THE UNIVERSITY OF CALGARY

The Emergence of The Sino-US Intellectual Property Rights Regime

by

Ying He

A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES

IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE

DEGREE OF MASTER OF ARTS

DEPARTMENT OF POLITICAL SCIENCE

CALGARY, ALBERTA

JANUARY, 1998

ABSTRACT

This thesis contends that, during the period from the establishment of Sino-US diplomatic relations in 1979 to the conclusion of the Sino-US IPR Enforcement Agreement of 1996, the People's Republic of China and the United States were able to cooperate in the fashioning of an incipient IPR regime. This cooperation was achieved even in the context of differences of national interests, ideology, culture and legal system. The thesis draws upon international relations theories of neorealism, interdependence and regime formation in order to help identify and explain the competing aspects of conflict and cooperation which helped shape the emerging Sino-US IPR regime.

ACKNOWLEDGEMENTS

I would like to thank my supervisor, Dr. Ronald C. Keith, for his enthusiastic encouragement and valuable suggestions in bringing this thesis to completion. Furthermore, I am grateful to the Department of Political Science for its generous support in my graduate program. I would also like extend my sincere thanks to the members of the Committee.

In addition, funding provided by the University Research Grants Committee enabled me to travel to Stanford University, where I conducted research at the East Asian Library and other libraries. While in Stanford, I received enormous support from the personnel in the Hoover Institution, particularly Ms. Julia Tung.

Finally, I owe the greatest debt to my family, my parents, Lijuan Wang, Enchun He, and my husband, Zhanshan Gao, for their selfless and unswerving support. It is to them that this thesis is dedicated.

TABLE OF CONTENTS

ABBREVIATIONS

CPO	The Chinese Patent Office
CTO	The Chinese Trademark Office
CCO	The Chinese Copyright Office
GATT	General Agreement on Tariff and Trade
IPR	Intellectual Property Rights
IR	International Relations
ITC	International Trade Commission
MOFTEC	Ministry of Foreign Trade and Economic Cooperation
MOU	Memorandum of Understanding Between the Government of PRC and the Government of the US on the Protection of Intellectual Property
MFN	Most Favoured Nation
NCA	National Copyright Administration
NTE	National Trade Estimate
OTCA	Omnibus Trade and Competitiveness Act
PRC	People's Republic of China
SAIC	State Administration for Industry and Commerce
TRIPs	The Agreement on Trade Related Aspect of Intellectual Property
USC	United States Congress
USTR	United States Trade Representative
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

INTRODUCTION

Intellectual Property Rights Protection and International Relations Theories

This thesis addresses the issue of trade conflicts over the protection of intellectual property rights between the People's Republic of China and the United States from 1979 to 1996. The thesis deploys international relations theory in the explanation of Sino-US IPR relations[1] in this period. It contends that the two countries have been able to cooperate in the fashioning of an IPR regime even in the face of competing national interests. It attempts to shed some light on our understanding of Sino-American IPR relations. The introductory chapter is organized into the following three sections, namely, intellectual property rights, general theoretical approach, and the IPR regime between the PRC and US.

I. Intellectual Property Rights (IPR)

Intellectual property rights could be reviewed and better understood with reference to property rights theory. In property rights theory, property rights imply ownership in the industrial market economy.[2] "Ownership" refers to "a bundle of rights that an agent is empowered to exercise over an asset or a piece of property." Ownership is comprised of "utilization right," "the right to possess the fruits," "return right," and "alienation right".[3]

Property can be categorized into tangible and intangible property. Tangible property refers to anything visible and concrete, movable and immovable, such as real estate, land, etc. Intangible property refers to anything invisible and abstract, such as intellectual and creative works, the creation

of new knowledge and ideas, and the like. IPR per se involves a distinction between tangible and intangible property rights. The nature of intellectual property rights is intangible and is represented by the rights similar to those of property, such as utilization right, the right to possess the fruits, return rights, and alienation rights through licensing.

According to formal definition, "intellectual" means "of the intellect," "property" means "possession." So the original meaning of intellectual property rights refers to the possessions created by exercising one's intellect.[4] Thus, intellectual property is about the exclusive rights in valuable information.[5] In intellectual property rights theory, the conventional wisdom is that IPR "...grant the inventor, artist, or writer a temporary monopoly over the use of his or her creation and prevent competitors from sharing that knowledge without payment."[6]

Intellectual property rights (IPRs) are "...bestowed on owners of ideas, inventions and creative expression that have the status of property. Like tangible property, IPR give owners the right to exclude others from access to or use of their property."[7] The IPR holders have the monopoly and control over royalties and intellectual products which derive from intellectual endeavour and creativity, including trademarks, patents, copyrights, trade secrets and other related matters.[8] They can be traded and licensed like tangible property. IPR protection issues mainly resolve around whether intellectual property rights are respected and protected or not. Hence, unauthorized uses of IPR are defined as piracy[9], counterfeiting[10], and infringement[11].

According to the provisions of Article 2(viii) of the Convention Establishing the World Intellectual Property Organization[12], concluded in Stockholm in 1967, "intellectual property" comprises rights relating to the following:

(1) literary, artistic and scientific works;

(2) performances of performing artists, phonograms and broadcasts;
(3) inventions in all fields of human endeavour;
(4) scientific discoveries;
(5) industrial designs;
(6) trademarks, service marks, commercial names and designations;
(7) protection against unfair competition, and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.[13]

Protection of intellectual property rights has become one of the important issues within nation states and across international boundaries. On the international scale, intellectual property rights protection has captured worldwide attention in international trade, investment, technology transfer. The lack of IPR protection has become a significant barrier to trade.[14] Moreover, pertaining to the international trade regime, intellectual property rights were first included in the Uruguay Round in the General Agreement on Tariff and Trade (now replaced by its successor, the World Trade Organization).[15] On the national level, IPR protection has been critical for countries, whether developing countries or developed ones,[16] to accelerate expansion of economic development and to foster structural change in their legal systems. On the other hand, some authors are skeptical about the impact of IPR protection on the economic and political situation of developing nations.[17]

In the view of industrial countries, new technologies appear to support the economic concept that IPR protection stimulates innovation.[18] The industrial countries have a well-established legal framework for the protection of intellectual property rights. IPR principles and norms should be established, controlled, and respected. The industrialized countries have claimed billions of dollars in losses due to inadequate IPR protection in foreign nations, especially in developing countries.

In the view of the developing countries, they are reluctant to recognize IPR because they lack funds, research facilities, and technical personnel to conduct research and development.[19] They are reluctant to take a rigorous approach to the protection of IPR. The developing countries argue that

IPR protection is "culturally biased," and favours Western needs.[20] They justify their position by arguing: (1) the developed countries impose the concept of IPR on them;[21] (2) intellectual property is the common heritage and property of mankind and "piracy is the benign form of technology transfer;" (3) IPR protection and international trade are unrelated.[22] Thus, major differences in ideology, culture, and vested economic interests can give rise to international trade disputes over the protection of intellectual property rights.

The Sino-U.S. IPR dispute is one of these typical examples of international trade disputes between the developed countries and developing countries in the context of international relations. Allegations relating to China's inadequate protection of U.S. IPR products have become an issue of trade contention for the last 19 years. Some background is necessary here to establish the context of Sino-US IPR disputes.

From the American perspective, US products should be protected by intellectual property laws on a global scale, otherwise US competitiveness will be impaired. American investment in its products is increasingly threatened by a lack of adequate intellectual property protection in some countries and by problems of noncompliance and non-enforcement of intellectual property laws in others.[23] According to the United States Trade Representatives, the People's Republic of China is the largest pirate of American IPR products, including China's piracy of American music, film, software and other intellectual property.[24] As a result, the U.S. Trade Representative (USTR) began to threaten China with the withdrawal of its trade-related benefits if China did not take action to rectify the situation.

China's efforts in establishing intellectual property rights started relatively late. China has strengthened IPR laws and taken significant steps to enhance IPR protection and enforcement. China

has gone a long way in promoting intellectual property rights protection, promulgating various IPR laws, including the Trademark Law, the Patent Law, the Law on Technological Contracts, the Copyright Law, and Anti-Unfair Competition Law, and further revising some of these laws. And China has made positive efforts in enforcement to curb and halt piracy of foreign products. As well, China has brought its laws closer to the international standard.

But in the Chinese social context, people are not fully aware that intellectual property is a right that should be protected. In traditional Chinese culture and customs, the mind-set of some people is "to steal a book is not really stealing." People's behaviour is justified by defending themselves as "to steal a book is an elegant offense." Hence, various factors contribute to a severe clash of interests between US and China regarding IPR protection and enforcement.

The importance of studying Sino-U.S. IPR disputes is based on the following reasoning: (1) China is the largest developing country and the United States is the largest developed country in the world; (2) The IPR protection is one of the defining issues in Sino-U.S. relations, and has been significant in trade disputes between China and the United States since 1979; (3) China and US joint efforts to solve their IPR disputes may have significant implications for international relations.

The fundamental questions are: how did the People's Republic of China and the United States of America struggle to achieve a compromise in trade disputes over the protection of intellectual property rights? Why was China willing to close the gap between international IPR laws and China's domestic IPR laws ? Under what conditions and constraints were China and the US able to cooperate in the area of IPR protection?

II. General Theoretical Approach:

International relations theory can help provide a basis for the explanation of the case study

of the Sino-U.S. IPR dispute from the establishment of Sino-US diplomatic relations in 1979 to the conclusion of the Sino-US IPR Enforcement Agreement in 1996. Neorealism, interdependence and regime theory can help explain the emergence of a Sino-US IPR regime. The clash of interests between the two countries has been amenable to conciliation and compromise. By focusing on the Sino-US IPR regime, this thesis addresses the extent to which neorealism and interdependence help to explain and analyze the mixed nature of Sino-US cooperation and confrontation in the context of protecting their respective national interests from within rationalisation for complex interdependence. International relations theory could be used to explain how developing states (e.g., China) and developed states (e.g., the U.S.) reconcile the IPR issue and how the two countries resolve this dilemma in theoretical terms. The thesis advances several related proposition.

The first proposition is that the transformation and continuity of Sino-U.S. IPR regime has reflected the broader context of international relations. Chinese neorealism and Western neorealism, Chinese interdependence and Western interdependence are compared to see whether there are any substantial differences. The issue of intellectual property protection is then placed within the context of such a comparison. A number of questions naturally follow. To what extent are the notions of neorealism and complex interdependence reflected in Chinese and US foreign policies? To what comparative extent have they emphasized the need for understanding, cooperation, and integration within the global economy? The concepts of neorealism and interdependence are used to analyze how external pressure (i.e., American coercion) and the relationship of interdependence have affected Chinese legal institutions and infrastructure in the area of intellectual property rights. The upshot is that Sino-U.S. cooperation tends to fit closer to Robert Keohane and Joseph Nye's theoretical assumption that situations in world politics "fall somewhere on a continuum between the

ideal type of realism and complex interdependence."[25]

The second proposition is that Sino-U.S. intellectual property institutions constitute an emerging IPR regime as defined in international relations theory. What are the related principles, norms, rules, and decision-making procedure? Neorealism puts emphasis on the role of power. Weaker states will accede to the demands and preferences of powerful states. On the other hand, interdependence, especially in the era of economic interdependence, enhances the prospect of cooperation rather than confrontation when countries conduct their relations. In other words, comprehensive analysis of regime formation has to assess the assumptions of both neorealism and interdependence. The PRC in its participation in an incipient IPR regime has adapted to the increasingly interdependent world. China acted to avoid any economic harm to its national interests based on pragmatism and a parallel neorealism. US participation reflected its emphases on protection of national interests and the crafting of interdependence with China.

The theories chosen for the analysis - neorealism, interdependence, and regime theory - provide a possible framework for analysing changes in IPR protection between China and the United States. These theories help explain international cooperation and conflicts more generally, but they may also help to shed light on specific issues regarding intellectual property rights. The following literature review will help facilitate the analysis of the latter.

1. Realism and Neorealism

To begin with, the American school of realist/neorealist insight helps to provide a good starting-point for the analysis of cooperation and discord.[26] The central principle of realism is that an "autonomous political sphere" is dictated by "objective laws" rooted in human nature and validated by historical experience.[27] As E. H. Carr stated:

> In the field of thought, it (realism) places its emphasis on the acceptance of facts and on the analysis of their causes and consequences. It tends to depreciate the role of purpose and to maintain, explicitly and implicitly, that the function of thinking is to study a sequence of events which it is powerless to influence or alter. In the field of action, realism tends to emphasise the irresistible strength of existing forces and the inevitable character of existing tendencies, and to insist that the highest wisdom lies in accepting, and adapting oneself to, these forces and these tendencies.[28]

According to neorealism, or structural realism, international politics is conceptualized as "a system within a precisely defined structure."[29] Neorealism is defined as "a school whose members harbour shared assumptions about the primacy of states as international actors, the separation of domestic and international politics, and who describe the latter in terms of anarchy as a concomitant struggle for power and security."[30] Patrick James sums up this theoretical framework:

> States act out of self-interest and attempt to maximize relative power within constraints imposed by a given structure. Anarchy plays an immanent role in conditioning behaviour. This classical realism is merged with systemic theory, resulting in what has been known as neorealism or structural realism.[31]

This concept is an important approach to viewing world politics. Robert Cox explicitly argues that "neorealism, both in its Waltzian structuralist form and in its game-theoretic interactionist form, appears ideologically to be a science at the service of big-power management of the international system."[32] According to Waltz, international affairs is a struggle for power among individually sovereign states in an anarchic world environment. The neorealist analytical focus is the distribution of "power" around the globe.[33] Power or the distribution of capability is the basic element highlighted in neorealism in international relations. Power generally refers to influence and control exercised by one nation over other nations or over international events. Many neorealists argue that nations will act in terms of interests defined as power. This school of thought is often espoused by writers like Keohane, Krasner, and Stein.[34] They emphasize the importance of national

interest in influencing a nation's behaviour.[35]

Power politics feature the balance of power between countries. Powerful countries exercise their influence and control upon the weak ones in an attempt to make the weak comply. From the neorealist perspective, the game of international politics is conducted in the context of anarchy and revolves around the pursuit of power: "acquiring it, increasing it, projecting it, and using it to bend others to one's will."[36] Conceptualizing "the causal link between interacting units and international outcome,"[37] neorealism posits that structure influences the interaction of states and the outcome they produce. Neorealism focuses attention on how states behave toward one another, and further elaborates how conflicts of interest and patterns of cooperation emerge through their interactions and systemic influence. States may choose to work within the system according to the established practices in order to bring about the eventual realisation of their interests.[38]

Before proceeding, it must be noted that the concept of "balance of power" has been the subject of considerable confusion. Ernst B. Haas, for example, has identified no fewer than eight distinct usages of the term.[39] For the purpose of this thesis, "power" is more specifically related to the character of national interest. This definition is especially appropriate for the analysis of Sino-U.S. IPR protection in the context of international relations.

2. Hegemonic Stability Theory and Cooperation

Power is obviously featured in "hegemonic stability theory." The theory of hegemonic stability defines hegemony as preponderance of material resources.[40] This "basic force model" argues that "one state is powerful enough to maintain the essential rules governing interstate relations, and willing to do so."[41]

The theory of hegemonic stability predicts that the more one such power dominates the world

political economy, the more cooperative will interstate relations be.[42] Joseph Grieco suggests that realism is the most compelling theory to explain international cooperation.[43] Neorealism admits that hegemony can facilitate cooperation, therefore it needs a hegemon to translate their resources, both material and ideological, into rules for the system. The hegemon seeks to persuade others to conform to its vision of world order and to defer to its leadership.[44] Cooperation involves mutual adjustment and could only arise from conflict or potential conflict.[45]

States have a vested interest in some kind of cooperative structures in international relations. This is one of the fundamental premises espoused by Hedley Bull.[46] Bull argues that states will pursue cooperative behaviour or abide by rules in international relations on the basis of their calculation of long-term benefits of rule maintenance rather than short-term benefits of breaching the rules or defecting from cooperation.[47] Keohane then argues that cooperation is typically mixed with conflict and reflects partially successful efforts to overcome conflict.[48]

Sino-U.S. IPR protection can be analysed in light of such a theory. The U.S. has often resorted to measures to force resisting states to pass laws strengthening intellectual property protection.[49] American leaders did not construct a hegemonic regime simply by commanding their weaker partners to behave in prescribed ways. On the contrary, they searched for mutual interests with their partners, and they had to make some adjustments themselves in addition to demanding that others conform to their design. Indeed, it is consistent with Hedley Bull's neorealist assumption. Hedley Bull assumes that states' behaviour is guided by inherent rationality which is defined as a "sense of action that is internally consistent with given goals."[50] However, Bull goes on to argue that such realism is unworkable that states seek to satisfy their own self-interest in total disregard of the interests of their counterparts.[51] That is why countries have to search for mutual interests and that

is why they become engaged in constant adjustment with their partners.

3. Free-Riding and Relative Gains

Realism finds that there are at least two major barriers to international cooperation, namely state concerns about cheating and relative gains.[52] First, collaboration becomes conflictual when the parties concerned disagree on the distribution of potential benefits.[53] Neorealists emphasize relative gains as opposed to absolute gains posited by neoliberals.[54]

> Neorealists ask the question "Who will gain more?" as Waltz suggests: When faced with the possibilities of cooperating for mutual gains, states that feel insecure must ask how the gain will be divided. They are compelled to ask 'Will both of us gain?' but 'Who will gain more?' If an expected gain is to be divided, say, in the ratio of two to one, one state may use its disproportionate gain to implement a policy intended to damage or destroy the other....the uncertainty of each about the other's future intentions and actions works against their cooperation.[55]

An examination of the foregoing statements yields several elements consistent with the neorealist view of international relations discussed earlier. The conflicts of interest result in discord,[56] which hinders the prospect for mutual cooperation and benefits. Hence, in the case study of Sino-U.S. IPR protection, China's piracy in intellectual property was annually pegged at $1 billion in lost U.S. exports.[57] The American mentality is based on the assumption that China has profited relatively more from pirating American IPR products and has gained a free-ride to the extent that it damages American economic interests. This would appear to be "relative gains" as opposed to absolute gains. China apparently gained the lion's share in disproportion to American gains in the area of intellectual property.

Secondly, the United States accused China of "cheating", "defection", and "free-riding," because American sales of IPR products have already been preempted by domestic piracy in China. The U.S. then resorted to legal leverages[58] and the threat of trade sanctions as bargaining chips to

intimidate and force China to conform to American trade practice. As Grieco writes, "perhaps a partner will achieve favourable gains, and thus strengthened, might some day be a more dangerous enemy than if they had never worked together."[59] The United States is uneasy at the perception that China with strong and growing power will constitute a threat to the U.S. in the future. Such a "China Threat" is predicated in the neorealist notion that relative gains may advantage partners and thus may foster a potential adversary in future in terms of relative power.[60]

4. Chinese Neorealism

The foregoing discussion related neorealism to American foreign policy articulation. In order to have a basis for comparison of Sino-US IPR protection in the international sphere, one has to explore the extent to which there is a comparable or parallel neorealist tendency in China. Given differences in social systems, ideologies, developmental paths, and national interests, it is not surprising that Chinese neorealist thinking and Western neorealism both diverge and converge.

In terms of divergence, Chih-yu Shih argues that Chinese neorealist premises are different from their Western counterpart. Chinese neorealism has no real political, economic, or cultural bases that are common to the rest of the world.[61] In terms of convergence, Shih defined Chinese neorealism as "the pursuit of broadly defined national interests with special attention to the necessity of building and utilizing international regimes to enhance national economic development."[62] An influential PRC scholar, Huang Xiang, made the following parallel argument:

> ...countries think about problems mainly in terms of their national and state interests and not world integration. When everyone is hurt by competition and lacks the means to compete, accommodation occurs. Not long afterwards, they clash again because of competition. Then the cycle of competition-clash-accommodation is repeated.[63]

As well, it is interesting to make a comparison between Western and Chinese neorealist

conceptions of material power and normative power. Samuel Kim argued that material power is defined as "conventional national capability based on economic, military,...technological factors." He used normative power in relation to "the ability to define, control, and transform the agenda of world politics and to legitimate a new dominant social paradigm."[64] According to Cox, Western neorealism "reduces the structure of world order to the balance of power as a configuration of material forces....[while] neorealism emphasizes a low value on the normative and institutional aspects of world order."[65]

In the Chinese context, interpretation of material power and normative power has changed over time. In the Maoist era, Mao attached great importance to normative power (e.g., justice) as a crucial component of national and international power.[66] During the Post-Mao or Dengist era, the Chinese concept of power shifted from normative to material.[67]

Western neorealism and China's neorealism increasingly shared a common ground of material power rather than normative power. As one Chinese scholar argued, goals of nations were said to be a multidimensional, but they still emphasized largely military/materialist comprehensive national strength.[68] In the world today, countries still put emphasis on the distribution of capabilities and equilibrium of power, especially the acquisition, augmentation, and projection of material power as a national goal.

Mao's thoughts on the "real world," and Deng's concepts of China's "reform and opening" help explain Chinese "neorealism." Mao Zedong's vision of "seeking truth from facts" is consonant with the "objective reality" of Western realism. Mao explained with reference to Marxist dialectical materialism:

The Marxist philosophy of dialectical materialism has two outstanding characteristics.

