sophisticated intangible property rights in 30 years. But intangible rights are difficult to comprehend even in societies that have recognised them for 400 years.

Under this strategy, the *Patent Law* was amended. Now the newly-amended *Patent Law 2008* has a different art 1:

This Law is hereby formulated in order to protect the legitimate rights and interests of patentees, encourage inventions and creations, promote the application of inventions and creations, improve the innovation capability, and promote the scientific and technological progress and economic and social development.

While the overall implications of the meaning of art 1 are similar to prior versions, namely, encouraging and protecting inventions, there are nuances in the choice of words in the last phrases. The 1984 version of art 1 recognises what Deng Xiaoping had pointed out in his many speeches:¹⁰² the need for China to raise its scientific and technological capabilities in order to achieve the four modernisations.¹⁰³ Meanwhile, the 2008 art 1 provides a different emphasis, encouraging the ability of China to be an innovator and not just an absorber of science and technology and the more general concepts of 'economic and social development' are used instead of the allusion to the four modernisations. This might reflect a view that, over the 24 years since the first *Patent Law*, China has

¹⁰¹ Ibid [47]–[48].

¹⁰² Ibid.

¹⁰³ See, eg, the report of the Ministry of Commerce which acknowledges that during the early days of the Open Door Policy, the introduction of intellectual property laws in China aimed to 'meet the requirements of economic development and scientific advancement', MOFCOM, *Status Regarding Legislation in Terms of IPR in China* (25 March 2005) <<http://english.mofcom.gov.cn/article/newsrelease/significantnews/200503/20050300029467.html>>.

'caught up' to the rest of the industrialised world and is now in the next phase of its development. However, the 2008 art 1 demonstrates greater harmonisation with international obligations by more accurately reflecting the objectives of the TRIPS Agreement found in art 7 reproduced above.

The *Patent Law 2008* (and its corresponding Implementing Regulations) overall provides a significant overhaul of China's patent regime. Changes include:

- the requirement of prior notification and confidential review for patent applications filed directly in a foreign country;
- the introduction of an absolute novelty requirement for patentability;
- special provisions concerning the protection of inventions relying on genetic resources
- the ability of foreign patent applicants to choose any qualified patent agency, no longer restricted to PRC agencies;
- the implementation of the *TRIPS Protocol* for the production of generic pharmaceuticals for export to least developed nations;¹⁰⁴ and
- heavier administrative penalties and statutory damages.

The third and fifth amendments referred to above demonstrate China's willingness to align itself with the views of a significant group of developing nations in the way that the TRIPS Agreement is interpreted. The requirement to provide information regarding inventions involving genetic resources addresses issues that have arisen over many years in relation to the Convention on Biological Diversity.¹⁰⁵ Many biodiversity rich nations are developing nations keen to stop biopiracy of their resources by the developed world through patents for pharmaceuticals. They have required details of inventions relying on such resources to combat such biopiracy. Further, the implementation of the amendments to compulsory licensing provisions in accordance with the TRIPS Protocol demonstrates how China can take advantage of its growing pharmaceutical manufacturing capacity in line with amendments to the TRIPS Agreement. What with China's rich history of traditional medicines and its growing capacity to manufacture generic medicines, these amendments to the *Patent Law* are examples of China utilising WTO negotiations and aligning itself with the growing strength of developing nation members in order to achieve its goal of being an 'innovation nation'.

VIII Other Foreign and Local Influences

According to the *IPR Enforcement Report 2009* from the Commission of the European Communities, China remains the primary nation of concern for EU companies, with 54 per cent of detained products at EU borders in 2008 originating from China.¹⁰⁶ But China's various intellectual property rights strategies have had some impact. For example, during the period 2004-08, there

¹⁰⁴ *Protocol Amending the TRIPS Agreement*, Amendment of the TRIPS Agreement, General Council WT/L/641, 8 December 2005.

¹⁰⁵ *Convention on Biological Diversity*, Rio de Janeiro, Brazil, 1760 UNTS 79, opened for signature 5 June 1992, (entered into force 29 December 1993).

¹⁰⁶ Commission of the European Communities, *IPR Enforcement Report 2009*, (September 2009) 5.

was a 10 per cent reduction in piracy rates for software. China is no longer in the top 20 countries displaying the highest rates of piracy in the industry.¹⁰⁷ Despite this, the EU report provides a disturbing analysis regarding the reason for the scale of infringements:

...access to the Chinese judicial system is made difficult in practice because of burdensome and costly legalisation and notarisation requirements, the ineffectiveness of the preliminary injunction system and the inadequacy of the damages awarded. It is also reported that criminal sanctions are difficult to obtain. Moreover, the improving willingness of authorities is affected by a lack of effective cooperation between themselves, by insufficient training of the staff involved, and by a very low level of public awareness regarding IPR.¹⁰⁸