> One is its class nature: it openly avows that dialectical materialism is in the service of the proletariat. The other is its practicality: it emphasizes the dependence of theory on practice, emphasizes that theory is based on practice and in turn serves practice. The truth of any knowledge or theory is determined not by subjective feelings, but by objective results in social practice.[69]

From Mao Zedong's epistemology discussed above, it is evident that there is a potential comparability between Chinese realism and Western realism. Indeed, Mao stated: "we are not utopians and cannot divorce ourselves from the actual conditions confronting us."[70] Mao Zedong argued, "the capitalist and socialist countries will yet reach compromises on a number of international matters, because compromise will be advantageous."[71] Mao's Marxist practicality, "make the past serve the present," "make foreign things serve China," lends itself well to this international conduct given its "objective reality." As J.D. Armstrong sums up:

> An additional problem arises from the assumption that the "national interest" represents "realism" and "ideology" represents "idealism," where "realism" means an emphasis on limited and short-term goals or on flexible and subtle means of attaining goals, whereas "idealism" denotes long-term, utopian, or revolutionary goals and/or impractical, naive methods of attaining goals. The difficulty in the case of Communist countries stems from the fact that the Leninist component of their official ideology as well as Mao Tse-tung's additions to the "treasury of Marxism-Leninism" are concerned as much with the practical techniques of winning and maintaining power as with ultimate purposes. Moreover, their emphasis is consistently on the necessity of employing "realistic" means in the sense discussed here.[72]

Subsequently, Deng Xiaoping focused on a prosperous, wealthy China. Deng stated, "...reform and greater openness are China's only way out." Under Deng's leadership, since 1978, Mao's "seeking truth from facts" has become a key phrase symbolizing Deng's pragmatic values.[73] Deng initiated the "Four Modernizations" and "Opening up to the Outside World" in the late 1970s. Deng's indifference to ideology has been glorified in his saying, "It does not matter whether a cat is white or black so long as it catches mice" and "To be rich is glorious." Deng's "cat theory"

reflected his pragmatism and self-serving interests. And Deng's pragmatic approach is consistent with those of western neorealist tradition informed by objective reality, national interest, and rationality.

Chinese behaviour is also constrained and conditioned by the international anarchic system. Samuel Kim argues, because of China's unique status in the post Mao era as a "poor global power," China's leaders focused on a wide range of specific policies to extract maximal benefits without at the same time suffering overwhelming constraints.[74] Chinese "neorealism" also reflected an ability to achieve necessary compromise in the face of adverse material odds. Kim has argued that "China's development strategy reflects a neo-mercantilist, state-centered, and state-empowering model."[75] This is further evidenced in Lucian Pye's argument:

> The extreme shifts in Chinese foreign policy, which always represent fine calculations of China's national interests, stand as testimony to the Chinese sense of reality, unaffected by sentimentality, and to their keen understanding of the current play of power in world affairs.[76]

This clearly shows that Chinese neorealism and Western neorealism are roughly parallel in their calculation of national interest, the understanding of the management of power, and concern for survival and security in the context of international anarchy. In order to gain access to American markets and technology, China readily transformed aspects of its legal system in order to protect foreign intellectual property rights.

To sum up, the Chinese foreign policy has featured pragmatic elements as the assumptions of national interest and maximization of utility. The following chart attempts to summarize the comparability of Western and Chinese neorealism:

Political Process under conditions of Western & Chinese neorealism

Comparison	Western Neorealism	Chinese Neorealism
goals of actors	achieve national interest and pursue their goals	build and utilize international regimes to enhance economic development in international realm
instrument of state policy	military or security measures as well as economic and other instruments will be used	utilization of and participation in international organization and treaties, i.e., IMF, WIPO. or various forums to achieve its economic interest, desire of accession to WTO
statism	nation-states as the primary actors and starting point of international relations theory	parallel with western neorealism with emphasis on state power and state-centric and state-empowering model
rationality	rational egoist or self-reliant maximizer at calculated costs and benefits	rational actor managing the notion of interdependence with that of independence and sovereignty
distribution of capabilities	maximizing, stabilizing and maintaining balance of power in international anarchy	attain and maximize state empowerment in international system

Source: The model freely draws from analysis in Keohane and Nye, *Power and Interdependence*, 1977.

5. Interdependence

Realist/neorealist theory in international relations does not, in and of itself, provide a sufficiently comprehensive theoretical framework to explain and analyze Sino-U.S. IPR disputes. It has to be integrated with other theories to develop a wider framework for understanding IPR protection. Interdependence in world politics refers to "situations characterized by reciprocal effects among countries or among actors in different countries."[77] American scholars Keohane and Nye argue "where there are reciprocal costly effects of transactions, there is interdependence....Costly effects may be imposed directly and intentionally by another actor"[78]

While economic interdependence eschews zero-sum games, it can still be correlated with neorealism. The potential for economic harm remains with increasing interdependence of the global economy and the politics of economic interdependence involves competition as well as cooperation.[79] Robert Keohane and Joseph Nye made the following qualification: "Our perspective implies that interdependent relationships will always involve costs, since interdependence restricts autonomy;...nothing guarantees that relationships that we designate as 'interdependent' will be characterized by mutual benefit."[80]

Interdependence underlies governments' efforts to cope with this reality and to adapt to it by collaborating with other governments. China and the United States, for example, compete for trading advantage. Sino-U.S. trade, on the other hand, is a two-way street. Both countries will seek to maximize the benefits of interdependence, hence they will act to minimize the consequences of trade retaliation. The United States transfers its technology to China and, in turn, gains market access. In this regard, the conclusion of both the 1992 and the 1995 Sino-U.S. IPR agreement were derived from interdependence as well as enormous self-interested American pressure for China to protect

American IPR products.

6. China's Framework of Interdependence

The Chinese perception of interdependence with the outside world has evolved from the relative isolation and autarky of Mao's era to China's extensive interaction with the outside world in Deng's era. Chinese Foreign Minister Qian Qichen argues, "The world economy is an integrated whole. All countries, industrialized or raw material suppliers, developed or developing, are economically interrelated and in need of each other."[81]

A critical component of China's efforts to build a prosperous modern economy has been the adoption of a participatory approach to the global economic system in order to gain access to foreign capital and expertise and the long-term economic benefits of Ricardo's international trade theory of comparative advantage.[82]

Evidence for this participatory approach was provided in 1982. Huang Hua, then as head of the Chinese delegation to the General Assembly of the United Nations, proclaimed the following:

> The economies of all countries are closely interrelated. The developed countries cannot achieve economic growth without the rich resources, vast markets and economic prosperity of the developing countries. All countries, whether rich or poor, north or south must abide by the principle of equality and mutual benefits if they are to carry out fruitful economic exchanges and co-operation.[83]

And by the latter half of the 1980s the concept of global interdependence finally came of age in China, even if there was no consensus on its formal implications for Chinese foreign policy.[84] According to Qian Qichen, all countries are relying on the development of the economy, science, and technology in their effort to occupy a favorable position in the new global economic pattern.[85]

Further evidence of China's embrace of the principle of interdependence -- that "China needs the world, the world needs China" -- came from Chinese leader Deng Xiaoping himself:

> While invigorating the domestic economy, we have also formulated a policy of opening to the outside world. Review our history, we have concluded that one of the most important reasons for China's long years of stagnation and backwardness was its policy of closing the country to outside contact. Our experience shows that China can not rebuild itself with its doors closed to the outside and that it cannot develop in isolation from the rest of the world.[86]

China has chosen to deepen interdependence with the outside world so as to further its modernization drive. China deliberately pursued an open-door policy and sought participation in the world economy. Deng did acknowledge that openness to the capitalist world would bring "undesirable things." But Deng consistently argued that these "things" are manageable and that they should not be used as an excuse to close China's open door.[87]

Samuel Kim has argued that China is managing asymmetrical interdependence. Beijing tries to maximize the benefits of interdependence while minimizing the risks.[88] Kim argues further that China attempts a "maxi/mini principle in the conduct of multilateral diplomacy--maximizing China's rights and interests and minimizing China's responsibility and normative costs."[89] This principle derives from Kim's "world order model project" which is committed to the minimization of collective violence. and the maximization of social and economic well-being.[90] But as Thomas Robinson puts it. the West is supposed to provide China with the benefits while minimizing costs.[91]

The Chinese approach to cooperation/conflict has been characterized by pragmatism and adaptation. So as to converge with the world economy, China recognized the necessity of cooperation with the United States. China has adapted to the global trend of interdependence and integration. Deng's view originated in his understanding of China's national interest and global interdependence. The foregoing discussion suggests that there is a rough and ready degree of similarity between Western or American and Chinese notions of "neorealism," and

"interdependence." IPR disputes reflect the mixed nature of states' cooperation and confrontation based on their perception of objective reality, promotion of national interest, and mutual reciprocity that dictate their international conduct. On this basis, China and the United States were able to adapt to a regime of intellectual property rights in international discourse.

III. The Emerging Sino-US IPR Regime

This thesis explains the emergence of an IPR regime between China and the United States with reference to the theories of neorealism and interdependence. Neorealists see cooperation as essential in a world of economic interdependence, and argue that shared economic interests create a demand for international institutions and rules.[92] Regimes are conducive to interstate agreement, and facilitate further efforts to coordinate policies.[93] The purpose of a "regime" is to harmonize policies, reduce transaction costs and uncertainty, and to settle disputes.[94]

The thesis examines the collaboration between China and the United States to establish a regime of intellectual property protection and enforcement. It considers the following questions. How could there be international cooperation despite the persistence of conflict? Under what conditions is there sufficient convergence of interest to facilitate the creation of regime?

Regime theory was introduced into the literature on international relations in the mid 1970s by John Ruggie.[95] Similarly, Robert Keohane played a prominent role in the development of regime theory in international political economy.[96] Keohane's *After Hegemony* depicted the nature of cooperation in international relations and the concept of regime. He suggested that regimes lower the likelihood of being double-crossed.[97] Stephen Krasner defined "regimes" as "sets of implicit and explicit principles, norms, rules and decision making procedures around which actors' expectations converge in a given area of international relations."[98]

> Regimes are norms, procedures, and rules agreed to in order to regulate an issue-area. Norms tell us why states collaborate; rules tell us what, substantially speaking, the collaboration is about; procedures answer the question of how the collaboration is carried out. Procedures, therefore, involve the choice of whether specific administrative arrangement should be set up to regulate the issue-area. Administration involve organization.[99]

Hedley Bull writes that a "regime" is operative where there is both an international system, consisting of interactions between the two or more states, and an international society predicated on the common adherence to mutually accepted rules and conventions.[100] The framework of common rules, principles, norms and conventions is the common ground on which for countries to seek and to set aside differences. This common ground is visualized as a "rational pursuit of interests" that will at some juncture coincide with the interests of others.[101] The adherence to the norms and practices minimize friction and enhances prospects of cooperation.

Regime analysis emerged from within liberal theory but it also interacted with other theoretical systems, especially neorealism. "Hegemony" underscored the well-being of the system because regimes will presumably enhance the national interests of all their member states.[102] Structuralists stressed the role of hegemonic states in the creation and maintenance of regimes.[103] In describing regimes, structuralists saw the world in terms of changing balances between "weak" states and "hegemonic" states. International regimes supposedly flourish when hegemonic states define them, operate them, and pay for them. Naturally, the rules of a regime are tailored to the national interests of the hegemon.[104]

Krasner suggested that regime autonomy provided opportunities for other states. LDCs (Less Developed countries) in particular were able to redefine regimes in their own interests.[105] Western neorealism provides a rationale for the use of state power to acquire and protect national interest in

a regime. A regime is also defined as "a recognized set of rules devised by governments for regulating conflict-prone behaviour. If there was no potential conflict, there would be no need for rules."[106] Hence, regime theory is compatible with neorealist theory, which underwrites the notion of utility maximization through the projections of state power in a cooperative arrangement and process.

Regime theory also impinges on interdependence in international relations. In *Power and Interdependence*, Keohane and Nye developed models to explain regimes. Keohane and Nye present models of "regime change" that depicted the process of interdependence. They also helped establish a distinction between two types of interdependence, "sensitivity" and "vulnerability."[107] They recognized that "interdependence does not imply an equal distribution of the benefits of trade between countries and that the inequalities that exist are at least partly due to the exercise of political pressure by stronger states upon weaker."[108] Thus, in an increasingly interdependent world, states need to cooperate in order to promote their national welfare. Furthermore, this reciprocal and participatory approach allows countries to cooperate and to reduce risks in the established regime/institutions of intellectual property rights from sensitivity and vulnerability.

Within the IPR regime, access to knowledge and diffusion of technology are of importance for states to exchange and trade on a reciprocal basis in the era of interdependence. Within the IPR regime, states, as the major actors in the international realm, grant, license and legitimize intellectual property rights. The intellectual property regime provides the context in which arrangement of principles, norms, and rules are agreed upon.

Within the IPR regime, control and exchange are important variables. For instance, in terms of China's opening up to the outside world, China sought technology transfer on an exchange and

reciprocal basis with other countries. Therefore, China's economic and technological development depended upon domestic legal reform and IPR protection. As well, American pressure with regard to technology transfer has had a direct bearing on the Chinese IPR regime. China has made concessions in legal reform and infrastructure within the realm of IPR for the sake of survival and security to defend its national interests and to secure its own survival given its the sensitivity and vulnerability in the anarchic world.

The emergence of the Sino-U.S. IPR regime is briefly examined in light of the real world vis-a-vis theoretical discussion in IR theory. First, China and the United States are committed to achieving improved intellectual property protection for the sake of interdependence, due to the fact that "interdependence makes the relationship costly to disrupt."[109] From 1984 to 1994, U.S. annual exports to China rose from $3 billion to $8.8 billion. In the same period, Chinese exports to the U.S. rose from $3.1 billion to nearly $38 billion.[110] The two countries clearly have an enormous interest in mutual trade. The expansion of trade underlined the importance and benefits of bilateral agreements to protect intellectual property rights.

Second, the U.S. pressure for protection of American intellectual property rights in China created a mechanism for conflict resolution within the theoretical framework of neorealism. Both countries negotiated in a practical and realistic fashion. They calculated benefits and costs. Both sides rationally balanced gains and losses. For example, in negotiating the 1995 IPR agreement between China and the U.S., the two countries threatened trade retaliation. About $3 billion-worth of American business had been lost to piracy. The U.S. threatened to slap 100% tariffs on only $1 billion-worth of Chinese exports, supposedly to avoid hurting American firms and customers. The U.S. targeted Chinese toys and apparel with sanctions but not electronic components, to minimize

the impact on US industry.[111] However, China's list of counter-sanctions covered goods such as compact discs. American sales of the latter had already been preempted by domestic piracy. The two sides sought to minimize the consequences of retaliation as they entered into various Sino-American IPR agreements. The two countries have both an economic stake and political influence upon each other. Both were likely to suffer if they resort to indiscriminate retaliatory actions while integrating into the world economy. Their respective neorealism and interdependence converged to dictate the development of Sino-U.S. IPR negotiations. As a consequence, within 12 years, China introduced Western-style intellectual property laws.[112]

This thesis applies the theoretical constructs in international relations discussed above to the Sino-U.S. trade dispute over IPR protection. This theory helps to explain a surprising degree of cooperation. Chapter two is dedicated to an analysis of the American approach to IPR protection with particular reference to the underlying influence of neorealism and interdependence inherent in American foreign policy toward China. It addresses American strategy for establishing an effective IPR regime in China. Similarly, Chapter Three focuses on the changes to domestic Chinese law on IPR and shows how these changes reflected China's adaptation to international trade practices and deepening interdependence with the US. The concluding chapter summarizes Sino-U.S. interaction with regard to the conclusion of several IPR Agreements and the emergence of a Sino-U.S. IPR regime.

1. Intellectual property rights is indicated as IPR in the whole thesis. Intellectual property rights refers to trademark, patent, copyright, neighbouring rights, industrial designs, industrial secrets, know-how, appellation of origin, geographical indicators, trade secrets, trade dress, trade names, unfair competition and integrated circuit layout design.

2. Louis Putterman, "The Role of Ownership and Property Rights in China's Economic Transition," *The China Quarterly*, 1995:1049.

3. Allan Ryan, "Property," in John Eatwell, Murray Milgate and Peter Newman eds., *The New Palgrave: Dictionary of Economics*, New York: Stockton Press, 1987:1029-31. Utilization right means the right to use, the right to possess the fruit, return right means the right to have renumeration, alienation right means "the right to transfer these rights to another agent through sale."

4. *Background Reading Material on the Intellectual Property System of China*, World Intellectual Property Organization, 1993:3.

5. Michael Pendleton, *Intellectual Property Law in the People's Republic of China: A Guide to Patents, Trademarks and Technology Transfer*, Butterworth & Co (Asia) Pte Ltd., 1986:1.

6. Ibid, 1.

7. "Intellectual Property Rights Protection: An Overview," *The United States Information Agency*, 1996.

8. A trademark is defined as "a word or symbol that identifies the sources of goods (services in the case of a service mark). A patent is a limited term monopoly granted by government to the inventor of a novel, non-obvious, and useful product, manufacturing process, machine, chemical composition, design, or plant in exchange for public disclosure of the pertinent innovation. Copyright is typically said to encompass the exclusive rights to reproduce, distribute, display, perform, or prepare derivative versions of the work in question. In William P. Alford, *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization*, Stanford University Press, Stanford, California, 1995:2.

Trade secret refers to information including programs, devices, techniques, processes, methods, and formulae that represent economic value for the business enterprise. In Kenneth A. Cutshaw and Jianyi Zhang, *International Quarterly*, vol. 8, no. 1, January 1996:73.

9. Piracy is defined as "in its broadest sense is any unauthorized and uncompensated reproduction or use of someone else's creative intellectual achievement." In Frank Emmert, "Intellectual Property in the Uruguay Round-Negotiating Strategies of the Western Industrialized Countries," Vol. 11, *Michigan Journal of International Law*, 1990:1319-20. Piracy has been defined as "the unauthorized taking of another person's intellectual property through substantial duplication or production of a substantially similar product or information for commercial purposes." See G. Hoffman, *Curbing Intellectual Piracy of Intellectual Property, Policy Options for a Major Exporting Country*, 1989.

10. Counterfeiting refers to "the practice of simulating brand-name products down to the last detail, including the originator's own trademarks, and then offering these products for sale as authentic goods on both domestic and export markets." In Derek Dessler, "China's Intellectual Property Protection: Prospects for Achieving International Standards," *Fordham International Law Journal*, vol. 19, no. 1, Oct. 1995:182.

11. Infringement means that another party uses a patent without permission. It infringes a patentee's exclusive enjoyment of the patent right. In William P. Fuller V, "The Protection of Computer Software in the People's Republic of China," *Boston College Third World Law Journal*, vol. IX, no. 1, Winter 1989:62.

12. The World Intellectual Property Organization (WIPO), of the United Nations, is located in Geneva, Switzerland and promotes the protection of intellectual property internationally through various treaties and administrative services.

13. WIPO provision of Article 2(viii), in *Background Reading Material on the Intellectual Property System of China*, World Intellectual Property Organization, 1993:3.

14. Carol J. Bilzi, "Towards an Intellectual Property Agreement in the GATT: View from the Private Sector,"*Georgia Journal of International and Comparative Law*, vol. 19, iss. 2, 1989:345. Eric Smith, executive director of International Intellectual Property Alliance, said "being tough on countries that steal our intellectual property is not protectionism, it is sound trade policy." In "IIPA Targets New Pirates," *Publishers Weekly*, March 8, 1993.

15. The General Agreement on Tariff and Trade (GATT) was both a multinational treaty and a trade organization dedicated to reducing international trade barrier. The GATT had included the principles of intellectual property rights under Article XX, hereinafter refer to the "necessity clause," it provides that member nations may enact laws and take action necessary to protect certain areas of trade. *General Agreement on Tariff and Trade*, Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187. Also see Punta del Este Ministerial Declaration of the Uruguay Round of Multilateral Trade Negotiation, *GATT DOC.* Min.Dec. (Sept. 20, 1986) [hereinafter Uruguay Declaration]. The Uruguay Declaration stated:

> In order to reduce the distortion and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures to enforce intellectual property rights do not themselves become barrier to legitimate trade, the negotiation shall aim to clarify GATT provisions and elaborate as appropriate new rules and disciplines.
>
> Negotiations shall aim to develop a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods, taking into account work already undertaken in the GATT.

The WTO replaced GATT in 1995. The WTO has the same function and mechanism as the GATT. The Uruguay Round established the WTO in 1995, which brought trade in services, investment, and intellectual property protection into the multilateral system for the first time.

16. Gunda Schumann, "Economic Development and Intellectual Property Protection in Southeast Asia: Korea, Taiwan, Singapore, and Thailand," In Francis W. Rushing and Carole Ganz Brown eds., *Intellectual Property Rights in Science, Technology, and Economic Performance: International Comparison*, Westview Special Studies in Science, Technology, and Public Policy, 1990:159. It states that intellectual property had originally been designed in the Western world to promote national technological, industrial and intellectual development.

17. Susantha Goonatilake, *Aborted Discovery: Science and Creativity in the Third World*, London: Zed Books, 1984. Also see Arman Kirim, *World Development* 13, no. 2, 1985:219-36.

18. Lawrence P. Harrington, "Recent Amendments to China's Patent Law: The Emperor's New Clothes?" *Boston College International and Comparative Law Review*, vol. XVII, no. 2, Summer 1994:341.

19. Gunda Schumann, *supra* note 16, at 159. Also see Kim, "Strict Controls Exact High Toll from Our Developing Countries," *L.A. Daily Journal*, Oct. 8,1986: 4. A Korean Ambassador to the U.S., Kyung Won Kim, stated that the price of high-tech items has increased to a point where developing nations are hard pressed to pay for them.

20. D. Silverstein, *Patent Protection and Technology Transfer in Less Developed Countries: A Reappraisal of the Legal Framework for Producing and Transmitting Knowledge*, 1986:12.

21. James W. Peters, Comment, "Toward Negotiating a Remedy to Copyright Piracy in Singapore," *Northwest Journal of International Law & Business*, 1986. In Richard E. Vaughan, "Defining Terms in the Intellectual Property Protection Debate: Are the North and South Arguing Past Each Other When We Say 'Property'? A Lockean, Confucian, and Islamic Comparison." *Journal of International & Comparative Law*, vol. 2, no. 2, Winter 1996.

22. India has declared that "protection of intellectual property rights has no direct or significant relationship to international trade." India maintains that the two concepts are incompatible. In "Indian Proposal Says Developing Countries Should Get Patent, Trademark Concessions," *International Trade Representatives*, (BNA) July 19, 1989:953. Moreover, Indira Gandhi of India summed up her nation's opposition to pharmaceutical patents by stating that "[t]he idea of a better-ordered world is one which medical discoveries will be free of patents and there will be no profiteering from life and death." In Brian Mark Berliner, Notes, "Making Intellectual Property Pirates Walk the Plank: Using 'Special 301' to Protect the United States Rights," *Loyola of Los Angeles International and Comparative Law*, vol. 12, no. 3, May 1990:729.

23. Charles E. Walker and Mark A. Bloomfield, "Foreword", in their eds., *Intellectual Property Rights and Capital Formation in the Next Decade*. University Press of America, 1988.

24. *Vancouver Sun*, February 6, 1995.

25. Robert Keohane and Joseph Nye, *Power and Interdependence*, Little, Brown and Company, 1977.

26. Robert O. Keohane, "After Hegemony," in John A. Vasquez, 3rd edition. *Classics of International Relations*, 1990:359.

27. Hans J. Morgenthau. *Politics Among Nations*, 4th. Ed., New York: Alfred A. Knopf, 1967:13 and 4 respectively.

28. E. H. Carr, *The Twenty Years' Crisis, 1919-1939*, 2nd. ed., London and Basingstoke: the Macmillan Press Ltd., 1946 edition reprinted in 1984:10.

29. Kenneth Waltz, "Realist Thought and Neorealist Theory," *Journal of International Affairs*, 44, pp. 21-37.

30. Martin Griffiths, "Order and International Society: the Real Realism," *Review of International Studies*, 18, July 1992:217-240.

31. Patrick James, "Neorealism as a Research Enterprise: Toward Elaborated Structural Realism," *International Political Science Review*, vol. 14, no. 2, 1993:123-148.

32. Robert W. Cox, "Social Forces, States and World Orders," in Robert Keohane ed., *Neorealism and Its Critics*, 1986:222.

33. See Kenneth Waltz, *Theory of International Politics*, 1979:131.

34. See Robert Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy*, Princeton: Princeton University Press, 1984. Stephen D. Krasner, ed., *International Regime*, Ithaca, NY: Cornell University Press, 1983. Arthur A. Stein, *Why Nations Cooperate: Circumstance and Choice in International Relations*, Ithaca, NY: Cornell University Press.

35. Hoyt Purvis, *Interdependence: An Introduction to International Relations*, 1992:46.

36. Charles W. Kegley, Jr. ed., Chapter 1, "The Neoliberal Challenge to Realist Theories of World Politics: An Introduction," *Controversies in International Relations Theory: Realism and Neoliberal Challenge*, St. Martin Press, New York, 1995:5.

37. See Kenneth Waltz. *Theory of International Politics*, 1979:131.

38. *Foreign Relations of the United States*, XII Part 1, 26 May 1952:97; *Foreign Relations of the United States*, XIII, Part 2, 26 April 1954:1410. Anthony Eden, *Full Circle*, (London: Cassell and Company LTD.,1960):83. *CAB* 131/12, D(52)2nd cited in Geoffrey Warner, "The Settlement of the Indo-China War," in Young, 1988:235.

39. Ernst B. Haas, "The Balance of Power: Perception, Concept, or Propaganda," *World Politics*, vol. 5, no. 4, July 1953:442-77.

40. Robert O. Keohane, "After Hegemony", from John A. Vasquez, 3rd ed., *Classics of International Relations*, p. 355. It suggests that for hegemony to become manifest, "...a country must have access

to crucial raw materials, control major sources of capital, maintain a large market for import, and hold comparative advantages in goods with high value added, yielding relatively high wages and profits. It must also stronger, on these dimensions taken as a whole, than any other country."

41. Robert O. Keohane and Joseph S. Nye, *Power and Interdependence: World Politics in Transition*, Boston: Little, Brown, 1977:44.

42. Ibid. 44.

43. Joseph Grieco, "Anarchy and the limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism," in Charles W. Kegley, Jr. (ed.), *Controversies in International Relations Theory: Realism and Neoliberal Challenge*, St. Martin Press, New York, 1995:151-171.

44. Ibid, 357.

45. Ibid, 248.

46. Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, New York: Columbia University Press, 1977.

47. Phil Williams, Donald M. Goldstein, and Jay M. Shafritz. Section IV, "Anarchy and Society in the International System," *Classic Readings of International Relations*, John A. Vasquez eds., 1994: 180.

48. *Supra* note 37, see Keohane, at 240.

49. Susan K. Sell, "Intellectual property protection and antitrust in the developing world: crisis, coercion, and choice," *International Organization*, 49, 2, Spring 1995, pp. 315-49:316.

50. Hedley Bull, *supra* note 46, at 169-70.

51. Ibid., 172.

52. Joseph M. Grieco, "Anarchy and the Limits of Cooperation," *Controversies in International Relations Theory: Realism and Neoliberal Challenge*, Charles W. Kegley, Jr. (ed.) St. Martin Press, New York, 1995:152.

53. Ernst B. Haas, "Why Collaborate? Issue-Linkage and International Regimes," *World Politics*, vol. 32, no.3, April 1980, 357-405:371.

54. Charles W. Kegley, Jr. ed., Part I, "The Foundations of International Relations Theory and the Resurrection of the Realist-Liberal Debate,"*Controversies in International Relations Theory, Realism and Neoliberal Challenge*, 1995:32.

55. Kenneth Waltz, "Anarchic Orders and Balances of Power," in Robert Keohane ed., *Neorealism and its Critics*, 1986:101-102.

56. Kenneth Waltz, *Man, the State and War*. New York: Columbia University Press, 1959.

57. February 15, 1996, according to *The Washington Post*, from Internet http://www.buchanan.org/freet.html.

58. Section 182 of the 1974 U.S. Trade and Tariff Act, referred to as Special 301, is the primary U.S. trade statute to protect U.S. IPR in foreign markets. And this provision was added by Section 1303 of the 1988 U.S. Omnibus Trade and Competitiveness Act.

59. Joseph M. Grieco, Part I "The Foundations of International Relations Theory and the Resurrection of the Realist-Liberal Debate", in Charles W. Kegley, Jr. ed., *Controversies in International Relations Theory: Realism and the Neoliberal Challenge*, 1995.

60. Ibid, p. 162.

61. Chih-yu Shih, *Interdependence, Independence and Chinese Neorealism*, Working Paper Series: No. 59, Joint Centre for Asia Pacific Studies, Toronto, 1993.

62. Ibid.

63. Huang Xiang, "World Prospects for the Years Ahead," *Beijing Review* 32, 14 (April 3-9, 1989): 15.

64. Samuel S. Kim, "Chinese and the World in Theory and Practice," in Samuel S. Kim ed., *China and the World*, 1994:28.

65. Robert W. Cox, "Social Force, States and World Orders", in Robert Keohane ed., *Neorealism and Its Critics*, 1986:222.

66. See, for example, *RMRB (People's Daily)*, editorial, November 25, 1957:1.

67. Samuel S. Kim, "The Political Economy of Post-Mao China in Global Perspective".

68. Li Tianran, "Guanyu shonghe guoli wenti" [On the Question of Comprehensive National Strength], *Guoji wenti yanjiu*, no. 2, (April 1990):52-58.

69. Mao Zedong, "On Practice," *Selected Works of Mao Tse-Tung*, {cited hereafter as Selected Works, followed by volume and page reference}, I, Peking: Foreign Languages Press, 1964:296-97.

70. Mao Zedong, "On New Democracy," *Selected Works*, II, Peking: Foreign Languages Press, 1965:358.

71. *Far Eastern Economic Review*, 1 August 1968:230.

72. J.D. Armstrong, *Revolutionary Diplomacy: Chinese Foreign Policy and the United Front Doctrine*, Berkley, Los Angeles, London: University of California Press, 1977:5.

73. A. Doak Barnett, Part I "China's Modernization Program," *China's Economy in Global Perspective*, the Brookings Institutions, Washington, D.C., 1981:57.

74. Samuel S. Kim, "Chinese and the World in Theory and Practice," in Samuel S. Kim ed., *China and the World*, 1994:30.

75. See Samuel S. Kim, at 29.

76. Lucian Pye, *The Mandarin and the Cadre: China's Political Culture*, Center for Chinese Studies, the University of Michigan, 1988.

77. Robert O. Keohane and Joseph S. Nye, Article 16, "The Characteristics of Complex Interdependence," in Phil Williams, Donald M. Goldstein, and Jay M. Shafritz eds., *Classic Reading of International Relations*, 1994:75.

78. Ibid, 75.

79. Ibid, 76.

80. Robert Keohane and Joseph Nye, "Interdependence as an Analytic Concept," *Power and Interdependence*, Little, Brown and Company Inc. 1977:8-10.

81. Qian Qichen, "Toward a Better World," Editor of Diplomatic History, *Overview of Chinese Foreign policy*, Beijing: Ministry of Foreign Affairs, 1988:16.

82. William R. Feeny, "China and the Multilateral Economic Institution", in Samuel Kim's *China and the World*, 3rd ed., 1994:226.

83. *Beijing Review* 25, October 11, 1982:18.

84. Samuel Kim, *China In and Out of the Changing World Order*, Princeton University, 1991:46.

85. *China Report*, FBIS-CHI-94-234, (19 December 1994):8.

86. Deng Xiaoping, "Achieving the Magnificent Goal of Our Four Modernizations, and Our Basic Policies, October 6, 1984," *Build Socialism with Chinese Characteristics*, Foreign Languages Press, Beijing, China, 1985:25.

87. Michael Yahuda, "Deng Xiaoping: The Statesman," *China Quarterly*, (September 1993):558.

88. Thomas Robinson, "Interdependence in China's Foreign Relations," in Samuel S. Kim ed., *China and the World*, 1994:191.

89. Samuel Kim ed., *China and the World*, 1994:557.

90. Ibid, 557.

91. See Thomas Robinson, in Samuel Kim's 3rd ed., *China and the World*. Boulder, Colo.: Westview Press, 1994.

92. David Mitrany, *The Functional Theory of Politics*, London: St. Martin's Press for the London School of Economics and Political Science, 1975.

93. Robert O. Keohane, Article 34, "Cooperation and International Regime", *After Hegemony: Cooperation and Discord in the World Economy*, in Phil Williams, Donald M. Goldstein, and Jay M. Shafritz eds., *Classic Reading of International Relations*, 1994:241.

94. Robert Keohane, "The demand for international regimes," *International Organization*, 36(2), 1982:325-355. Also see Stephen Krasner, *International Regimes*, Ithaca, NY: Cornell University Press, 1983.

95. John G. Ruggie, "International Responses to Technology: Concepts and Trends," *International Organization*, 29, no. 3, Summer 1975:557-584.

96. Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy*, Princeton, N.J.: Princeton University Press, 1984:97.

97. Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy*, Princeton, N.J.: Princeton University Press, 1984:97.

98. Stephen D. Krasner, ed., *International Regimes*, Ithaca, N.Y.: Cornell University Press, 1983:2.

99. Ibid, 397.

100. Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, London and Basingstoke: The Macmillan Press LTD., 1977:162.

101. Ibid., 170 and 172.

102. Stephen D. Krasner, ed., *International Regimes*, Ithaca, N.Y.: Cornell University Press, 183:15.

103. Ernst B. Haas, "Why Collaborate? Issue-Linkage and International Regimes," *World Politics*, vol. 32, no.3, (April 1980):359.

104. Ibid, 387.

105. Stephen Krasner, *International Regime*, Princeton, N.J.:Princeton University Press, Cornell University Press, 1983:264.

106. Ibid, 396.

107. Keohane and Nye, *Power and Interdependence: World Politics in Transition*, Little, Brown and Company, 1977:126.

108. See Keohane and Nye, *Power and Interdependence*, 1977:130-31.

109. Barry Buzan, "Security and the International Political System," in *People, States and Fear*. Chapel Hill: University of North Carolina Press, 1991:152.

110. "U.S.-China IPR Agreement Commits China to IPR Enforcement (USTR Fact Sheet on 2/26/95 U.S.-China IPR Agreement)", *The United States Information Agency*. The Release as of February 26, 1995.

111. Amy Borrus and Joyce Barnathan, "This is One Showdown the White House Can't Duck", *Business Week*, Iss. 3470, April 8, 1996:52.

112. "Copy to Come: Intellectual Property in China." *The Economist*, January 7th. 1995.

Chapter Two

American Strategy For Establishing An Effective IPR Regime in China

Historically, the U.S. was once a notorious pirate of foreign copyrighted material.[1] How did the US make the transition from a pirate to a country safeguarding its own IPR? What was the underlying rationale for IPR protection? The chapter explores the philosophical foundations of intellectual property rights in the US context. It also examines related American legislation and legal infrastructure, including the specific contents and mechanisms of Section 337 and Special 301, and their role in the protection of American intellectual property rights in international trade. As far as the US is concerned, IPR protection is one of the pre-conditions for China's entry into the WTO. Although American trading partners have pointed out that some aspects of American IPR laws are problematic and do not conform to international standards,[2] the US has pressured other nations, China in particular, to strengthen their IPR laws. The US behavioural orientation is assessed in relation to neorealism and interdependence. This demonstrates that the US, as a hegemonic power in favour of interdependence, has unilaterally deployed its trade law and has held up China's accession to WTO in order to protect American intellectual property rights abroad.

I. Philosophical Foundations of IPR in the United States

The American approach to property protection was founded primarily on John Locke's "labour theory."[3] The Lockean labour theory rested on two premises. "First, in order to encourage the creation of goods, services and ideas that benefit society, it is necessary to provide a reward, and that reward is property. Second, labour should be rewarded by recognition, and that recognition is a property interest."[4] William Blackstone, author of the *Commentaries on the Laws of England*

(1765-69) and a great influence on early American law, asserted that the "absolute" rights of man are "the right of personal security, the right of personal liberty, and the right of private property."[5] In the US and Europe, this view focused attention on individual rather than collective rights to property.

American law adopted the Lockean approach. Thomas Jefferson, for example, noted: "The doctrines (of the Declaration of Independence) are essentially those of John Locke...that government should...secure the inalienable rights of man."[6] The inalienable rights of man included property rights, which were enshrined in the United States Constitution. The US Constitution's Fourth Amendment defined "property" as "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated....Thus property in writings were protected as well."[7] The Fifth Amendment of the US Constitution stated that "No person shall...be deprived of...property, without due process of law; nor shall private property be taken for public use without just compensation."[8]

The Western concept of property also specifically embraced intellectual property rights.[9] The idea of private right laid the basis of the Western IPR laws governing the principles of "exclusive right" and individual ownership. This was quite evident in the American Constitution. The American government enacted an "intellectual property clause" as part of the American national policy. Article I, section 8, known as the "intellectual property clause," of the US Constitution provided "The Congress shall have Power...to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[10]

II. The Historical Evolution of US Trade Law on IPR

As far as Sino-US IPR relation is concerned, has the US successfully used its power and domestic law to affect China's IPR regime? The following part deals with how the US government uses trade law to further its objectives. This unilateral trade strategy, along with American critical acceptance of China's accession to WTO, has very much informed the outcome of Sino-US IPR negotiation. Section 301 and Section 337 are now at the heart of the US trade strategy, however these sections have to be placed in the context of American legislative history.

Section 337 of the Tariff Act of 1930 was originally proposed in 1922 and later on was extensively revised by the Trade Act of 1974. Section 337 of the Tariff Act of 1930 set out the statutory basis for the border protection of IPR.[11] After the amendment of 1988 Omnibus Trade and Competitiveness Act, Section 337 is "[o]ne of the most effective remedies available to domestic innovators to protect against unfair trade practices...."[12] Specifically, it attempted to prohibit importations into the United States which infringe American valid intellectual property rights.[13] Section 337 was amended in 1994[14] to target any imported products which infringe upon a valid US patent, copyright, and trademark registered under the Title 17 of the United States Code.[15]

US complainants under Section 337 could choose between two forums, (either through the International Trade Commission (ITC)[16] or the Federal Court) to file a complaint.[17] The Federal Court was assigned the domestic cases involving infringement. ITC was given the authority to use Section 337 to police importation infringement.[18] An administrative law judge could then hold a preliminary hearing on the merits of the case on the part of the complainants.[19] The ITC would then adopt the administrative law judge's decision in whole, in part, or not at all, and recommend relief.[20] The relief may take the form of an exclusion order or a cease and desist order,[21] a limited exclusion

order directed against named respondent,[22] or a general exclusion order which is enforceable at the border against any person.[23] After the ITC rules on the case, the matter goes to the President.[24] If the President approves of or fails to act on the recommendation, the decision becomes final and appealable to the Federal Circuit Court of Appeals, and from there to the Supreme Court.[25] The International Trade Commission (ITC) can halt the sale of pirated items and prevent their future import to the US by enforcing section 337 of the Tariff Act of 1930.

Section 301 of the Trade Act of 1974 was the most powerful tool for the U.S. government to deal with countries that allegedly deny adequate and effective intellectual property protection for American goods and services. Section 301 of the Trade Act of 1974 was intended to empower the president with negotiating leverage through the threat of retaliatory actions.[26] The Trade Act of 1974 authorized the President of the United States "to take all appropriate action, including retaliation, to obtain the removal of any act, policy, or practice of a foreign government that violates an international agreement or is unjustifiable, unreasonable, or discriminatory and burdens or restricts US commerce."[27]

The Trade and Tariff Act of 1984 amended Section 301 of the Trade and Tariff Act of 1974. The 1984 Act broadened the President's authority to retaliate against unfair foreign trade practices. Specifically, it "created the office of the United States Trade Representatives (USTR) and designated it to be the President's agent in all trade negotiations."[28] The US Congress focused on inadequate intellectual property protection. Under the 1984 amendment, Congress required the USTR to submit annually a National Trade Estimate (NTE) to the House Ways and Means Committee.[29] The Congress required the USTR to establish procedures and timetables to initiate investigation into offensive trade practices.

As of 1988, the United States had still to retaliate against any country for denial of intellectual property protection.[30] Impatient with the President's unwillingness to exercise the required authority, Congress enacted the Omnibus Trade and Competitiveness Act of 1988 (OTCA), which included mandatory retaliation.[31]

This statute required the USTR to retaliate against countries that "deny adequate and effective protection of intellectual property rights" or "deny fair and equitable market access to United States persons that rely upon intellectual property protection."[32] A major purpose of this Act was to provide negotiating leverage to the USTR regarding unfair foreign trade practices. Perhaps the most controversial provision of the OCTA was the "Special 301," or "Super 301".[33] Special 301 required "mandatory responsive action" to resolve problems of intellectual property protection.[34] The Special 301 was to "seek enactment and effective enforcement by foreign countries of laws which recognize and adequately protect intellectual property."[35]

First, the amendment of Section 301 reflected US Congressional dissatisfaction with enforcement of provisions of the GATT. Second, it adjusted to changing trade patterns in international trade.[36] The Trade Act of 1988 broadened the power of the President and the USTR in response to unfair trade practices. Amendments to section 301 of this Act concerned: (1) a transfer of authority from the President to the USTR;[37] (2) a provision for mandatory retaliation in certain circumstances;[38] (3) the expansion and defining of certain "unfair trade practices,"[39] including non-existent patent protection, inadequate enforcement of laws, and non-recognition of new technologies.[40]

The USTR is required each year to identify foreign countries that deny adequate and effective protection of intellectual property, or deny fair and adequate market access to United States persons

who rely on intellectual property protection. The Special 301 directs the USTR to create three lists - the priority foreign country list, the priority watch list, and the watch list.[41] Priority foreign countries are "countries that have onerous or egregious acts, policies, or practices in the area of intellectual property and have failed to enter into good faith negotiations or make significant progress in bilateral or multilateral negotiations."[42] Countries on the priority watch list are "similar to priority foreign countries except these countries are engaging in good faith negotiations, or are making significant progress in negotiations."[43] Countries on the watch list are in the least offensive of the three categories, but they still "warrant attention because particular problems exist with respect to the protection or enforcement of IP rights."[44]

In determining the Special 301 lists, the USTR considers data from the Register of Copyrights, the Commissioner of Patents and Trademarks, and the National Trade Estimates.[45] The USTR must identify offending countries within thirty days of the release of the National Trade Estimate.[46]

The USTR is required under Section 302 to conduct an investigation of the offending countries within 30 days.[47] Once a country is identified as an offending country, the USTR has six months (extendable to nine months) to investigate the acts, practices and policies of that country. The USTR must determine if the foreign practice violated US rights under a trade agreement or is "unreasonable" or "discriminatory."[48] Prior to the final determination, the USTR engages in consultation, including "an opportunity...for the presentation of views by interested persons."[49] The USTR is required to provide notice in the Federal Register of any final determinations.[50] The offending countries must take substantial remedial measures within six to seven months or face the possible imposition of trade sanctions, import duties, and other economic restrictions.