The *National Intellectual Property Strategy* discussed above recognises these shortcomings. National enforcement rates for civil judgments are relatively low¹⁰⁹ and tend to correlate with the economic development of the region in which the court is located.¹¹⁰ This is often associated with the factors of corruption and protectionism at the local level.¹¹¹

However, compared to other developing nations with a similar per capita income, China's overall corruption levels have been found by the World Bank to be lower.¹¹² This may be attributed to the significant efforts made by the central government to combat corruption. For example, Keith Henderson notes that China's 'judicial system is emerging as a key institution in the reform process' and that this has occurred in a relatively short period of time.¹¹³ He then goes on to explain the next steps that China must take in order to address judicial corruption, one of the keys being the establishment of a truly independent judiciary but also dealing with the underlying causes of corruption:

Addressing and preventing corruption requires open, transparent, accountable, accessible legal and judicial processes, and professional judges with integrity. These processes include all key phases of the judicial system, including budgets, appointments, promotions, discipline, trials, decisions, appeals and enforcement. In China, making judicial processes more transparent and

¹⁰⁷ Business Software Alliance: *Sixth Annual BSA — IDC Global Software 08 Piracy Study, In Brief* (May 2009) <<http://global.bsa.org/globalpiracy2008/studies/studybrief.pdf>>.

¹⁰⁸ Commission of the European Communities, above n 106, 6.

¹⁰⁹ For example, enforcement rates have been noted at 40 per cent for the High People's Courts, 50 per cent for Intermediate People's Courts and 60 per cent for the Basic or Primary People's Courts: Robert Slate, 'Judicial Copyright Enforcement in China: Shaping World Opinion on TRIPS Compliance' (2006) 31 *North Carolina Journal of International Law and Commercial Regulation* 665, 686.

¹¹⁰ Xin He, *The Enforcement of Commercial Judgments in China*, The Foundation for Law, Justice and Society in collaboration with The Centre for Socio-Legal Studies, University of Oxford <<http://www.fljs.org/uploads/documents/Xin%20He%231%23.pdf>>.

¹¹¹ As David Murphy has pointed out, despite the prosecution of corrupt judges for the acceptance of bribes, 'courts remain ineffectual because local judges are literally in the pocket of local governments, which pay their wages and routinely influence decisions. Most people have little chance of a fair hearing against anyone with government connections': Slate, above n 109, 686–7, quoting David Murphy, 'When Courts Don't Work' (2004) 40 *Far Eastern Economic Review* 26.

¹¹² Keith Henderson, 'The rule of law and judicial corruption in China: half-way over the Great Wall', in Transparency International, *Global Corruption Report 2007: Corruption in Judicial Systems* (Cambridge University Press, 2007) 151, 156.

¹¹³ *Ibid* 151–2.

opening courtrooms to the public would seem to be among the very highest reform priorities.¹¹⁴

The significance of an independent judiciary becomes clear when one realises that there are approximately 200 000 judges in China.¹¹⁵ However, one must remember the distinction between regions and the impact that has on the question of protectionism and corruption. Where enforcement is sought in major centres, the systems and infrastructure in place have seen greater levels of success.¹¹⁶ It is also arguable that intellectual property related cases are more likely to be initiated in such centres as the parties are more likely to be located there than in the more remote underdeveloped regions.

Consider the volume of intellectual property infringement cases. Nationally in 2007, SIPO statistics showed that there were approximately 17 877 intellectual property rights civil cases and 2684 criminal cases.¹¹⁷ Of those cases some five per cent were brought by foreign companies — a continuing trend as the following statistics will show. SIPO's 2008 report, *China's Intellectual Property Protection in 2008*, illustrated significant increases in civil and criminal intellectual property cases.¹¹⁸ Some 24 406 first instance civil cases were filed nationally with 23 518 being resolved. Copyright was represented by 10 951 cases, trademarks accounted for 6233 cases, patents accounted for 4074 cases with 1185 unfair competition cases, 623 technology contracts cases and 1340 other cases. Further, 4759 appeals were filed with 4699 being resolved. Meanwhile, local courts resolved 3326 intellectual property related criminal cases.

Once again, the vast majority of these cases are between Chinese parties with only 1139 first-instance civil cases involving foreign parties and 225 involving parties from Hong Kong, Macau and Taiwan.¹¹⁹ However, despite these significant volumes of intellectual property related cases, they represent approximately 0.3 per cent of all cases dealt with annually in China.¹²⁰ This brings the importance of intellectual property rights enforcement into perspective. But perhaps what is a driving force is the fact that 95 per cent of cases are between Chinese parties. Consequently, the central government's focus on improving intellectual property protection and enforcement is not just due to foreign pressures but also internal pressures. Rather, domestic enterprises have realised the value of intellectual property rights and have a vested interest in enforcing these rights.

This is borne out as the EU Report acknowledges that the current *National Intellectual Property Strategy* is domestically oriented.¹²¹ This strategy, in focusing on making China an innovative nation, is reaching back to the four

¹¹⁴ Ibid 158.