If an affirmative determination is made that a country has violated Special 301, two courses of action are available. First, the USTR may decide on trade retaliation, usually in the form of 100 percent import tariffs on selected products. The retaliation is subject to the discretion of the President,[51] including removal of trade concessions and imposition of import restrictions or duties.[52] Second, the USTR may enter into bilateral negotiations with the offending countries that would remove unfair trade practices.[53] If the negotiations fail, the USTR is required to retaliate against the offending countries.[54]

The United States has deployed a range of tough statutory weapons to combat unfair trade practices and strengthen intellectual property protection. The Director of the Intellectual Property Office for the USTR underscored the efficacy of Special 301 when he stated:

> [Special 301] has succeeded in getting attention of countries which otherwise may not have paid as much attention to these issues...and I am optimistic that it will continue to accomplish the objectives of getting us into a negotiating environment where we can resolve issues by dialogue and discussion rather than confrontation.[55]

As a matter of fact, the US intellectual property laws have no extraterritorial effect in other countries.[56] As a result, trademark counterfeiting, patent infringement, and copyright piracy in other countries do not violate American domestic IPR laws. Therefore, the American efforts to combat unfair trade practices rely on multinational and bilateral treaties to standardize intellectual property protection, and on the use of US trade laws for treaty enforcement.[57] Intellectual property rights protection is an essential element of US economic policy. The US approach to strengthening the protection of intellectual property abroad consists of:

- employing trade statutes such as Section 337 of the Tariff Act of 1930 and Special 301 of the Omnibus Competitiveness of Trade Act of 1988 to protect US intellectual property rights
- pursuing improvements in protection and enforcement in bilateral negotiations with its trading partners

- seeking to raise international standards of protection through international agreements and organizations

From the American point of view, international intellectual property regimes have not been effective in addressing unfair trade practices. Many of the existing conventions (i.e., the Berne Convention,[58] the Universal Copyright Convention,[59] and the Paris Convention,[60] etc.) have failed to provide standards of protection. Although these international intellectual property regimes are in place, they have not been effective in curbing unfair trade practices. The multilateral conventions suffer from two major deficiencies.[61] First, these conventions do not include adequate dispute settlement provisions or enforcement mechanisms.[62] Second, some countries have signed the agreement with a reservation that they would not adhere to the dispute resolution procedures.[63] For example, according to the General Principles of the Civil Code of the People's Republic of China, as soon as China adheres to an international treaty, the latter will automatically become part of the Chinese domestic law, except those provisions to which China has declared a reservation beforehand, according to the said treaty.[64]

III. American Perspective on IPR

The American government paid little attention to the importance of IPR laws throughout the 1970s.[65] After the Viet Nam war, however, the lack of intellectual property protection was highlighted against a burgeoning trade deficit.[66] The United States had apparently lost billions of dollars due to intellectual property piracy.[67] Many private sector and government leaders in the US cited foreign violations of intellectual property as a major trade barrier to US exports.[68]

The negative correlation of piracy and the trade deficit was examined in light of the trade figures. In 1984, for the first time, the United States had a negative balance of trade. This deficit rose

from $122 billion in 1985 to roughly $200 billion in 1995.[69] And as intellectual property comprised a greater part of the Gross National Product (GNP), the IPR issue became central to the American national interest.[70] According to the Congressional Economic Leadership Institute, sixty percent of the trade deficit originated in IPR violations.[71] In 1986, the US government estimated that piracy of intellectual property cost American industry $20 billion in annual sales and affected roughly 750,000 jobs.[72] In 1995, this job loss climbed to 2,040,000.[73]

Intellectual property has surpassed all other categories of trade in importance to national economic life, in both North and South.[74] For example, there has been a sharp rise in the export of intellectual property products from the United States. According to the US Department of Commerce, intellectual property comprised less than 10 percent of all U.S. exports in 1947.[75] This figure grew to more than 37 percent in 1986.[76] Currently, especially in the information era, intellectual property accounted for well over 50 percent of US exports.[77]

Intellectual property has become the modern "wealth of nations."[78] The US considers intellectual property to be one of America's most valuable commodities.[79] IPR protection will be critical for the American role as a leading economic and political power. The United States has established a link between IPR and economic growth. It argues that IPR stimulates economic growth, increases the gains from international trade, and promotes investment and technology transfer. IPR protection is the legal means to maintain strong US momentum and international competitiveness. The effect of unfair trade practices on the United States economy is quite substantial. The effect is summarized in a 1995 report of the US General Accounting Office:

> [t]he absence of strong intellectual property rights protection in foreign markets carries serious economic costs for US industries. These costs include lost sales in third-world markets, diminished incentives and capital to funds, new research and development, and

distortions in trade flows.[80]

The US rationale for IPR protection is based on the following two points. First, when a foreign infringer exports its product into the US, the US companies will lose a share of their own domestic market. Secondly, piracy will deprive US of its accession to the market in the infringing country.[81] The US has historically had a competitive advantage in the development of new technologies.[82] The Chair of the House Subcommittee on International Economic Policy & Trade, Toby Roth, drew the following conclusion, "...intellectual property is the key to virtually every aspect of technological and economic leadership. The United States simply cannot allow other nations to steal the keys to our technological leadership."[83]

IV. US China Policy and IPR

Sino-American relations are at a crossroad, with fundamental problems rooted in different views of world order and their different perceptions of each other. The US China policy starts from the assumption that US foreign policy should serve American national interests. The American outlook is statist, competitive, security conscious, flexible, and interdependent.

But what are the United States' interests in China? The United States wants to spread American values, consolidate democracy and free market access in China. The United States saw national security as its top priority during the Cold War, but now it is giving a more urgent priority to economic interests. From the point of view of the US, its commercial involvement with China is critical to American economic objectives.[84] China is the world's eleventh-largest trading nation, and the fourth-largest exporter of goods to America. The US has great economic and political stakes in the PRC, including market access, investment, technology transfer, and security, etc.

Due to the expansion of trade between the two countries, the U.S. Department of Commerce

issued rules and regulations relating to the PRC. For example, many U.S. high technology items are available to export to the PRC, including lasers, computers, high speed digital telecommunications equipment, computer controlled milling equipment, modems, microwave technology, thermal imaging equipment, and global positioning satellite receivers.[85]

According to former US President George Bush, the US must be committed to a path of engagement, not confrontation, in its relations with China.[86] In 1994, the Clinton administration delinked human rights from MFN and adopted a "constructive engagement" policy with China. Clinton said, "We have severe disagreement on human rights, religious freedom but the best way to advance, in my view, is to work with China and not create a new Cold War."[87] Clinton made a further elaboration on the recent US China policy.

> Isolation of China is unworkable, counterproductive, and potentially dangerous....Isolation would encourage the Chinese to become hostile and to adopt policies of conflict with our own interests and values....It would close off, not open up, one of the world's most important markets. It would make China less, not more, likely to play by the rules of international conduct and to be a part of an emerging international consensus.[88]

The American government attaches great importance to IPR protection. Intellectual property protection has become one of the central objectives of American foreign policy generally.[89] For the first time in 1987, the American trade deficit with China became an issue in bilateral negotiations.[90] The USTR began issuing annual reports on this subject in the same year. Each year, the reports criticized China for high tariffs and import regulatory taxes, tight foreign exchange controls, restrictive quotas and licenses, and especially inadequate protection of American intellectual property.[91]

IPR protection has become the forefront of Sino-US trade relations in the 1990s. According to the United States Trade Representatives, the PRC is allegedly the largest pirate of American IPR

products and PRC's computer software piracy rate is around 94 percent. The US began to increase protectionism to address the mounting American trade deficits. The USTR had threatened China with the withdrawal of its trade-related benefits on several occasions if China did not take action to redress American trade losses.

V. US Strategy for Establishing an IPR Regime in China

The following discussion of the Sino-US IPR case study focuses on the American unilateral strategy for establishing an effective IPR regime in the PRC. The US has deliberately deployed domestic trade laws to protect its own intellectual property rights. The enactment and implementation of Section 301 and Section 337 demonstrated the US capacity for blunt unilateralism in forcing American standards of IPR protection in the PRC.

A Sino-American Trade Agreement was signed on May 14, 1979, soon after PRC and the United States normalized their bilateral relations on January 1, 1979. The Trade Agreement created "the most favourable conditions for strengthening, in all aspects, economic and trade relations between the two countries."[92] The 1979 Sino-American Trade Agreement also provided that the United States and PRC would 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 trademarks equivalent to the patent and trademark correspondingly accorded by the other party."[93] It also required the PRC to provide copyright protection to US nationals.[94]

In 1985, US officials expressed concerns over IPR protection in China during talks held under the US-Chinese Joint Commission on Commerce and Trade, and similar concerns were raised in market access negotiations in 1987.[95]

In 1989, the USTR intended to designate China as a priority foreign country under Section

301 and Section 337 provisions of the 1988 US Omnibus Trade and Competitiveness Act. As a result, a Memorandum of Understanding between China and the United States was reached on May 1989, so that the United States would not designate China as a priority foreign country and gave China more time to comply with the American Trade Act provisions.[96]

The 1989 Memorandum of Understanding stipulated: "1. China would submit a draft of a copyright law to the State Council and then to the Standing Committee of the National People's Congress by the end of 1989; 2. China's copyright legislation would include computer programs as a specific category: 3. upon enactment of the copyright law, the Chinese and US governments would take appropriate actions to extend protection of their copyright laws to work originating in each other's countries."[97] The 1989 MOU put an end to the Chinese legal debate as to whether computer software should be protected under the copyright law, the patent law or in a separate law.[98]

Among other things, under the MOU concerning patents, China promised to submit to the State Council an amendment to the Chinese patent law by the end of 1989. The amendment would extend the patent protection from 15 years to 20 years. China agreed to strengthen its legal protections for foreign enterprises in China.[99]

The USTR was required to evaluate before November 1, 1989 whether China had made satisfactory progress in the enactment of a copyright law including computer software protection, in the establishment of copyright relations with the US and in improved patent protection for all classes of inventions.[100] However, China's intellectual property protection was still deemed by the United States as inadequate under the 1989 MOU. The US desired patent and copyright protection within the standards of the Paris and Berne Conventions.[101] From the American viewpoint, although China took measures to improve IPR protection, Chinese copyright law had not yet been enacted and

proposed patent legislation had not covered important sectors. [102] In 1990, the USTR announced that China remained on the "priority watch list."

In April 1991, US decided to identify China as a "priority foreign country" under the Special 301 provision of the Trade Act for its failure to protect American IPR products.[103] By December 1991 bilateral relations had deteriorated over IPR protection. With respect to the PRC, the USTR stated:

> China is our only major trading partner to offer neither product patent protection for pharmaceuticals and other chemicals, nor copyright protection for US works. In addition, trademarks are granted to the first registrant in China, regardless of the original owner. Trade secrets are not adequately protected in China. As a result, piracy of all forms of intellectual property is widespread in China, accounting for significant losses to US industries.[104]

The US government intended to impose trade sanctions on Chinese imports and hoped to reach a solution which would satisfy the requirement of the Special 301 provisions. In the meantime, the Chinese government took some practical steps to address the American concerns.[105] A potential trade war between the two countries was averted at the eleventh hour.[106] On January 17, 1992, the governments of the PRC and the United States entered into the second Memorandum of Understanding on the Protection of Intellectual Property Rights.[107]

As a result, the US agreed to end its Special 301 investigation into China's intellectual property practices in exchange for a number of commitments by the Chinese government. In the MOU, China agreed to extend patent protection to pharmaceutical and chemical products. Previously China only protected pharmaceutical and chemical processes, whereas the United States desired protection of products as well.[108] The Chinese government agreed to take action to enact new laws and regulations that will expand the scope of protection for US intellectual property.[109] In terms of copyright protection, China agreed to protect works of US nationals under Chinese copyright law

from March 17, 1992[110] and to join two international copyright conventions (the Berne Convention and Universal Copyright Convention) in the next 18 months.[111] In addition, China agreed to treat computer software as literary work, with a protection term of fifty years.[112] Among other things, the 1992 MOU was intended to "provide effective procedures and remedies to prevent or stop, internally and at their borders, infringements of intellectual property rights." And the MOU required both governments to "deter further infringement."[113]

The USTR argued that, although China had fulfilled most of its obligations under the 1992 IPR agreement, it failed to adequately enforce the laws. US attention shifted from Chinese law-making to enforcement. As a result, in 1994, the US named China a priority foreign country for the second time in four years.[114] Yet a third round of disputes over IPR protection emerged in 1994, with the threat of American Special 301 sanctions and a Chinese "White Paper" defending its behaviour. The US demanded stricter legal protection for its trademarks, patents, and copyrights. To be specific, the US desired: (1) effective measures to immediately curtail piracy, (2) the creation of an IPR enforcement regime, and (3) improved market access for IPR products.[115]

In light of China's piracy of intellectual property, US Trade Representative Mickey Kantor announced "if there is not agreement by February 4, 1995."[116] The US would impose 100 percent tariffs on US$1.08 billion worth of Chinese products effective from February 26, 1995.[117] China responded with counter-sanctions against American exports, such as compact discs and cigarettes.[118] China further announced that it would suspend talks with American companies regarding automobile joint ventures, and it would withhold approval for American audio-video manufacturers to open branch offices in China.[119] The nature of interdependence determines both PRC and US behavioural orientation in terms of severe consequence of trade disruption. On 4 February 1995, after 20 months

of "often very difficult negotiations,"[120] China and the US once again averted trade war by 11th-hour negotiations.[121] The third MOU was signed by the two governments, which annexed an "Action Plan for Effective Protection and Enforcement of Intellectual Property Rights" detailing the measures to be taken to enforce and upgrade the IPR protection in China.[122]

The US appeared to have won agreement for all its demands. In a written statement, US President Bill Clinton hailed the deal as "a strong agreement for American companies and American workers. It will mean thousands of jobs for Americans in key industries, including computer software . . . books and periodicals and audio-visual products."[123] US Deputy Trade Representative Charlene Barshefky told reporters, ". . . this is the single, most comprehensive agreement on intellectual property rights we have ever negotiated with any country."[124] The substantive detail of the 1995 IPR agreement included the following commitments:

- The 1995 IPR Agreement committed China to launch an immediate, all-out crackdown against pirated merchandise in the country, particularly computer software, CDs and laser discs.[125]
- During the next six months, China had promised to raid all factories found to be producing unlicensed products, seize their goods, destroy their equipment, and revoke their business licenses.[126]
- Authorities from the US could monitor and verify China's commitment to crack down on the pirated goods.[127]
- Task forces with broad authority throughout China will be established to examine business records, enter premises of suspected copyrighted violators, destroy pirated goods and refer cases to criminal prosecutions.[128]
- China would provide greater access for US recording and film to the Chinese market; and China would lift existing Chinese quotas on imported movies and permit revenue-sharing and distribution arrangements between American film studios and Chinese partners.[129]
- As of October 1, 1995, new Chinese customs laws must be implemented providing greater authority to prosecute infringers and destroy product.[130]

Despite the 1995 MOU on IPR Enforcement, violation of intellectual property rights continued unabated in China.[131] Although China raided and closed down many factories

manufacturing pirated CDs, CD-ROM, and computer software, many factories which had been previously shut down re-started their operations.[132] According to US sources, PRC enforcement lacked "aggressive raids, announcement of criminal prosecutions, and administrative fines."[133]

In December 1995, the USTR again indicated that China had not made significant progress in its commitments under the 1995 MOU as the US examined Special 301. In May 1996 the US threatened punitive tariffs on $2 billion of Chinese apparel and other consumer goods.[134] The Clinton administration informed the Chinese government that on June 15, 1996, certain categories of Chinese exports would be subject to punitive tariff rates. As a response, China threatened counter-retaliation.[135]

Under the US pressure and demands, China made strenuous efforts to enforce patent and copyright laws and intensified its crackdown on infringement of trademarks, copyrights, patents, and on other forms of unfair competition, including closing down 34 factories producing pirated laser discs.[136] On June 17, 1996, the US chose not to sanction China for its failure to enforce the February 1995 Sino-US IPR agreement - despite the fact that intellectual property piracy was estimated to cost US firms more than $2 bn in 1995. China and the United States signed the 3rd last minute agreement on intellectual property. As a result, the US withdrew the threat of $2 bn in trade sanctions after China promised to clean up its act[137] and undertook a long list of actions to halt piracy.[138]

Foreign pressure, especially from the United States, has resulted in various MOUs with China. It continues to play a vital role in influencing China's institutional development, legislation and law enforcement. In view of the Sino-US IPR case study, the US has often engaged in bilateral negotiations aiming at improving intellectual property protection in China. However, the US

triggered bilateral negotiation with strong unilateralism in order to compel China to conform to its own standard of intellectual property protection. The threat of retaliation was effectively deployed to get China to reduce what was perceived as unfair trade practices. Recently the pattern of unilateralism has encompassed controversy over the terms of China's accession to the World Trade Organization.

VI. China's Accession to the WTO

One of the main goals of Chinese foreign policy has been obtaining contracting party status in the World Trade Organization ("WTO"), which replaced the General Agreement on Tariffs and Trade ("GATT") on January 1, 1995. The US has played a key role in China's accession process, demanding that adequate enforcement of intellectual property rights should be one of the pre-conditions for China enter to the GATT/WTO.[139]

Originally, China was a founding member of the GATT in 1947.[140] After the retreat of Chiang Kai-shek's Nationalist forces to Taiwan in October 1949, the Nationalist government notified the GATT Secretariat of China's withdrawal from the GATT in March 1950.[141] On July 14, 1986, the PRC formally notified the GATT Secretariat of its wish to resume its status as a contracting party.[142] From 1986 until the founding of the WTO on January 1, 1995, China was granted an observer status to participate in the GATT. However, after several years of negotiating with the GATT contracting parties to accede to GATT/WTO, China was unable to acquire GATT membership. China was also unable to secure status as a founding member of the WTO in 1995.

Sino-US tension was focused in the area of intellectual property protection. Prior to the 1995 Sino-US IPR Agreement, the United States clearly demonstrated that it was no longer committed to China's "rapid attainment" of membership to the GATT/WTO.[143] The American posture was contrary

to its promise in the 1992 MOU.[144] The PRC's entry into GATT and WTO was barred in large part due to the political opposition of the United States and Europe.[145] Once again the United States stressed China's inadequate intellectual property enforcement.[146] They insisted that China should abide by accepted international rules and accept the obligations if China wanted to join the WTO.[147] China's WTO accession was tied to compliance with the WTO's Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPs") provisions,[148] which include:

> ...protection of computer programs as literary works; rental rights for computer programs and sound recordings; fifty years of copyright protection for sound recordings and motion pictures; product and process patent protection for virtually all types of inventions:... and protection for trade secrets, integrated circuits, industrial designs, and non-generic geographical indications used to describe wines and spirits.[149]

The introduction of TRIPs has linked international trade and IPR protection. The TRIPs agreement requires that all member countries agree to set up an infrastructure to protect IPR. China's aspiration to accede to WTO would foster its ability to enforce IPR agreements. China had taken steps to make Chinese IPR laws conform more closely to TRIPs and international IPR standards. Although China was not a member of the World Trade Organization, China publicly declared its support of the Uruguay Round text on TRIPs.[150] For instance, China foresaw it would ultimately go back to the GATT. To avoid the trouble of amending China's Patent law once China acceded to the GATT, China decided to amend its laws according to the TRIPs. In 1992, the amendment of the Patent Law turned out to be quite close to TRIPs.[151]

China recently indicated its interest in rejoining the WTO, but the PRC has refused to pay too high a price for WTO entry. If the PRC successfully rejoins WTO and signs the Uruguay Round agreements including TRIPs and Trade in Counterfeit Goods, China has to comply with the standards of TRIPs, for example, the protection of geographical indications and layout-designs of

integrated circuits, enforcement procedures and remedies, provisional measures, and special requirements related to border measures.[152]

China made progress in bringing its IPR law closer to international practice, and the United States was the signatory of TRIPs, but the US continued to use Special 301.[153] Foreign countries criticized the US because it allowed the USTR to identify a country "for Special 301 treatment notwithstanding its compliance with TRIPs."[154] Even after the establishment of the World Trade Organization in 1995, an American official stated that, "the United States will not shy away from using unilateral measures such as Section 301 of the Trade Act of 1974, which authorizes investigations and trade sanctions."[155]

WTO and TRIPs have significant impacts on the protection and enforcement of IPR in China. The US has been a critical factor in China's bid to the WTO. China's accession process is affected by political, social, economic considerations, from either foreign pressure or China's domestic policy priorities. It would take some time for China to be admitted into the WTO. China's efforts to bring its IPR enforcement in line with WTO requirement would ease the way towards WTO entry.

Summary

Where the multilateral regime is perceived to have failed, the US has resorted to "mandatory bilateralism." The US used unilateral pressure tactics in order to precipitate bilateral negotiations on more favourable terms. Sometimes the mere threat of retaliation by the Special 301 from the United States was sufficient to manoeuvre foreign countries to accede to the United States wishes.[156] The trade sanction provisions were effectively used to pressure China into increasing China's intellectual property protection. American efforts in protecting its IPR demonstrates the vitality of Western neorealist tendency in world politics. Paradoxically, a perspective on power was deployed ostensibly

in favour of a neo-liberal notion of interdependence. The US used domestic trade law to protect its national interests (national wealth) in the IPR negotiations with China.

The extent of American dissatisfaction with China's intellectual property regime is indicated by repeated US threats to impose Special 301 trade sanctions against China. For example, as far as the conclusion of Sino-American IPR agreements and American critical acceptance of China's entry to WTO are concerned. my findings suggest there is a correlation between the magnitude of American trade penalty and the level of Chinese compliance and enforcement. Because China still seeks WTO membership, the United States has significant leverage to exact concessions from China in the area of intellectual property protection. The PRC found itself vulnerable to the American foreign policy pressures. Therefore, China made major concessions in its dealings with the United States in the realm of IPR protection. The afore-mentioned bilateral IPR agreements concluded by the US and the PRC demonstrate that US trade threats or sanctions have been instrumental in the forced creation and development of an IPR regime with respect to both countries.

The US purpose of upgrading China's IPR protection is to protect American national interests from vulnerability and maintain its competitive edge in international trade. It demonstrates how Section 337 and Special 301 have been successful and effective tools in international trade negotiations. It could be summarized from the American viewpoint in this light:

> [the US] agreement with China on protecting intellectual property is powerful evidence that our existing section 301 process is effective in dealing with bilateral disputes between the United States and China that exists under the current law.[157]

On the other side of the equation, although retaliation may in some ways satisfy political demands, it is sometimes costly, and difficult to enforce. The American commercial policy toward China is quite realistic and flexible. American trade strategy has been informed by a keen perspective

on power. At the same time, the US has recognized the importance of interdependence. According to Joseph Nye and Robert Keohane, interdependence is characterized as the state of affairs of mutual dependency and the nature of international relations is highly interdependent. In the Sino-American IPR case study, the interdependence relationship also extends to the US in the trade-related IPR issue. American trade interdependence with China is based on the degree to which the US needs access to Chinese markets, trade, investment, etc. Both the United States and China fear the prospect of a significant trade disruption. A cycle of trade sanctions and counter sanctions would punish the US as well as China.

For example, on the part of American government, trade disruption will hurt American high-tech industry, with a loss of numerous jobs, and denial of market access to the Chinese market. The United States also made some calculated concessions in order to get China's intellectual property laws enacted. The US has softened its stand on trade issues, such as delinking human right issue from renewal of MFN status for China, withdrawal of trade retaliation, and proclaimed support of China's bid to join the WTO.

This kind of economic brinkmanship can result in very severe costs to economic priorities of both the US and PRC. Three times the two countries managed to agree in an eleventh-hour bid to avoid these cost. The American behavioural orientation indicates commercial pragmatism and flexibility informed by interdependence. Former US Secretary of State Warren Christopher came to the following conclusion, speaking of differences between the US and China concerning intellectual property protection, the US did not intend to fight a trade war with China.[158] Trade sanctions/retaliation will do no good for both countries to conduct their normal trade relations. As a consequence, both countries, which have an enormous interest in trade and the expansion of trade,

are increasingly recognizing the importance and benefits of bilateral agreements to protect intellectual property rights. It is obviously in the best interests of both the United States and China to avoid any adverse consequences. All of these demonstrate a strong commitment on the part of each country to establish and maintain a long-term, mutually beneficial and cooperative relationship.

1. Paul Goldstein, *Copyright's Highway*, 1994:186. Also see William P. Alford, *To Steal A Book is An Elegant Offense*, Stanford University Press, 1995:130n15. For example, Charles Dickens' work was sold in the United States in many pirated editions. *A Christmas Carol* was offered for as little as six cents in the United States as opposed to the equivalent of $2.50 in Great Britain. For more information on the early history of US copyright law, see Aubert *Clark, Movement for International Copyright in 19th Century America*, Washington, D.C., Catholic University, 1960.

2. Sumner J. La Croix, *Intellectual Property Rights in ASEAN and the United States: Harmonization and Controversy*, East-West Center, no. 14, November 1994:1.

3. See Hughes, "The Philosophy of Intellectual Property," 77 *Georgia Law Journal*, 1988-89:287.

4. J.P. Errico, *Pacific Rim Intellectual Property Law*, Licensing Law Handbook, Licensing Law Library, 1995-96 edition, 1995:15.

5. Richard E. Vaughan, "Defining Terms in the Intellectual Property Protection Debate: Are the North and South Arguing Past Each Other When we Say "Property"? A Lockean, Confucian, and Islamic Comparison." *Journal of International & Comparative Law*, vol. 2, no. 2, Winter 1996:324.

6. "Thomas Jefferson," *Dictionary of American Biography*, vol. 10, 1933:19. Cited in J.P. Errico's *Pacific Rim Intellectual Property Law*, 1995:14.

7. US Constitution, Amendment IV. Cited in Richard Vaughan, *supra* note 5, 1996:329.

8. Amendment V of the US Constitution. Cited in Richard Vaughan, *supra* note 5, 1996:329.

9. J. H. Reichman, "Intellectual Property In International Trade: opportunities and Risks of GATT Connection," 22 *Vand. Journal Transnational Law*, 1989, 747, 775. (Asserting that intellectual property is a property right just like any other property rights, or in a narrow sense, even a human right). Cited in Richard E. Vaughan, *supra* note 5, 1996:331.

10. US Constitution, article I, section 8, clause 8. Cited in J.P. Errico's *Pacific Rim Intellectual Property Law*, 1995:22.

11. Zhong Jianhua, "Border Protection of Intellectual Property Rights in Hong Kong: A Comparative Study with the Position of Mainland China," *European Intellectual Property Review*, 3, 1997:155. Also 46 Stat. 703 (1930), 19 U.S.C. § 1337 (1982), 19 U.S.C. § 1337(a) specifically empowers the Trade Commission to exclude articles from entering the United States which further "[u]nfair methods of competition and unfair acts...."

12. Hon. Mel Levine, "Protecting US Patents," 137 *Cong. Rec. E* 1201, vol. 137, no. 53 (Apr. 11, 1991).

13. 19 U.S.C. § 1337 (a)(1)(B)-(D).

14. Ernest P. Shriver. "Separate but Equal: Intellectual Property Importation and the Recent Amendments to Section 337," *Minnesota Journal of Global Trade*, vol. 5, iss. 2, Summer 1996:442.

15. 19 U.S.C. § 1337(a)(1)(B)(i) (1994).

16. 19 U.S.C. § 1337(b)(1) (1992); 19 C.F.R. 210.10 (1992). The United States International Trade Commission (ITC) is a quasi-judicial agency established by Congress with broad investigative powers in trade. The ITC makes determinations of injury and threat of injury by imports to United States industry. The ITC also gathers and analyses trade data, which it provides to the President and Congress as part of the information on which United States trade policy is based. United States International Trade Commission, Pub. 2490, Annual Report 4 (1991).

17. Sumner J. La Croix, *Intellectual Property Rights in ASEAN and the United States: Harmonization and Controversy*, East-West Center, no. 14, November 1994:25.

18. Marshall Leaffer. "Protecting United States Intellectual Property Abroad: Toward a New Multilateralism," 76, *Iowa Law Review*, 1990:273

19. 19 C.F.R. §§210.41(e), .53.

20. 19 C.F.R. § 210.56.

21. 19 U.S.C. § 1337(d)-(f).

22. 19 U.S.C. § 1337(e)(1) (1994). Cited in Ernest P. Shriver, "Separate but Equal: Intellectual Property Importation and the Recent Amendments to Section 337." *Minnesota Journal of Global Trade*, vol. 5, iss. 2, Summer 1996:442.

23. 19 U.S.C. § 1337(d)(1) (1994). See Ernest P. Shriver, *supra* note 22, 1996:442.

24. 19 C.F.R. § 210.57(b); 19 U.S.C § 1337(j).

25. 19 C.F.R. § 210.71.

26. Bliss, "The Amendments to § 301: An Overview and Suggested Strategies for Foreign Response," 20, *Law & Policy of International Business*, 501, 507 (1988).

27. *Government Accounting Office Report*, 19 U.S.C. 2411 (d)(3)(B) gives the USTR authority to act. Cited in Angela Mia Beam. "Piracy of American Intellectual Property in China," *Journal of International Law and Practice*, vol. 4, iss. 2, summer 1995:350.

28. Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 304, 98 Stat. 3004-05 (codified as amended at 19 U.S.C. §§ 2111-2487). Cited in Brian Mark Berliner, "Making Intellectual Property Pirates Walk the Plank: Using 'Special 301' to Protect the United States' Rights", *Loyola of Los Angeles International and Comparative Law*, vol. 12, no. 3, (May 1990):733.

29. The annual National Trade Estimate Report must identify and analyse acts, policies or practices which constitute significant barriers to the United States exports of goods or services or United States foreign direct investment. Additionally, the report must estimate the trade-distorting impact of such acts on United States Commerce. Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 181, 98 Stat. 3001 (codified at 19 U.S.C. §§ 1872, 2155 (Supp. III1985)).

30. Ibid. 734.

31. Ibid, 734.

32. 19 U.S.C. § 2242(a)(1)(B).

33. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1301, 102 Stat. 1107, 1164. See Brian Mark Berliner, *supra note* 14.

34. Ibid. § 1303, 102 Stat. 1179. See Berliner, *supra note* 14, at 734.

35. H.R. Conf. Rep. No. 576, 100th Cong., 2nd. Sess. 522, *reprinted* in 1988 US Code Cong. & Admin. News 1547, 1555.

36. Dale E. Hughes, "Opening Up Trade Barriers With Section 301 - A Critical Assessment," *Wisconsin International Law Journal*, vol. 5, June 1987:182.

37. Trade Act of 1988, § 301(a), (c), 19 U.S.C. § 2411(a), (c) (1988). Congress believed that the USTR, being uninvolved in domestic and foreign political concerns would be more willing to take retaliatory action. H.R. Rep. No. 40, 100th Cong., 1st Sess., pt. 1, at 59 (1987). Cited in Thomas Mesevage, "The Carrot and the Stick: Protecting US Intellectual Property in Developing Countries," *Rutgers Computer & Technology Law Journal*, vol. 17, no. 2, 1991:428.

38. Trade Act of 1988, § 301(a), 19 U.S.C § 2411(a) (1988).

39. Ibid. § 301(d), 19 U.S.C. § 2411(d).

40. US State Department, *Country Reports on Economic Policy and Trade Practices*, 1989.

41. Michael Yeh, "Up Against a Great Wall: The Fight Against Intellectual Property Piracy in China," *Minnesota Journal of Global Trade*, vol. 5, iss. 2, Summer 1996:504.

42. U.S.C.A. § 2242(b)(1)(West Supp. 1995). See Michael Yeh, *supra note* 64.

43. "USTR Fact Sheets on Super 301 Trade Liberalization Priorities and Special 301 on Intellectual Property," Released May 25, 1989, 6, *International Trade Representatives (BNA)*, 715, 719 (May 31, 1989). Also see Michael Yeh, *supra note* 64, at 505.

44. United States Trade Representative, *1995 Trade Policy Agenda and 1994 Annual Report*, 58, 1994:98. Also see *supra note* 41, at 505.

45.See Michael Yeh. *Supra* note 41, at 505.

46. 19 U.S.C.A. § 2242(a) (West Supp. 1995). Cited in Michael Yeh, see *supra* note 41, at 505.

47. 19 U.S.C. § 2412(b)(2)(A).

48. Wayne M. Morrison, "The China-US Trade Dispute on Intellectual Property Rights," *CRS Report for Congress*, 95-294 E, February 21, 1995.

49. 19 U.S.C. § 2414(b)(1).

50. 19 U.S.C. § 2414(c).

51. 19 U.S.C. § 2414(a)(1).

52. 19 U.S.C. § 2414(c)(1)(A)-(B).

53. 19 U.S.C. § 2411(c)(1)(A)-(B).

54. 19 U.S.C. § 2411(a), 2414(a).

55. "Role of Intellectual Property in Global Competition Explored," *Patent, Trademark & Copyright Journal*, (BNA) July 23, 1987:302.

56. 35 U.S.C. § 271 (1983); 17 U.S.C. § 501 (1977). Section 271(a) provides that "[w]hoever without authority makes, uses or sells any patented invention, within the United States during the term of the patent therefor, infringes the patent." 35 U.S.C. § 271(a) (1983). Section 501(a) provides that one "who imports copies or phono records into the United States ... is an infringer of the copyright." 17 U.S.C. § 501(a) (1977). See Brian Mark Berliner, *supra* note 28, 1990:726.

57. *Unfair Foreign Trade Practices: Hearings Before the Energy and Commerce Committee*, 99th Congress, 2nd Session, 1986:91-92. Also see Brian Mark Berliner, *supra* note 28, 1990:726.

58. The Berne [Convention was] signed in Berne in 1886 and last revised in 1971. Under the Convention, each member State must accord the same protection to the copyright of the nationals of the other member State as it accords to that of its own nationals. The Convention also prescribes some minimum standards of protection; for example, that copyright protection generally continues throughout the author's life and for fifty years thereafter. It includes special provisions for the benefit of developing countries. (In WIPO, General Information. 1990). See also Michael Yeh. *supra note* 41, 1996:509.

59. Universal Copyright Convention (UCC) falls within the purview of UNESCO. It establishes lower minimum standards than those of the Berne Convention. The UCC provides reproduction, public performance and broadcast rights for the author, and a minimum term of 25 years from the date of first publication, or for the life of the author plus 25 years. The UCC provides limited exceptions for developing countries. In Brent W. Sadler, "Intellectual Property Protection Through

International Trade," *Houston Journal of International Law*, vol. 14, 1992:403.

60. The Paris [Convention was] signed in Paris in 1883 and last revised in 1967. Under the Convention, each member State must accord the same protection to inventions, trademarks and other subject matter of industrial property of the nationals of the other member States as it accords to those of its own nationals. The Convention also provides certain facilities to foreigners; for example, it allows them, without losing their claim to novelty, to file their applications for patents up to a year after first filing in the country of origin. It contains provisions concerning the conditions under which a State may license the use of a patented invention in its own territory if, for example, the owner of the patented invention does not exploit it in such territory. (In WIPO, General Information, 1990). See Michael Yeh, *supra note* 41. 1996:507-08.

61. Sumner J. La Croix, *Intellectual Property Rights in ASEAN and the United States: Harmonization and Controversy*, East-West Centre, no. 14, (November 1994):5.

62. Carol J. Bilzi, "Towards an Intellectual Property Agreement in the GATT: View from the Private Sector," *Georgia Journal of International and Comparative Law*, vol. 19, iss. 2, 1989:346.

63. See J.M. Gould, "Protecting Owners of US Process Patents from the Importation of Pharmaceuticals Made Abroad by Use of the Patented Process: Current Options, Proposed Legislation, and a GATT Solution." 42, *Food Drug Cosmetic Law Journal*, 1987. Cited in Sumner J. La Croix, 1994:4.

64. See Article 142 of the General Principles of the Civil Code of the People's Republic of China. In Zheng Chengsi, "TRIPs and Intellectual Property Protection in China," 5 *European Intellectual Property Review*, 1997:243.

65. William P. Alford, "How Theory Does-And Does Not-Matter: American Approaches to Intellectual Property Law in East Asia," *UCLA Pacific Basin Law Journal*, vol. 13, no. 1, Fall 1994:10.

66. Ibid, 10.

67. Brent W. Sandler, "Intellectual Property Protection Through International Trade," *Houston Journal of International Law*, vol. 14, 1992:407.

68. Brian Mark Berliner, Notes "Making Intellectual Property Pirates Walk the Plank: Using 'Special 301' to Protect the United States' Rights," *Loyola of Los Angeles International and Comparative Law*, vol. 12, no. 3, May 1990:725.

69. Richard E. Vaughan, "Defending Terms in the Intellectual Property Protection Debate: Are the North and South Arguing Past Each Other When We Say 'Property'? A Lockean, Confucian, and Islamic Comparison."*Journal of International & Comparative Law*, vol. 2, no. 2, Winter 1996:314.

70. "Foreign Investment: Foreign Holdings in United States Increase Eleven Percent, United States Direct Investment Abroad Up by Nine Percent," *International Trade Representatives*, (BNA) July 2, 1986.

71. "Piracy of United States Intellectual Property Rights," *International Trade Representatives*, (BNA) Jan. 23, 1991:134.

72. *Unfair Foreign Trade Practices: Hearings Before the Energy and Commerce Committee*, 99th Congress, 2nd Session, 1986:87.

73. *Supra* note 5, see Richard E. Vaughan, 1996:315.

74. Richard P. Rozek, "Protection of Intellectual Property Rights: Research and Development Decisions and Economic Growth," in *Intellectual Property Rights in Science, Technology, and Economic Performance*, F. Rushing & C. Ganz Brown eds. 1990:11.

75. US Department of Commerce, *Statistical Abstract of the United States*. 1951 (1952). Citing in Nicolas S. Gikkas, "International Licensing of Intellectual Property: The Promise and the Peril," Vol. 1, *Journal of Technology Law & Policy*. Spring 1996, available on <http://journal.law.ufl.edu/~techlaw/1/gikkas.html>.

76.US Department of Commerce, *Highlights of US Export and Import Trade*, Report FT990 (1986).

77. Fred Warshofsky, *The Patent Wars*, 1994:6.

78. Fred Warshofsky, *The Patent Wars: The Battle to Own the World's Technology*, 1994:3. See also *Economic Outlook for 1993, Hearings Before the Joint Congressional Economic Committee*, Federal News Service, Jan. 27, 1993. Statement of Senator Bennett demonstrated how IPR has dramatically changed the nature of wealth creation in the developed world:

> I find it significant that the richest man in the United States now is Bill Gates who owns no huge factories or ranches, no tremendous commercial enterprises that we would think of 50 to 60 years ago. It all comes out of his head. And the intellectual product has made him the richest man in the United States, not the physical product of a steel mill or an automobile factory. And I think that's a demonstration of the kind of structural differences that we have.

79. *Unfair Foreign Trade Practices: Hearings Before the Energy and Commerce Committee*, 99th Congress, 2nd Session 36, 1986:102.

80. General Accounting Office, *GAO Report: US China Trade-Implementation of Agreement on Market Access and Intellectual Property*, Jan. 31, 1995.

81. Statement of Carla A. Hills, United States Trade Representative, "Intellectual Property, Domestic Productivity and Trade: Hearing before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the Committee on the Judiciary," *101st Congress, 1st Session, 68*, 1989:33.

82. Tyson, "Managing Our High-Tech Trade," Los Angeles Time, September 17, 1989, § IV, at 2, col. 4. In Brian Mark Berliner, Notes "Making Intellectual Property Pirates Walk the Plank: Using 'Special 301' to Protect the United States' Rights," *Loyola of Los Angeles International and Comparative Law*, vol. 12, no. 3, (May 1990):725.

83. Hon. Toby Roth, Congress Representative from Wisconsin and Chairman of the House Subcommittee on International Economic Policy and Trade, *The US-China Intellectual Property Rights Agreement and Related Trade Issues*, Joint Hearing before the Subcommittee on International Economic Policy and Trade and Asia and the Pacific of the Committee on International Relations, House of Representatives and the Subcommittee on East Asian and Pacific Affairs of the Committee on Foreign Relations Senate, One Hundred Fourth Congress, Second Session, March 7, 1996:3.

84. Mr. Archer, "Disapproval of Most-Favoured-Nation Treatment for China," *Congressional Record, NewsBank, inc. - Global NewsBank*, available from US document database at Stanford University.

85. See Nicolas S. Gikkas, "International Licensing of Intellectual Property: The Promise and the Peril," Vol. 1, *Journal of Technology Law & Policy*, Spring 1996, available on <http://journal.law.ufl.edu/~techlaw/1/gikkas.html>.

86. "US Policy on China Questioned," June 27, 1996, *Bangkok Post*, available from *http: www.apec.org/apps/media/fullmedia/bush27.html*.

87. Bill Clinton, speech of a Democratic National Committee Luncheon at Palm Beach, Florida, *China News Digest*, November 3, 1997.

88. Special report "Remarks by US President in Address on China and the National Interest, October 24," *Beijing Review*, November 10-16, 1997:16.

89. William P. Alford, 1994:14.

90. Harry Harding, *A Fragile Relationship: The United States and China since 1972*, The Brookings Institution, Washington, D.C., 1992:192.

91. Ibid, at 192.

92. *Sino-American Trade Agreement*, July 7, 1979, China-United States, art. 1, 31 U.S.T. 4651, T.I.A.S. no. 9630.

93. Agreement on Trade Relations, July 7, 1979, US-PRC, art. VI(3), 31 U.S.T. In Richard L. Thurston, "Country Risk Management: China and Intellectual Property Protection," *The International Lawyer*, vol. 27, no.1, Spring 1993:54.

94. M. Sean McMillan, *Attitudes of the People's Republic of China to International Commercial Trade (1979)*, Monograph 3, published under the auspices of the American Bar Association's Section

of International Law Committee on the People's Republic of China.

95. Wayne M. Morrison, "The China-US Trade Dispute on Intellectual Property Rights", *CRS Report for Congress*, Congressional Research Service, Library of Congress, 95-294 E, February 21, 1995.

96. Michel Oksenberg, Pitman B. Potter, William B. Abnett, *Advancing Intellectual Property Rights: Information Technologies and the Course of Economic Development in China*, The National Bureau of Asian Research, vol. 7, no. 4, November 1996:7.

97. Pitman B. Potter, "Prospects for Improved Protection of Intellectual Property Rights", *China Business Review*, vol.16, iss.4, July/August 1989:27-29.

98. Richard P. Rozek, "Protection of Intellectual Property Rights: Research and Development Decisions and Economic Growth," in *Intellectual Property Rights in Science, Technology, and Economic Performance*, in F. Rushing & C. Ganz Brown eds., 1990:11.

99. Pitman B. Potter, *supra* note 97, 1989:27-29:.

100. T. K. Chang, Chapter 3 "Some Thoughts on Government Control and Intellectual Property Law in China," in *Annual Conference on Intellectual Property*, 3, October 4-6, 1989, General editor Sandra M. Stevenson, Albany Law School and Rensselaer Polytechnic Institute.

101. "China: US Takes First Steps On Sanctions Against Chinese Goods Under Special 301." 8 *International Trade Representatives*, (BNA) December 4, 1991:1754.

102. Office of The United States Trade Representative, *Press Release*, (April 27, 1990):1-2.

103. *Country Reports on Economic Policy and Trade Practices*, Report Submitted to the Committee on International Relations, Committee on Ways and Means of the US House of Representatives and the Committee on Foreign Relations, Committee on Finance of the US Senate by the Department of State in accordance with Section 2202 of the Omnibus Trade and Competitiveness Act of 1988, (February 1995):45.

104. Office of the United States Trade Representative, *Fact Sheet*, (April 26, 1991):2.

105. Xiao-Lin Zhou, "US-China Trade Dispute and China's Intellectual Property Rights Protection," *New York University Journal of International Law and Politics*, vol. 24, no. 3, (Spring 1992):1117.

106. Richard L. Thurston, "Country Risk Management: China and Intellectual Property Protection," *The International Lawyer*, vol. 27, no. 1, (Spring 1993):55.

107. "Intellectual Property," *Memorandum of Understanding between the United States of America and the People's Republic of China*, Treaties and Other International Acts Series 12036, January 17, 1992.