¹¹⁵ Ibid 152.

¹¹⁶ For example, 90 per cent of civil and criminal judgments by Beijing courts have been enforced during the period 2003 to 2006: Slate, above n 109, 686.

¹¹⁷ SIPO, *China's Intellectual Property Protection in 2007*, <http://www.chinaipr.gov.cn/policyarticle/policy/documents/200804/237294_2.html>.

¹¹⁸ SIPO, *China's Intellectual Property Protection 2008*: <http://www.sipo.gov.cn/sipo_English/laws/whitepapers/200904/t20090427_457167.html>.

¹¹⁹ Ibid.

¹²⁰ Slate, above n 109, 693.

¹²¹ Commission of the European Communities, above n 106, 5.

modernisations espoused by Deng Xiaoping at the beginning of the Open Door Policy. It recognises that progress as a nation is dependent on domestic innovation, however, the necessary stage of technology transfer from foreign interests made clear the significant role that intellectual property rights play in the innovation process. It is no wonder that one of the more recent developments in China's innovation strategy was a policy to give preference to 'self-innovation products' in government procurement, also known as the 'indigenous innovation policy'. For manufacturers to be able to use the term 'self-innovation products', they must have locally-owned intellectual property rights. This means that products developed in China but by a foreign owned enterprise would not qualify for the preferential treatment, a matter of considerable concern for foreign technology producers.¹²² Such policies have been developed at all levels of government procurement. However, this has created significant concern for China's trading partners and was reported in the US Special 301 Reports for 2010¹²³ and 2011¹²⁴ which condemned these policies as contrary to free trade principles. China made some effort to address the concerns by voiding three key policies with effect from 1 July 2011 but many more have been thus far left in place.¹²⁵ China is not a member of the WTO Agreement on Government Procurement¹²⁶ but is currently an observer negotiating accession. Perhaps this is what influenced China to take steps to placate US concerns.

It is important to remember that the previous intellectual property strategies were developed also in response to foreign pressures such as dealing with complaints over counterfeiting or piracy brought by the US and other intellectual property exporting nations and complying with the WTO Protocol. These foreign pressures have clearly not come to an end. The EU Report notes the joint EU-China initiatives establishing an EU-China IP Dialogue and an EU-China IP Working Group.¹²⁷ The first is an annual event dealing with general issues of regulation and enforcement and information exchange while the second is mandated to deal with specific issues or sectors.¹²⁸ In addition, an action plan concerning EU-China customs cooperation on intellectual property rights was adopted in January 2009. Meanwhile, China remains on the US priority watch list of the Special 301 Report for 2010 which claims that 'China's IPR enforcement regime remains largely ineffective and non-deterrent'.¹²⁹ The US border experience is worse than that of the EU with infringing 'product seizures at the US border that were of Chinese origin [accounting for] 79 per cent in 2009, a small decrease from 81 per cent in 2008'.¹³⁰ The avenue for further discussion and

¹²² USTR above n 94, 19.

¹²³ *Ibid.*

¹²⁴ USTR, Special 301 Report 2011 (April 2011) < <http://www.ustr.gov/about-us/press-office/reports-and-publications/2011/2011-special-301-report>>.

¹²⁵ US China Business Council, *USCBC Statement on China's Innovation and Procurement Regulatory Changes* (29 June 2011), <<https://www.uschina.org/public/documents/2011/06/statement-on-regulatory-changes.html>>.

¹²⁶ *WTO Agreement on Government Procurement*, entered into force 1 January 1996.

¹²⁷ Commission of the European Communities, above n 106, 5.

¹²⁸ *Ibid.*

¹²⁹ USTR, above n 94, 19.

¹³⁰ *Ibid.*

negotiation between the US and China remains the Joint Commission on Commerce and Trade (JCCT) and the JCCT Intellectual Property Rights Working Group.

IX Conclusion

During China's Maoist era, there was a complete absence of intangible property rights, but with the opening up of China came the necessity for the nation to embrace the concept of property rights, at least for the purpose of engaging with foreign interests. As interactions with these foreign interests and foreign markets increased, China's hunger for commodities and technology escalated and with it the demands by those foreign interests to have their intellectual property rights protected. The pirating nation that ensued demonstrated how difficult it is to move from traditional collective doctrine to private property rights regarding intangibles. It is evident that actions taken by China to improve its intellectual property regime were a result of foreign pressure and in particular the prize of accession to the WTO and maintaining that membership. However, it is equally clear that China's self-interest in becoming an 'innovation nation' is what permitted the foreign pressure to have an impact. China's current standing in the world economy is already a testimony to Deng Xiaoping's vision. In the last decade China has embraced operating in a WTO dominated world, acknowledging the importance of abiding by its rules but also exploring how this forum can be utilised for advancement. Rather than resisting engagement at a global level, China has been learning how to play the game but equally has shown determination to shed its 'pirating' reputation in order to move toward the desire of being an 'innovation nation'.