108. Michael Yeh, "Up Against a Great Wall: The Fight Against Intellectual Property Piracy in China," *Minnesota Journal of Global Trade*, vol. 5, iss. 2, (Summer 1996):510. Under Article 25 of the Chinese Patent Law, pharmaceutical products and substances obtained by means of a chemical process cannot be patented. Only the process of making them is patentable.

109. Joseph T. Simone, Jr, "Improving Protection of Intellectual Property," *China Business Review*, vol.19, iss.2, (March/April 1992):9-11. Also see, Pitman B. Potter, "Prospects for Improved Protection of Intellectual Property Rights", *China Business Review*, vol.16, iss.4, (July/August 1989): 27-29, the MOU stipulates that: "1. China will submit a draft of a copyright law to the State Council and then to the Standing Committee of the National People's Congress by the end of 1989, 2. China's copyright legislation will include computer programs as a specific category, 3. upon enactment of the copyright law, the Chinese and US governments will take appropriate actions to extend protection of their copyright laws to work originating in each other's countries."

110. See Jianyang, Yu, "Protection of Intellectual Property Protection in PRC: Progress, Problems, & Proposals," *UCLA Pacific Basin Law Journal*, vol. 13, no. 1, (Fall 1994):143. In Meiguo zuoping zai zhongguo shoudao baohu: Zhongmei jianli shuangbian zhezhuo chuan baohu guanxi, *Renmin Ribao*, [People's Daily (overseas edition)], (Mar. 24, 1992):4.

111. "China: US-China Intellectual Property Accord Ends Threat of US Retaliatory Duties," 9 *International Trade Representatives*, (BNA), (May 1, 1991):644.

112. *Supra* note 108, see Michael Yeh, 1996:510.

113. Tan Loke Khoon, "Recent Development in Intellectual Property Law in the People's Republic of China," *European Intellectual Property Review*, vol. 15, iss. 5, (May 1993):176-79.

114. Lee M. Sands, "IPR Watchdogs," *China Business Review*, (Nov.-Dec. 1994):16-17. According to the office of USTR, twenty-nine factories in southern China had a production capacity of 75 million CDs per year in 1994, although domestic demand stood at only 5 million CD per year, and piracy of computer software in China has run as high as 94 percent.

115. Ibid. see Lee M. Sands, 1994:17-18.

116. Mark O'Neil, "US-China Trade War Edges Closer," *The Globe and Mail*, (January 30, 1995):B4.

117. Bulletins, "US. China Bargaining," *Globe & Mail*, (February 7, 1995):B2. Sanger, *infra* note 118, see David E. Sanger, (Feb 5. 1995):A3. The US trade sanctions imposed on China consisted of 100% punitive tariffs on $1.08 billion of Chinese exports, which included items such as: plastic articles, cellular phones and answering machines, sporting goods, bicycles, and other goods such as footwear, and winter apparel.

118. David E. Sanger, "President Imposes Trade Sanctions on Chinese Goods," *New York Times*, (Feb. 5, 1995):A1.

119. Ibid. A3.

120. Deputy US Trade Representatives Charlene Barshefsky, originally from Charlene Fu. "US. China Sign Trade Deal," *reprinted* in *Halifax Chronicle Herald*, (Feb. 27, 1995):A2.

121. Rod Mickleburgh, "US, China Avert Trade War: Sanctions avoided by 11th-hour deal," *Globe & Mail*, (February 27, 1995):B1. B4. Between the announcement by the USTR on February 4. 1995 that US $ 1.08 billion in sanctions would be imposed on China and the announcement on February 26, 1995 of the IPR Agreement, Chinese authorities closed down seven of the twenty-nine factories cited by the USTR as the greatest pirates of CDs and Video discs. See Donna Smith, "China. US Pact Positive Step for Both Countries," *Reuters*. Feb. 27. 1995. available in *Internet. Clari.World.Asia.China.*

122. *Supra* note 27. 8.

123. See *supra* note 121, B4.

124. Ibid., B4.

125. See Rod Mickleburgh, *supra* note 121, B1.

126. See Rod Mickleburgh. *supra* note 121, B4.

127. Ibid. B4.

128. Ibid. B4.

129. Washington Post. "US. China Avert Trade War at 11th Hour," reprinted in *Montreal Gazette*, Sunday. (February 26, 1995):B1.

130. *Memorandum of Understanding between the United States and China*, Annex I, February 26, 1995.

131. Geoffrey T. Willard, "An Examination of China's Emerging Intellectual Property Regime: Historical Underpinnings, the Current System and Prospects for the Future," *Indiana International & Comparative Law Review*, vol. 6, no. 2, 1996:434.

132. Amy Borrus, et al., "Counterfeit Disks, Suspect Enforcement," *Business Week*, (Sept. 18, 1995):29.

133."IPR Industry to Offer USTR Mixed Assessment of Chinese Enforcement," *Inside US Trade*, (Aug. 11, 1995):20.

134. Peter Morici, "Barring Entry? China and the WTO," *Current History*, (September 1997):275.

135. *Supra* note 27, 8.

136. See *China's News Digest. CD*, February 9, 1996.

137. Matt Forney, Nigel Holloway, "Play it again, (Uncle) Sam", *Far Eastern Economic Review*, vol. 159, iss. 26, (June 27, 1996):65.

138. *Supra* note 27, 8.

139. Michael N. Schlesinger, Note "A Sleeping Giant Awakens: the Development of Intellectual Property Law in China," *Journal of Chinese Law*, vol. 9, no. 1, (Spring 1995):94. The following barriers to China's accession to the GATT are: (1) absence of transparency in China's laws; (2) import licensing requirement; (3) import prohibitions and quantitative restrictions; (4) technical and certification requirements. Patrick H. Hu, "The China 301 on Market Access: A Preclude to GATT Membership," *Minnesota Journal of Global Trade*, vol. 3, 1994.

140. GATT went into effect on January 1, 1948, with "the Republic of China" identified as one of original Contracting Parties in the Preamble, see General Agreement on Tariffs and Trade (GATT). Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187. See Michael N. Schlesinger, 1995:94.

141. Lori F. Damrosch, "GATT Membership in a Changing World Order: Taiwan, China, and the Former Soviet Republic," vol. 1, *Columbia Business Law Review*, 1992. See Michael N. Schlesinger, 1995:135.

142. See Michael N. Schlesinger, 1995:136. See Harold K. Jacobson & Michel Oksenberg, *China's Participation in the IMF, the World Bank, and GATT*, 1990:94. (Stating that in China's written request to accede to the GATT in 1986, China notified the GATT Secretariat of its wish to participate in the Uruguay Round negotiations. The contracting parties decided to allow countries who were negotiating the terms of their membership to participate as observers.)

143. See Michael N. Schlesinger, 1995:137.

144. Memorandum of Understanding Concerning Market Access, art. VIII(2), Oct. 10, 1992, 31 *International Legal Material*, 1274.

145. "Brittan: China Must Do More to Earn GATT Membership," *Deutsche Presse-Agentur*, No. 7, 1994. (During China's fierce negotiations to join the GATT in late 1994, the European Union Commissioner, Sir Leon Brittan, was firm in his opposition to China's bid to join the GATT without improvements in market access, economic reform, free trade for all products and currency convertibility.) See Michael N. Schlesinger, 1995:136.

146. "China's Piracy Woes Tarnish Image, UPI, July 30, 1994 (reporting that the United States demanded stringent action against violators of copyright as "one of conditions for China's re-entry into the General Agreement on Tariffs and Trade"), available in Michael N. Schlesinger, 1995:137. See Lindsay Griffiths, "US China Trade Words Over GATT," *Reuters Euro. Business Representatives*, Nov. 3, 1994. ("The chief stumbling block [to China's gaining entry into GATT] is the US insistence that China first reform its economic system," including "cracking down on trade

156. See Brent W. Sadler, *supra note* 59, 1992:415.

157. Mr. Archer, "Disapproval of Most-Favoured-Nation Treatment for China," *Congressional Record, NewsBank, Inc. - Global NewsBank*, June 27, 1996, available in US Government database at Stanford University.

158. "Confrontation Damages China-US Interests," *Xinhua News Agency*, May 30, 1996, available in Global NewsBank (NewsBank, Inc.) database at Stanford University.

Chapter Three

China's Adaptation to the International Norms and Practices

We cannot demand a new-born baby should stand as well as an adult. Given time and care, [China's Intellectual Property system] will grow up rapidly.

Wang Zhengfa[1]

Western countries must be patient and allow China adequate time to adapt.

Jill Chiang Fung[2]

Chapter Three explains the changing patterns and philosophical perspectives of intellectual property rights in the Chinese context. It explores the shift from China's non-recognition of intellectual property rights and economic development to the current realist accommodation to international norms and practices. This chapter focuses on changes that China has adopted in its legislative framework: legal reform, legal infrastructure, and China's accession to major international IPR conventions and treaties. It discusses China's efforts in addressing American concerns regarding IPR protection and enforcement in China. It analyses the major reasons for these changes in China's legal reform with reference to neorealism and interdependence theory.

This chapter surveys major Chinese Trademark Law, Patent Law, Copyright Law, and Anti-Unfair Competition Law. It also introduces the relevant controversies with regard to these laws in the Sino-US IPR dispute. It incorporates analysis of Chinese IPR developments by evaluating these

changes in relation to China's economic reform and China's US policy.

China's response to American pressure reveals mixed and complex policy reactions to the United States in the area of IPR protection. China's desire for technology to benefit its modernization drive, as well as outside pressure to upgrade IPR protection, are critical to an explanation of Sino-American IPR relations and the ongoing development of an IPR regime between China and the United States. Despite substantive historical differences between American and Chinese legal traditions, the two sides are participating in a "regime" which is based upon common principles, rules and enforcement in the area of intellectual property protection. .

I. Philosophical Foundation - IPR Under Confucian and Marxist Influences

Any understanding of IPR protection is rooted in a complexity of cultural and philosophical perspectives relating to belief, mindset, culture, intention, social convention, customs, and tradition. As mentioned in the previous chapter, the West has often emphasized that individual rights are sacred, abstract, and of universal nature.[3] Such a viewpoint sanctioned a legal doctrine of intellectual property rights which granted a near-monopoly to the IPR holder as an economic incentive for others to innovate.[4] In contrast, traditional Chinese concepts of rights and ownership tended to place an emphasis on social and economic rights, viewing them as collective, non-universal, and subordinate to state interest.[5]

The Confucian tradition endorsed a free transmission of ideas. Ideas were not "property" subject to ownership.[6] This was succinctly captured in the following passage in *Analects*: "The Master [Confucius] said: 'I transmit rather than create; I believe in and love the Ancients.'"[7] The Confucian doctrine subordinated the individual rights to the public good and state's interest. This tradition located the individual within the moral structures of society, and rights were not as

important as mutual obligations.

Traditionally, copying individual works was a legitimate way to learn and share knowledge.[8] The Chinese viewed the copying of another's intellectual work as a compliment to the creator.[9] This can be demonstrated in Professor James Feinerman's discussion regarding IPR protection in the Asian Pacific region: "Throughout Asia, a shared consciousness exists that the use of another's intellectual property is not regarded as stealing or piracy, but a sort of non-culpable usage."[10]

To a certain extent, Confucian ideology dovetailed with concepts of Marxism that took hold before and after the founding of the People's Republic of China. Marxism also elevated state interests over individual autonomy.[11] Marx reasoned: "...My own existence is a social activity. For this reason, what I produce, I produce for society and with the consciousness of acting as a social being."[12]

Under socialism, labour would be socialized and the resources commonly owned. The fruits of social labour would be directly distributed to all.[13] Marxist governments "are traditionally hostile toward private ownership of intellectual property."[14] This viewpoint was carried forward into modern China. When Mao and the Chinese Communist Party came into power in 1949, China began to develop a new legal system based largely on the Soviet model.[15] The basis of the IPR philosophy was mainly egalitarian in Mao's era. Thus, as a result of both cultural and political influences, individual accomplishments belonged to the society in the early years of PRC.[16] This was evident in the 1963 China's *People's Daily(renmin ribao)*, which stressed that "invention or technical improvement is a precious part of people's property."[17] Monetary awards other than proprietary rights would be sufficient to stimulate innovation in the collective ownership principle of socialism.[18] As a result, in the Maoist era, neither *China's Regulations Concerning Awards for Inventions* nor *the*

Regulations Governing the Control of Trademarks were effectively enforced.[19]

During the Cultural Revolution (1966-76), there was an extreme egalitarianism, which heralded the "higher phase of communist society."[20] Mao emphasized that individual rights should be subordinate to the state.[21] And Mao further stated that since all property belonged to the State, even if ideas were property, no person could own them, and any legal principles governing individual ownership were ideologically unacceptable.[22] Material incentives were denounced as bourgeois[23] and property was considered part of the collective wealth. This was succinctly evidenced in the 1975 Chinese Constitution:

> The 1975 Constitution articulates the PRC's attitude that art and culture are also considered collectively-owned productive forces usable in the class struggle. The proletariat must exercise all-around dictatorship over the bourgeoisie in all spheres of culture. Culture and education, literature and art, physical education, health work and scientific research must all serve proletarian politics, serve the workers, peasants and soldiers, and be combined with productive labour.[24]

II. Domestic Policy Response to Interdependence

After Mao's death and the overthrow of the "Gang of Four," Deng Xiaoping launched an ideological attack on the excessive egalitarianism and lack of regard for economic development of the Gang of Four.[25] China began to change its focus from class struggle to economic reform. There was a change in China's political ideology in the Deng era. Deng's thought prepared the ideological ground for changing the status of *pingdengquan* ("egalitarian right") to individual right within a triangular structure of interests (namely individual, collective, and state ownership) . Drafted under the auspices of Deng Xiaoping in 1975, a document entitled "Some Problems in the Acceleration of Industrial Development" pronounced that

> [t]he restriction of bourgeois right can never be performed in isolation from the material conditions and spiritual conditions at the current stage....[W]e cannot deny distribution

innovation" and afford international protection for Chinese technology.[36] And lastly, many Chinese top leaders concluded that IPR was an essential and indispensable ingredient of an innovative and civilized society. The above-mentioned factors embody the notion of interdependence. The current Chinese interdependence is defined in terms of economics. Much of the Chinese literature on interdependence embraced this notion in the early 1990s:

> Interdependence is not only a fact of contemporary international life, but both a favourable condition and an indispensable factor in China's own economic development. Interdependence...is defined as including international economic cooperation,...North-South relations should be viewed within the context of interdependence....the South (i.e., China) needs the capital and expertise of the North, while the North needs the markets, investment sites, raw materials, and the inexpensive labour of the South.[37]

China also believes that China cannot develop fully if it remained isolated from the rest of the world. It is beneficial for China to promote commercial interaction and technology exchange with the capitalist world. Since China's open door policy, China has become economically interdependent with the Western economic system. It reflects that trade globalization also extends to China. China is managing interdependence with the world economy by adopting the precepts of western law in the area of intellectual property protection.

Analysts point to China's commitment to improved IPR protection as a major boost to the country's foreign trade.[38] For example, Chinese Minister of Foreign Trade and Economic Cooperation (MOFTEC), Wu Yi, said that "IPR protection is important to China's scientific and technological progress, economic development and international trade."[39] Further evidence is provided in the following two articles of the 1982 State Constitution.

> Citizens of the People's Republic of China have the freedom to engage in scientific research, literary and artistic creation and other cultural pursuits. The state encourages and assists creative endeavours conducive to the interests of the people that are made by citizens engaged in education, science, technology, literature, art and other cultural

work. (Article 47)

> The state promotes the development of the natural and social sciences, disseminates knowledge of science and technology, and commends and rewards achievements in scientific research as well as technological innovations and inventions. (Article 20)[40]

More specific support can be found in the 1986 General Principles of the Civil Law.[41] The latter recognized the rights of individuals and legal entities to hold copyrights, patents, and trademarks.[42] Article 44 also indicated that, "[c]itizens and legal persons enjoy the author's right (*zhuzuo quan*) and are entitled by law to sign, publish and print their works and obtain remuneration therefrom...."[43] On July 22, 1994, China's State Council announced the *White Paper on IPR Protection* through Xinhua News Agency:

> It is part of our reform and open-door policy to protect intellectual property rights. Intellectual property rights protection is important for the development of science, technology and culture, and for the proper functioning of the socialist market economy. In step with the increasing integration of the global economy and international science and technology, and in order to accelerate our progress to restored membership of the GATT, we have in recent years expedited intellectual property development. We have successively promulgated the Trademark, Patent, Technology Transfer, Copyright, and Anti-Unfair Competition laws, bringing us generally in line with international standards. This effort has pushed ahead our reform and open-door policy, and our modernization.[44]

III. IPR in China's US Policy

The Chinese government attaches great importance to Sino-American relations. The US is one of the world's largest producers of new information. The United States is the third-largest foreign investor investing $26 billion in 20,000 projects in China.[45] Statistics from a Chinese source showed that Sino-US bilateral trade soared to US$40.8 billion in 1995 from US$2.5 billion in 1979, rising at an average annual rate of 20 percent.[46]

The Sino-U.S. trade relation has profound implications for the upgrading of China's IPR regime. Although Chinese authority does not officially subscribe to neorealism, its behavioural

orientation displays a particular understanding of the assumptions of neorealism. Chinese neorealism places priority on economic development to make China materially powerful and prosperous. Most of the recent changes in China's legislation and enforcement can be traced back to the American pressure on the Chinese government. As discussed in the previous two chapters, the United States applied considerable pressure to China, demanding China upgrade IPR protection and enforcement. The American threat of Special 301 sanctions hastened this process because China could not stand to lose billions of dollars in exports to the United States. As Chih-Yu Shih argues, cooperation is an inevitable compromise or a strategic move to protect and increase national interests.[47] It indicates China's pragmatic motivation and desire for a workable solution informed by Chinese neorealism to promote China's national interests.

Out of necessity, China has attempted to restructure its political and economic infrastructure to conform to internationally accepted principles. In the same manner, China has changed its policy towards intellectual property rights.[48] Deng Xiaoping, for example, told the chairman of a laser disc company in the Shenzhen Special Economic Zone that it was necessary for China to abide by international regulations on intellectual property rights.[49] Concerning Sino-US IPR negotiations, China's Trade Minister of MOFTEC, Wu Yi, commented that the negotiations affected the overall Sino-U.S. relationship.[50] Zhang Yuejiao, a chief negotiator of China's MOFTEC with the US counterpart, officially admitted that China did not deny the existence of piracy.[51] However, China held a "serious and earnest attitude" on IPR protection and enforcement.[52]

The attempts of the Chinese government to strengthen IPR protection resulted in the passage of national IPR legislation, accession to international conventions and conclusion of international treaties. Chinese IPR law has set out criteria for the granting of intellectual property rights in certain

categories of information. This section summarizes China's legislative conformity with international treaty law. As indicated in the following series of charts in Figures 2.1, 2.2, 2.3, 2.4, 2.5, etc. The detail in these Figures strongly suggests a sea change in China's domestic legal structure and process.

The specialized comprehensive nature of related China's domestic law is detailed in Figure 2.1, whereas the developing conformity with international treaty law is detailed in Figure2.2. Figure 2.3 is devoted to China's legal system, especially PRC's administrations in charge of IPR. Figure 2.4 and 2.5 deals with PRC's IPR agencies and organs respectively. At least, China displays its behaviour to fill the gap between China's legal regime and international legals norms and practices.

Figure 2.1: Chinese Legislation Relating to Specific IPR[53]

Date	Specific Intellectual Property Rights Laws
1982	*Trademark Law and Implementing Regulations*
1984	*Patent Law and Implementing Regulations*
1985	*Interim Provisions on Claims for Priority in Applying for Registration of Trademarks*
1985	*Interim Regulations on the Registration of Names of Industrial and Commercial Enterprises*
1986	*General Principles of the Civil Code*
1990	*Copyright Law*
1990	*Software Protection Regulations*
1991	*Regulations on the Registration and Protection of Enterprise Names*[54]
1991	*Regulations on Patent Agent*
1992	*Patent Law Revision*
1992	*Answers Given by the Highest People's Court to Questions on Hearing of Cases of Patent Dispute*
1992	*International Copyright Treaties Implementing Rules*[55]
1993	*Anti-Unfair Competition Law*
1993	*Trademark Law Revision*
1993	*Implementing Regulations of the Trademark Law*
1993	*Supplementary Provisions Concerning the Punishment of Crimes of Counterfeiting Registered Trademarks*
1994	*Protection of the Rights and Interests of Consumer Law*
1994	*Resolution of the Standing Committee of the National People's Congress on Publishing the Crimes of Copyright Piracy*
1994	*The Statute for Administration of Audio-Visual Products*[56]
1994	*Decision of the State Council on Further Strengthening the Work of Protection of Intellectual Property*[57]
1994	*Procedures for the Registration and Administration of Collective Marks and Certification Marks*
1995	*The Regulations on Customs Protection for Intellectual Property*[58]
1995	*The Implementing Measures of the General Administration of Customs Concerning the Protection of Intellectual Property*[59]

Figure 2.2: China's Accession to the International Intellectual Property Conventions

Date	Members of International IPR Conventions and Treaties
1980	*The Convention Establishing the World Intellectual Property Organization* [60]
1980	*The Paris Convention for the Protection of Industrial Property*[61]
1989	*The Madrid Agreement Concerning the International Marks and Regulations*
1992	*Memorandum of Understanding between the Government of USA and the Government of PRC on the Protection of Intellectual Property*
1992	*The Berne Convention for the Protection of Literary and Artistic Works*[62]
1992	*The Universal Copyright Convention*[63]
1992	*The Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks*
1992	*The Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms*
1994	*Patent Cooperation Treaty*
1994	*Agreement on Trade-Related Aspects of Intellectual Property*[64]
1995	*Memorandum of Understanding between the Government of USA and the Government of PRC on the Protection of Copyrights*
1995	*Intellectual Property Rights Enforcement Agreement between USA and China*
1996	*Sino-U.S. IPR Agreement*

Figure 2.3: Legal system - Administrations for IPR Laws of the PRC

The Chinese Patent Office ("CPO")	The CPO and its local offices are the administrative authorities of China for patent affairs. The CPO itself does not accept patent infringing cases. The local administrative authorities for patent affairs have the power to order the infringer to stop the infringing act and to compensate for the damage.[65]
The Chinese Trademark Office ("CTO")	The CTO, under the State Administration for Industry and Commerce, is the institute responsible for enforcing the Trademark Law of China. Where the exclusive right to use a registered trade mark is infringed, the CTO and its local offices have the power to order the infringer to stop the infringing act immediately, seal or seize the representations of the trade mark, order the removal of the trade mark from the remaining goods or packaging, and order the infringer to compensate the party whose right was infringed for the damage suffered.[66]
China's Copyright Office ("CCO")	The CCO and its local offices are responsible for enforcing the Copyright Law of China. The CCO and its local offices have the power to inflict the administrative penalties of issuing a warning, ordering a stop to the making and distributing of infringing reproductions, confiscating unlawful income, and imposing a fine.[67]
The Ministry of Public Security("MPS")	The MPS arrests violators of the IPR law and accumulates evidence against criminals.[68]
The People's Procuracy	It receives cases from the MPS and brings cases to the court.[69]
The Courts	Especially the recently founded intellectual property tribunals at national and provincial levels hear complaints of infringement and can impose fines and imprisonment.[70]
The Culture Market Management Sections within the Ministry of Culture	They are responsible for inspecting all retail and wholesale outlets selling cultural commodities (books, records, videotapes, CDs, paintings), for removing offending materials, and for fining the violators.[71]
The State Administration of Industry and Commerce	license corporations to do business and therefore can withdraw licenses from IPR infringers.[72]
The Custom Administration	has authority to intercept and halt the export and import of pirated products at China's border.[73]
The Ministry of Justice (MJ)	MJ has been trying to reform China's lawyer's system by transforming all law firms into independent ones to better serve a market economy.[74]

Figure 2.4: Administrative Agencies Dealing with IPR Procedures and Operations

The Legislative Bureau of the State Council	Drafts IPR legislations.[75]
The National People's Congress and its Standing Committee	Has the power to delay and amend IPR legislations.[76]
The Ministry of Foreign Trade and Economic Cooperation (MOFTEC)	Negotiates IPR issues with foreign countries.[77] MOFTEC is the agency responsible for conducting multilateral and bilateral treaty negotiations. For example, in Sino-American IPR negotiation, MOFTEC deals directly with USTR in the rounds of trade negotiations over IPR protection.[78]

Figure 2.5: Various Intellectual Property Organs Established in China

July 1994	*The Intellectual Property Rights Working Conference*[79]	Chinese State Council under the auspices of State Science and Technology Commission
September 1994	The China United Intellectual Property Protection Center[80]	N/A
N/A	Intellectual Property Rrights Working Office	The Supreme Court
1994	Special Intellectual Property Rights Trial Division[81]	The Higher People's Courts in Beijing, Shanghai, Tianjin, Guangdong, Fujian, Jiangsu and Hainan, plus Intermediate People's court in the provinces' capitals and the special economic zones
March 1995	The China Software Alliance[82]	Beijing
1995	The China Intellectual Property Association[83]	Beijing
1995	The Copyright Society of China[84]	Beijing
August 1995	Intellectual Property Exchange [85]	Xi'an
April 3, 1996	The Intellectual Property Rights (IPR) Training Center[86]	Beijing

The following section details relevant Chinese IPR laws, such as the Trademark Law, Patent Law, Copyright Law, and the Anti-Unfair Competition Law. The formation of China's IPR regime is assessed in relation to promulgation and revision of the following laws.

1. China's Trademark Law

In 1904, the Government of the Qing dynasty promulgated the *Regulations on Trademark Registration for Trial Implementation.* However, for various reasons, the Regulations were not put into force.[87] In 1923, the Republican Government promulgated the Trademark Law, but it still did not enter into force.[88]

After the founding of the People's Republic of China, China promulgated *the Provisional Regulations on Trademark Registration* in 1950.[89] In 1963, the Provisional Registrations were changed to *the Regulations on the Administration of Trademarks*.[90] During the cultural revolution, China's Trademark Office was dysfunctional and the registration of trademarks ceased.[91]

After China implemented a policy of "reform and opening," the new Trademark Law of 1982 invalidated the early regulations.[92] It was China's first modern experiment in intellectual property protection. The new law guaranteed "the right to exclusive use of trademark."[93] The significance of the trademark law lay in China's interpretation and application of the law.

The 1982 Trademark Law and the subsequent 1985 Amendment include the following seven features:

(1) Applicants receive trademark protection on a "first-to-file" basis.[94]
(2) Trademark registration is voluntary.[95] Entities may use an unregistered mark as long as it does not infringe on a registered mark and the entity clearly identifies its name.[96] A 1985 amendment imposed compulsory registration of marks on certain goods, such as tobacco.[97]
(3) A valid trademark is usable within three years of issuance; keeping a trademark for any extended period during its operation without usage may result in revocation.[98]
(4) A trademark is valid for a period of ten years, is renewable, and is assignable through license.[99]

(5) No protection exists for service marks, state names, national emblems, or international symbols.[100]
(6) Nationals of the members of countries of the Paris Convention have priority registration for trademarks.[101]
(7) An owner may enforce a trademark through administrative and legal proceedings.[102]

China also updated its Trademark Law, as well as the Criminal Law concerning counterfeiting of registered trademarks in 1993. These 1993 amendments and the Criminal Law emphasized:

(1) Protect trademarks, service marks, defensive marks, collective marks, and certified marks;
(2) Strengthen trademark protection;
(3) Increase administrative fines and permits administrative authorities to order payment of damages;
(4) Add criminal penalties for trademark violations, including imprisonment of up to seven years and imposition of fines;
(5) Improve trademark registration procedure.[103]

In addition, China acceded to the Madrid Agreement Concerning International Marks and Registration in 1989. And according to the 1992 MOU, China agreed to provide procedure and remedies to prevent, internally and at their borders, infringement of intellectual property rights, including trademark counterfeiting.[104]

2. Contemporary Patent Law

Between 1980 and 1983, China sent dozens of experts with legal, scientific, and political backgrounds to study extensively the patents laws and practices of various developed countries.[105] As a result, the Chinese patents laws contained many features common to the patent laws in the developed countries.[106] In April 1985, *the Patent Law* of the PRC and *Regulations for Implementing the Patent Law* entered into effect.[107] China proclaimed its intention to adhere to the Paris Convention[108] on 19 March 1985, and formally acceded to the Convention in November 1986.[109]

China's patent law granted three kinds of protection for patents: invention, utility model, and

design.[110] The 1985 Patent Law excludes from patentability inventions that violate the law, social morality or public interest.[111] Also excluded are rules and methods for "mental activities," a term generally including computer programs and software,[112] scientific discovery, methods for the diagnosis and treatment of disease,[113] animal and plant varieties,[114] pharmaceutical products and substances derived from a chemical process[115] and food, beverages and flavorings.[116]

In 1992, China and the U.S. entered into a memorandum of understanding that led to a number of promulgations and revisions made to China's patent law. In accordance with Articles 1 and 2 of the MOU, China amended its 1984 patent law in 1992, and promulgated new patent regulations effective January 1, 1993.[117] The revised 1992 patent law addressed many concerns voiced by the U.S. government to resolve Chinese intellectual property practices.[118] Consistent with MOU, the 1992 patent law included the following major amendments:

(1) Chinese patent law now affords protection to patented inventions for 20 years.[119] (Previously 15 years)
(2) It expands the scope of protection to include "all types of technological inventions, whether new products or new techniques, including pharmaceutical products and substances obtained by means of a chemical process, foods, beverages and flavoring," and products directly produced from a patented process.[120]
(3) Eliminates the unconditional compulsory licensing requirement.[121]
(4) It offers greater protection for process patents.[122] In the past, infringement of a process patent occurred only in the manufacturing area.[123] Under Article 2 of the amended Patent Law, the unauthorized manufacturer or sale of a patent or patented product constitutes patent infringement.[124]

In addition, in accordance with the provisions under MOU, China promulgated rules and regulations to administrative protection to pharmaceutical and agricultural chemical products under certain conditions.[125] As added protection for pharmaceuticals, the State Pharmaceutical Administration of China promulgated *Regulatons for the Administrative Protection of Pharmaceuticals* in December 1992.[126] Under the Regulations, foreigners may apply for

administrative protection of certain types of pharmaceuticals if their country has entered into a bilateral treaty or agreement with China on the administrative protection of pharmaceuticals.[127] As for protection of agricultural chemical products, the Ministry of Chemical Industry issued the *Regulation on Administrative Protection of Agricultural Chemical Products*, which took effect on January 1, 1993.[128]

In 1994, China acceded to the Patent Cooperation Treaty (PCT), which established standardized procedures for patent filing and examination, and therefore should simplify the process of obtaining patent rights in China.[129] The PRC also published the *Patent Examination Guidelines of the Chinese Patent Office*.[130]

3. China's Copyright Law

China had no precursor laws governing the protection of computer programs. China did not formally recognize the concept of copyright until 1985 when the *Inheritance Law* was enacted. The Inheritance Law provided for the inheritance of copyright as a property and an economic right.[131] In 1992, under the pressure of trade sanctions by the United States, China extended copyright protection to "foreign owners of software, books, films, sound recordings, and other medium previously unprotected."[132] As stated in the 1992 MOU, China decided to base its software protection on copyright. The main features of the Chinese Copyright Law are as follows:

(1) It protects an author in fields such as literature, art, natural science, social science, and engineering technology.[133]
(2) The copyright protection period generally covers the author's life plus fifty years.[134]
(3) Joint copyright is awarded for two or more persons who have created a work jointly.[135]
(4) Works that individuals have created during their employment are considered professional works for which the authors receive copyrights; however, their work units have a priority right of use.[136]
(5) Copyrights are awarded to the relevant work unit, however, for professional works in the form of engineering and product design blueprints, software, maps, and so forth, that an individual produced primarily with the use of a work unit's material and technical resources, and for which the

work unit bears responsibity. The author may receive a reward from the work unit for the achievement.[137]
(6) Copyright protection extends to performances by foreign performers in China and to audio-video recordings that foreigners produce and issue in China.[138] Works of foreigners published outside of China receive protection in accordance with any applicable international conventions to which both China and the foreigner's country are parties.[139]

After enacting its Copyright Law, China promulgated *Computer Software Protection Rules.*[140] The earliest version of the Copyright Law only protected works first published in China. However, as part of the negotiations between the United States and China in the 1992 MOU, China's Copyright Law was amended to provide automatic protection for copyright works first published in the United States. The P.R.C. promulgated the *International Copyright Treaties Implementation Rule* in 1992.[141] The key provisions include:

(1) Protecting unpublished foreign works under the Copyright Law;
(2) Protecting foreign works of applied art for a term of twenty-five years;
(3) Protecting foreign computer programs as literary works without requiring their registration;
(4) Protecting foreign works that are created by compiling non-protectable materials, but which prossess originality;
(5) Eliminating certain limitations imposed by the Copyright Law on the Copyright owner's rights to comply with the Berne Convention;
(6) Protecting foreign works which, at the moment when the international conventions come into force in China, have not yet fallen into public domain in the country of origin after the expiration of their term of protection.[142]

Up until July 1994, the Chinese Copyright Law made piracy only a civil, not a criminal offense.[143] Only five days after the U.S decided to designate China a Priority Foreign Country on 30 June 1994, the Chinese National People's Congress, approved new criminal penalties for copyrights violator. *The Resolution on Punishing the Crime of Copyright Violations* went to effect on July 3, 1994. The new provision provided fines and jail terms of up to seven years for violators.[144]

Consistent with article 3(1) of the MOU, China joined the Berne Convention on October 15, 1992, and the Universal Copyright Convention on October 30, 1992.[145] All signatories to the Berne

Convention or the Universal Copyright Convention receive automatic protection in China for works published in the member countries.[146] It joined the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms in 1993.[147]

4. Anti-Unfair Competition Law

In January 1992, in negotiations with the USTR, China promised to protect 'trade secrets' under the anti-unfair competition law before 1994.[148] The 1992 MOU called for the PRC to submit the bill to provide the levels of protection specified in article 4 of the MOU to the National People's Congress of the PRC by July 1, 1993, and stated that the PRC would "exert its best efforts" to enact and implement the bill before January 1, 1994. Consistent with Article 4 of the MOU, China promulgated a law providing protection for trade secrets and against unfair competition.[149] The "Anti- Unfair Competition Law" was adopted on September 3, 1994, and became effective December 1, 1993.[150]

This new law fulfilled China's commitment under the MOU to enact and implement a law protecting trade secrets.[151] In the past, trade secrets were protected under a contractual agreement. Now trade secrets receive protection under the law. This protection is intended to extend the prohibition of use by third parties. They are defined as "...technical and management information which is not known to the public, can produce economic benefits, is of practical value to other proprietors and which the owners have sought to keep confidential."[152]

"Unfair acts" prohibited by the new law included using improper means, including theft, inducement and coercion to obtain trade secrets, and revealing, using, or allowing others to use trade secrets obtained by improper means.[153] The law provides additional protection for well-known or unique brand names and remedies for acts of unfair competition.[154] Unfair acts prohibited by the

Anti-Unfair Competition Law include the following:

(1) the passing off of the registered trademarks of others
(2) the unauthorized use of the name, packaging or decoration "peculiar to well known goods," and the use of a decoration that is similar to those of well-known goods in such a way that the goods are confused with the well-known goods
(3) unauthorized use of the enterprise name or personal name of another party that causes people to mistake the products of one party for the products of the other party
(4) forging or falsely using quality symbols and symbol of famous and high-quality goods[155]

The law provides the following remedies for the above-mentioned infringing acts.

(1) someone found guilty of damaging another party through any of the prohibited acts must compensate the injured party for such damages, as well as compensate the injured party for the cost of investigating the prohibited acts.
(2) infringer can be ordered to stop the infringing acts, any illegal income can be confiscated, and a fine may be imposed.
(3) if the infringement is serious, the infringer may lose its business license and be criminally prosecuted.[156]

Despite the availability of a fairly comprehensive set of Chinese intellectual property protection laws and regulations, international treaties, and the specific MOU and agreements signed with the United States discussed above, China's trade practices in the area of IPR protection have caused the United States to threaten economic sanctions numerous times. Of the various types of intellectual property violations, trademark counterfeiting in the form of counterfeited goods and copyright piracy in the form of pirated CDs, music, videos, and software programs are widespread in China.

The 1992 MOU intended to focus on improving intellectual property laws. In contrast, the 1995 Sino-American IPR Enforcement Agreement centred on enforcing IPR laws and educating the Chinese populace. Under the 1995 Sino-American IPR agreement, China's most immediate actions were to close down factories that produced counterfeit CDs, and took active steps to prevent the export of these pirated goods through customs control.[157] The Agreement created numerous

administrative entities that delegated the authority to both monitor customs procedures and implement China's intellectual property laws.[158]

Upon the first year anniversary of the 1995 Agreement reached by China and the United States, the United States again evaluated Chinese compliance under the Agreement. The American government was less than satisfied with Chinese compliance under the Agreement. Under US pressure and demands, China moved to rectify the situation by improving its IPR enforcement. As a consequence, the 1996 Sino-American IPR Enforcement Agreement came into being.

It is evident that China's failure in the area of IPR protection is not simply an issue of incomplete legislation. Although legislation could still be improved in China, laws alone, cannot solve the problem of intellectual property violations in China. Alford identified the fact that meaningful IPR protection is not even available for the Chinese themselves. He observed that "it is inconceivable that a system designed largely to protect [foreign property interests] . . . could be sustained in modern China, given the bitter legacy of more than a century of foreign privilege."[159] Thus, we should look beyond the laws to non-legal factors. Possibly differences in ideology, culture, and vested economic interests may help explain the underlying rationale for piracy in the Chinese context.

Slow societal adaptation and indifferent law enforcement may be explained with reference to competing factors, for example, cutural apathy, organizational resistance, the weakness of judicial administration and economic opportunism. Chinese culture continues to play an important role influencing the Chinese people's understanding of intellectual property protection. The awareness of intellectual property rights remains underdeveloped in Chinese society. In some places there is little appreciation of the importance of intellectual property rights protection. The lack of a strong

tradition of respect for intellectual property rights makes it very difficult for the authorities to stamp out piracy and counterfeiting.[160]

Secondly, centralized enforcement efforts have been hampered by factors of organizational resistance originating in economic reform itself. Governmental and provincial organs, the military, and government cadres in economic ventures have acquired a stake in piracy.[161] Provincial governments' ties to pirating operations have complicated enforcement.[162] Also corruption has become pervasive. Many Chinese infringers are protected by Chinese officials and, consequently, are beyond the Intellectual Property Courts' ability to prosecute.[163] Other pirates openly flaunt the law by relying on protection from friends in government.[164] For instance, the Chinese Trade Minister, Wu Yi, has mentioned that at least one such factory is "untouchable" because of its owner's ties with the Chinese military.[165]

Infrastructure in China is not fully developed and the laws are rarely implemented. All of this does not bode well for the enforcement of the national laws and international obligations undertaken by the central government.[166] Jerome Cohen, a noted IPR lawyer in a New York firm, stated that "the Central government does not have enough money to pursue the offenders."[167] Cohen further stated,

> ...the central agencies don't have enough budget to enforce the IPR agreement. The Central Copyright Agency is understaffed. They have a lousy tax collection system, comparable to that of Italy. They are making progress. They need higher fines and damages and we need to have the mechanism for punishment institutionalized in the court system.[168]

Thirdly, although China has recently established courts in major cities to deal with intellectual property cases, the court system is likely to be ineffective for many years.[169] Some analysts have condemned the judicial system as an obstacle to enforcement in China. Ton Loke Koon, for example, noted that the courts are "still relatively inexperienced in the interpretation and

implementation of intellectual property related to law."[170] In addition, Chinese courts are often understaffed and lack access to basic resources.[171]

Lastly, while one might argue that China's economic reform and opening has generally been positive to China's economic development and promotes China's cooperation with the Western world, intellectual property rights violation has originated in the unintended consequences of reform. The lack of IPR protection and enforcement has to be explained in multidimensional terms. Those committing acts of piracy fall mainly into two categories, the first being those who have no knowledge of the law, including the intellectual property law. The second category includes a number of lawbreakers who live by piracy. In their eyes, pursuing the market economy means making money.[172] Hence, Deng's aphorisms "to get rich is glorious" and "it does not matter whether a cat is black or white so long as it catches the mice" justify people's behaviour to ignore IPR laws in order to realize their financial interests.

Summary

There has been significant formal improvement in Chinese intellectual property legislation since the introduction of the open-door policy. In recent years, China clearly has made positive efforts to enhance its intellectual property legislation and modernize its legal regime. It is in China's national interest to facilitate modernization and technological advancement through long-term cooperation and investment with the Western countries. The development of domestic IPR legislation was fillipped in US unilateralism and subsequent eleventh hour bilateral brinkmanship. The main difficulties faced by the Chinese government currently lag in the lack of enforcement of IPR laws due to China's cultural, historical, and political legacy.

The current Dengist strategy to participate fully in the international trading system appears

to be in antithesis to China's previous policies of isolation in the Maoist era. There is no doubt about the Chinese commitment to becoming a full-fledged member of the world trading community. China has a strong interest in Western technology transfer on terms consistent with its own national conditions, and China is also aware of the necessity to bend itself to the international commercial realities and to accept certain internationally accepted principles in the interdependent era.

No state is economically self-sufficient. States depend on outside sources for economic goods and services and require external markets. China is no exception in the world-wide web of interdependence. China could not afford to lose the American market and obstruct the flow of capital and technology from the American counterpart. It is important for China to abide by international trade practice if China wants to trade with the capitalist world.

China's legal reform represents this kind of interdependence in the realm of intellectual property protection. The enactment and enforcement of the IPR laws evidence a commitment on the part of the Chinese government to encourage foreign investment and technology transfer. This reflects in large part China's accommodation to the international norms and practices in the Western trading system.

China has also specifically revised its IPR laws to address specific concerns voiced by the U.S. during negotiations to resolve the Section 301 investigation of Chinese intellectual property practices. China's behavioral orientation manifests flexibility, neo-mercantilism, and pragmatism informed by neorealism. Rounds of Sino-US IPR negotiations and several subsequent MOUs have led to substantial change in China's intellectual property regime, including changes in Chinese domestic laws, administrative and judicial institutions, and it is China's desire and efforts to accede to major international IPR conventions and agreements. As Harry Harding argues, the attitude of the

international community - particularly the United States as the leading developed economy - has been a force that has helped foster the PRC's integration with the global economy.[173] The IPR protection is an example in point. Originally, the Chinese simply did not have a concept of intellectual property rights. China had to build almost from scratch a legal system to protect patents, trademarks, copyrights, and other related matters for the good of China's national interests.

The PRC has attempted to comform its laws to the international IPR regime. However, the U.S. government has continued to believe that China has been delinquent in taking the necessary steps to guarantee the enforcement of IPR. This poses a theoretical dilemma in international relations. On the one hand, Chinese IPR laws are fairly complete and conform generally to international standards. On the other hand, foreign countries still doubt China's ability to enforce its laws. Alford posits that the enactment of intellectual property laws with a foundation in Western, not Chinese, tradition, will likely prove to be of limited utility, unless there is "...a concomitant nuturing of the institutions, personnel, interests and values capable of sustaining a liberal, rights-based legality."[174]

Intellectual property protection offers the avenue for both countries to manage cooperation and conflict in IPR protection, however, IPR still remains as a source of friction in Sino-American trade disputes. While one might have preferred an evolutionary as distinct from a revolutionary adaptation to a new IPR regime, in the end all of this is a matter of China integrating effectively with the international community.

1. Wang Zhengfa, "The Chinese Intellectual Property System at the Turning Point", *China Patents and Trademarks*, vol. 1, 1992:28.

2. Jill Chiang Fung, Notes and Comments, "Can Mickey Mouse Prevail in the Court of the Monkey King? Enforcing Foreign Intellectual Property Rights in the People's Republic of China," *Loyola Los Angeles of International & Comparative Law Journal* vol. 18, no. 3, (June 1996):638.

3. Derk Bodde & Clarence Morris, *Law in Imperial China*, 1967:18-21. In Jill Chiang Fung, Notes and Comments, 1996:616.

4. Paul Goldstein, *Copyright, Patent and Related State Doctrines*, 3rd ed. 1990:18.

5. Ann Kent, "Waiting for Rights: China's Constitutions: 1949-1989," 13 *Human Rights Quarterly*, 1991:174. See Jill Chiang Fung, 1996:616.

6. John C. Lindgren & Craign J. Yudell, "Articles Protecting American Intellectual Property in Japan," 10 *Computer & High Technology Law Journal*, no. 2, 1994. Cited in Richard E. Vaughan, "Defining Terms in the Intellectual Property Protection Debate: Are the North and South Arguing Past Each Other When We Say 'Property'? A Lockean, Confucian, and Islamic Comparison." *Journal of International & Comparative Law*, vol. 2, no. 2, (Winter 1996):337.

7. *The Analects of Confucius*, book 7, chapter one.

8. Arthur Wineburg, "The Close of Round Two," *The China Business Review*, (July-August 1995):21.

9. William P. Alford, "Don't Stop Thinking About...Yesterday: Why There Was No Indigenous Counterpart to Intellectual Property Law in Imperial China," *Journal of Chinese Law*, vol. 7, no. 3, 1993:18-34. (discussing the traditional Chinese respect for the past and the need of leaders and authors alike to legitimate their authority by copying what has gone before them.)

10. James V. Feinerman, "Protection of Intellectual Property in the Asian-Pacific Region: Regime Overlap and New Challenges," Georgetown University, *Asia Pacific Issues*, The East-West Centre, Honolulu, no. 23, August 1995.

11. Brian Barron, "Chinese Patent Legislation in Cultural and Historical Perspective," 6 *Intellectual Property Journal*, 1991. Cited in Lawrence P. Harrington, "Recent Amendments to China's Patent Law: The Emperor's New Clothes?" *Boston College International and Comparative Law Review*, vol. XVII, no. 2, (Summer 1994):342.

12. Karl Marx, *Early Writings*, T. Bottomore Translation and ed., 1963:157. Cited in Barden N. Gale, "The Concept of Intellectual Property in the People's Republic of China: Inventors and Inventions," *The China Quarterly*, 74, 1978:340-41.

13. Liwei Wang, "Political and Cultural Perspectives of the PRC Patent Law: The Role of Article 14," *Wisconsin International Law Journal*, vol. 6, no. 2, (Spring 1988):197.

14. Chwang and Thurston, "Technology Takes Command: The Policy of the People's Republic of China with Respect to Technology Transfer and Protection of Intellectual Property," 21 *International Law*, 1987:142.

15. William P. Alford, *To Steal A Book is An Elegant Offense*, 1995:56.

16. Ibid., 56-57.

17. Editorial, "Encourage Inventions and Technical Improvements by Rewards in Order to Promote Development of Our Production and Construction," *Renmin Ribao (People's Daily)*, 2 December 1963. See Barden N. Gale, 1978:341.

18. Ibid., 341.

19. See R. Duan, *A Brief Introduction to Patent Law*, 1981:39; Shen, "A Talk in the Formation and Development of China's Trademark Laws," *FAXUE YANJIU (Legal Research)*, 1980.

20. L. Mark Wu-Ohlson, "A Commentary on China's New Patent and Trademark Laws," *Northwestern Journal of International Law & Business*, vol. 6, no. 1, (Spring 1984):87.

21. Mark Sidel, "Copyright, Trademark and Patent Law in the People's Republic of China," *Texas International Law Journal*, vol. 21, 1986:263.

22. Ibid., 263.

23. Xu, "On Wages Reform," in DANGQIAN ZHONGGUO JINGJI WENTI TANTAO [*The Exploration of Contemporary Economic Problems in China*], 1985:52.

24. Note, "Copyright Relations Between the US and the PRC: An Interim Report," 10 *Brooklyn Journal of International Law*, 1984:411.

25. L. Mark Wu-Ohlson, 1984:87.

26. "Some Problems on the Acceleration of the Industrial Development," *Chinese Law & Government*, 1979:75,95. Cited in L. Mark Wu-Ohlson, "A Commentary on China's New Patent and Trademark Law," *Northwestern Journal of International Law & Business*, vol. 6, no. 1, (Spring 1984):87.

27. "Deng Xiaoping to Third Plenary Session of Central Advisory Commission," Oct. 22, 1984, *Renmin Ribao*, January 1985. Cited in Allen S. Whiting "Foreign Policy of China," in Roy C. Macridis ed., *Foreign Policy in World Politics*, Prentice Hall, Englewood Cliffs, New Jersey, 1992:250.

28. A. Doak Barnett, "Introduction," *China's Economy in Global Perspective*, The Brookings Institution, Washington D.C., 1981:6.

29. Jennifer A. Meyer, "Let the Buyer Beware: Economic Modernization, Insurance Reform, and Consumer Protection in China," 62 *Fordham Law Review*, 1994:287.

30. Jianyang Yu, "Protection of Intellectual Property in the P.R.C.: Progress, Problems, and Proposals," *UCLA Pacific Basin Law Journal*, vol. 13, no. 1, (Fall 1994):140.

31. William P. Alford, 1994:12.

32. Michael R. Pendleton, *Intellectual Property in the People's Republic of China*, Butterworth & Co (Asia) Pte Ltd. 1986:9.

33. Wang Zhengfa, The Chinese Intellectual Property System at the Turning Point," *China Patents and Trademarks*, Vol. 1, 1992:22. *Daguofan*, literally big rice pot, became a popular term in China when many farms were communized and the peasants literally ate from one large rice pot. This practice spread to the other sectors of China as well. The term has become to symbolize the idea that no matter one's contribution to the pot, one is entitled to his share of the rice. The phrase is used to describe the lack of incentive of workers, who are not rewarded according to their effort. In Anna M. Han, "Technology Licensing to China: The Influence of Culture," *Hastings International & Comparative Law Review*, vol. 19, no. 4, (Summer 1996):638.

34. "Some Problems on the Acceleration of the Industrial Development," 12, *Chinese Law & Government*, 1979:75,95. See L. Mark Wu-Ohlson, "A Commentary on China's New Patent and Trademark Laws," *Northwestern Journal of International Law & Business*, vol. 6, no. 1, (Spring 1984):88.

35. Stanley J. Marcuss and Arthur R. Watson, "Technology Transfer in the People's Republic of China: An Assessment," *Syracuse Journal of International Law and Commerce*, vol. 15, no. 2, (Winter 1989):178.

36. Robert E. Rosenthal, "Recent Development: The Chinese Patent System," *Law & Policy in International Business*, vol. 17, no. 4, 1985:911.

37. Wendy Frieman and Thomas W. Robinson, "Costs and Benefits of Interdependence: A Net Assessment," in *China's Economic Dilemmas in the 1990s: The Problems of Reform, Modernization and Interdependence*, edited by the Joint Economic Committee, Congress of the United States, 1993:732-33.

38. *Asian Business*, April 1995.

39. Excerpted and translated from *Chinese Xinhua Monthly*, February 1995.

40. *Zhonghua renmin gongheguo xianfa* (The Constitution of the People's Republic of China), art. 47 and art. 20.

41. *Zhonghua renmin gongheguo minfa tongze* (The General Principles of the Civil Law) were adopted on April 12, 1986 by the Fourth Session of the Sixth National People's Congress.

42. Michel Oksenberg, Pitman B. Potter, William B. Abnett, *Advancing Intellectual Property Rights: Information Technologies and the Course of Economic Development in China*, vol. 7, no. 4, (November 1996):13.

43. *Supra* note 41, art. 44.

44. *Zhishi chanquan baohu de baipishu* (White Paper on IPR Protection), China's State Council, July 22, 1994. Cited in Winston Paul Kiang, "Technology Transfers to the People's Republic of China: A Canadian Lawyer's Perspective," *Canadian Intellectual Property Review*, vol. 12, no. 1, (October 1995):139.

45. *The U.S.-China Intellectual Property Rights Agreement and Related Trade Issues*, Joint Hearing Before the Subcommittee on International Economic Policy and Trade and Asia and the Pacific of the Committee on International Relations, House of Representatives and the Subcommittee on East Asian and Pacific Affairs of the Committee on Foreign Relations Senate, One Hundred Fourth Congress, Second Session, (March 7, 1996):2.

46. "Confrontation Damages China-US Interests," May 30, 1996, *Xinhua News Agency* available in Global NewsBanks database, NewsBank Inc. at Stanford University.

47. Chih-Yu Shih, *China's Just World: The Morality of Chinese Foreign Policy*, Lynne Rienner Publishers, Boulder & London, 1993:212.

48. Horsley, "Protecting Intellectual Property," *The China Business Review*, Nov.-Dec. 1986:17. Cited in Janiece Marshall, "Current Developments in the People's Republic of China: Has China Change?" *The Transnational Lawyer*, vol. 1, no. 2, (Fall 1988):529.

49. "Deng Xiaoping's Visit to Shenzhen Reported," *Xinhua Gen'l Overseas News Service*, March 30, 1992. See Glenn R. Butterton, "Pirates, Dragons and U.S. Intellectual Property Rights in China: Problems and Prospects of Chinese Enforcement," *Arizona Law Review*, vol. 38, no. 4, (Winter 1996):1085.

50. Associated Press, "U.S. Wins Scrap Over Intellectual Property," *reprinted* in *Vancouver Sun*, (February 27, 1995):A7.

51. "Trade Official Says US 'Big Stick' Will Not Resolve Copyright Issue," June 6, 1996, *Zhongguo Xinwen She* (China News Agency), available in Global NewsBank database, NewsBank Inc. at Stanford University.

52. "Chinese FM Spokesman on Forthcoming Sino-US IPR Talks," May 30, 1996, *Xinhua News Agency* available in Global NewsBank database, NewsBank Inc. at Stanford University.

53. Winston Paul Kiang, 1995:122. This list is originally derived from Joseph T. Simone, "PRC: Protective Progress," *Asian Law Journal*, (October 1992):47.

54. Ibid., 47. The Regulations improves the protection of company names and pending the implementation of service mark registration beginning 1 July 1993, offer explicit quasi-service mark protection for business names in the PRC.

55. "PRC Law Overview", from *http://www.qis.net/chinalaw/prclaw10.htm.*

56. Ibid.

57. Ibid.

58. Tom Hope, Kenny Wong, Pravin Anand, Cita Citrawinda Priapantja, and et al. "The MIPAsia and Pacific Rim Update," *Managing Intellectual Property*, iss. 59, (May 1996):39-47. Also see Joseph T Simone, Jr. "A stronger front line,"*China Business Review*, vol. 23, iss. 2, (March/April, 1996):29-35.

59. Robert E. Cox and David D. Chow, "Checkered Chinese Policy: Infringement in the Far East is a problem, but are sanction threats the answer?" from *http://www.ipmag.com/cox.html.*

60. "WIPO Convention Accession: China," *Industrial Property*, (April 4, 1980):123. (Stating that China deposited its accession documents on March 3, 1980 and that China became a member of the WIPO Convention on June 3, 1980.)

61. The Paris Convention for the Protection of Industrial Property is a major treaty regulating international industrial property. It was originally concluded in 1883, and has been revised six times since. It "covers patents for inventions, utility models, industrial designs, trademarks, trade names, marks of origin and inventor's certificates." The Paris Convention provides: "Nationals of any country of the Union shall, as regards the protection of industrial property, enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals...[T]hey shall have the same protection as the latter, and the same legal remedy against any infringement of their rights." *Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Revision of the Paris Convention on Industrial Property Committee*, H.R. Doc. No. 23, 97th Congress, 2nd Session, 1982:4-6. China submitted its instrument of accession to the Paris Convention on December 19, 1984 and became a member of the Paris Convention on March 19, 1985. Information Office of the State Council, *Intellectual Property Protection in China (1994).*

62. The Berne Convention refers to Convention for the Protection of Literary and Artistic Works. China acceded to the Berne Convention on October 15, 1992 as one of the commitments under a memorandum of understanding on intellectual property entered into between China and United States in January 1992. See Memorandum of Understanding on the Protection of Intellectual

Property, ("The Chinese government will accede to the Berne Convention for the Protection of Literary and Artistic Works [and] will use its best efforts to have the bill [authorizing accession to the Berne Convention] enacted by June 30, 1992.").

63. The Universal Copyright Convention (UCC), provides similar, but not the same coverage as the Berne Convention. The greatest difference appears to be that the UCC has shorter terms of protection. In "Symposium: Intellectual Property: Article: An Overview of Intellectual Property Rights Abroad," 16 *Houston Journal of International Law*, 1994:454-456.

64. "PRC Law Overview", from *http://www.qis.net/chinalaw/prclaw10.htm*, 1997:9.

65. See article 60 of the Patent Law of PRC, revised as of 1992, citing in Zhong Jiahua, "Border Protection of Intellectual Property Rights in Hong Kong: A Comparative Study with the Position of Mainland China," *European Intellectual Property Review*, 3, 1997:153. Early in January 1980, the State Council approved the establishment of the Patent Office of the P.R.C. From D. Dong, Zhongguo Zhuanli Zhishi Jiangzuo [*Lectures on China's Patent Law*], 1987:12.

66. See article 39 of the Trademark Law of China, revised as of 1993.

67.See article 46 of the Copyright Law of China.

68. *Supra* note 29, 20.

69. Ibid., 20.

70. Ibid., 20.

71. Ibid., 20. For a general discussion of the management of the cultural markets, see Daniel Lynch, *The Market is the Message*.

72. Ibid., 20.

73. Ibid., 20.

74. Jianyang, Yu, "Protection of Intellectual Property in the P.R.C.: Progress, Problems, & Proposals," *UCLA Pacific Basin Law Journal*, vol. 13, no. 3, (Fall 1994):150.

75. Ibid., 150.

76. Ibid., 150.

77. Ibid., 150.

78. Joshua R. Floum, "Counterfeiting in the People's Republic of China: The Perspective of the 'Foreign' Intellectual Property Holder," *Journal of World Trade*, 28, no. 5, (October 1994):54.

79. Glenn R. Butterton, 1996:1087(footnote 17). This Working Conference was designed to study issues and coordinate actions related to the strengthening of copyright protection. It issued "four demands" for various localities:

> (1) a plan to inspect law enforcement should be worked out and implemented immediately and law enforcement inspection teams are required to report the results of inspections once a week; (2) local government should do a good job of investigating and handling piracy activities within their own administrative regions and should cleanse the pirated goods market; (3) all provinces should earnestly inspected and rectify compact disc and laser video disc production lines, including detailed lists of products, production authorization, records of violations of the IPR law and results of investigations and punishment, in regions within their jurisdiction; and (4) a good job should be done in spreading general knowledge about IPR law and conducting professional training.

80. Glenn R. Butterton, 1996:1087(Footnote 18). China established a national intellectual property rights watchdog in Beijing Called the China United Intellectual Property Protection Centre, which is designed to monitor the enforcement of IPR both nationally and regionally. It was to have a "watch network" in 26 provinces, municipalities and automous regions - and to investigate cases of infringement on behalf of domestic and foreign clients. It was also to secure evidence, file lawsuits and take other legal action, offer advice on IPRs and provide anit-forgery technology and products.

81. "Judiciary Back IPR", from *http://www.china.or.cn/bjreview/june/96-26-1.html.* Intellectual Property Divisions have jurisdiction over disputes on patents, trademarks, copyrights, technological achievements, and technological contracts. Before the end of 1993, the Intellectual Property Division of the Beijing Municipal Intermediate People's Court received 125 intellectual property cases, among which 10 cases involved parties from Hong Kong, Macao, Taiwan, and other foreign countries, and of which 82 cases have since been concluded. See Jianyang, Yu, cited in Zhang Tao, "Huishou zhengcheng zhanyouhan: 1993 nian "yanda" douzheng huigu," *Legal Daily*, (Dec. 29, 1993):1. Also see "State Forms Intellectual Property Rights Court," *Xinhua*, August 5, 1993, on *FBIS-CHI-93-150*, 30.

82. Michel Oksenberg, Pitman B. Potter, William B. Abnett, *Advancing Intellectual Property Rights: Information Technologies and the Course of Economic Development in China*, The National Bureau of Asian Research, vol. 7, no. 4, (November 1996):22.

83. Ibid. 23.

84. Ibid. 23.

85. This exchange is designed to provide a place where copyrights and other intellectual property can be bought and sold legally. From Suzanne McElligott, "A Better Mindset on Intellectual Property? Beijing Moves to Curb Infringement," *Chemical Week*, Supp. (Aug. 30/Sept. 6, 1995):S7, S8. In Gregory S. Kolton, "Copyright Law and the People's Courts in the People's Republic of China: A Review and Critique of China's Intellectual Property Courts." *University of Pennsylvania Journal of International Economic Law*, vol. 7, no. 1, (Spring 1996):457-458.

86. Qiujing Bu and Daluo Jia, "China Establishes IPR Training Center", *China News Digest*, April 3, 1996. China established first government-funded the intellectual property protection training center, one day before the copyright piracy talks between China and the U.S. Chinese official said it's a "crucial measure" because the lack of professional training of Chinese IPR personnel was a major obstacle to the enforcement of relevant laws and IPR protection.

87. World Intellectual Property Organization, *Background Reading Material on the Intellectual Property System of China*, 1993:17.

88. Ibid., 17.

89. Ibid., 17.

90. Ibid., 17.

91. Ibid., 17.

92. Leung, "The Development of Intellectual and Industrial Property Law in China,"1 *Asian Pacific Commerce Law*, (Feb.-Mar. 1984):13.

93. See *Trademark Law of the People's Republic of China*, 1982. Jill Chiang Fung, 1996:624.

94. Ibid. See Jill Chiang Fung, 1996:625.

95. Ibid. See *Circular Governing Suggestions on the Adoption of the Non-Registered Trademarks*.

96. Ibid. *Trademark Law*, art. 38.

97. Ibid., art. 38.

98. Ibid. Art. 30(4).

99. Ibid., art. 23.

100. Trademark Law of the People's Republic of China, article 8.

101. Ibid. See also *Provisional Regulations Governing Applications For Priority Registrations of Trademarks in China. Introduction*, March. 15, 1985.

102. Ibid. Art. 39.

103. Jianyang Yu, "Protection of Intellectual Property in the P.R.C.: Progress, Problems, and Proposals," *UCLA Pacific Basin Law Journal*, vol. 13, no. 1, (Fall 1994):142-43.

104. *Memorandum of Understanding Between the United States of America and People's Republic of China*, (January 17, 1992):8.

105. Lionel S. Sobel, "Technology Transfer and Protection of Intellectual Property in China," 12 *Loyola of Los Angeles of International & Comparative Law Journal*, 1989. Among the nations China had visited were Canada, the United States, and European Community members.

106. The Chinese borrowed primarily from the patent laws of the United States, Germany and Canada. The "[Chinese] Patent Law...does not differ drastically from the United States Patent Law or that of the Paris Convention members." In Ross J. Oehler, Comment, "Patent Law in the People's Republic of China: A Primer," *New York Law School Journal of International & Comparative Law*, vol. 8, 1987:456.

107. The Patent Law of the People's Republic of China, adopted March 12, 1984, at the Fourth Session of the Standing Committee of the Sixth National People's Congress, effective as of April 1, 1985 [hereinafter Patent Law]. Regulations for Implementing the Patent Law was promulgated by the Patent Office of China on January 19, 1985.

108. The Paris Convention for the Protection of Industrial Property, 21 UST 1630-1677.

109. Stanley J. Marcuss and Arthur R. Watson, "Technology Transfer in the People's Republic of China: An Assessment," *Syracuse Journal of International Law and Commerce*, vol. 15, no. 2, (Winter 1989):179.

110. "Invention" in the Patent Law is defined to include any "new technical solutions relating to a product, a process or improvement thereof." "Utility model" is defined to include "any new technical solutions to the shape, the structure, or their combination, of a product which is fit for a particular use." "Design" is defined to include "any new design of the shape, pattern, color, or their combinations of a product which create an aesthetic feeling and is fit for industrial application."

111. See Patent Law, *supra* note 32, art. 5.

112. Ibid., art. 25.

113. Ibid., art. 25.

114. Ibid., art. 25.

115. Ibid., art. 25.

116. Ibid., art. 22.

117. "Standing Committee of the National People's Congress, Amendment of the P.R.C., Patent Law Decision," *China Law & Practice*, (Nov. 5, 1992):42. In Paul B. Birden, Jr., Esq., "Technology Transfers to China: An Outline of Chinese Law," *Loyola of Los Angeles International & Comparative Law Journal*, vol. 16, no. 2, (Feb. 1994):420.

118. Geoffrey T. Willard, "An Examination of China's Emerging Intellectual Property Regime: Historical Underpinnings, the Current System and Prospect for the Future," *Indiana International & Comparative Law Review*, vol. 6, no. 2, 1996:422.

119. Zhonghua Renmin Gongheguo Zhuanlifa (1992 Nian Xiuding Ben) [*Patent Law of the People's Republic of China (1992 Revision)*], *translated* in *China Laws For Foreign Business: Business Regulation*, (CCH Austr.) 14,201 (1993). The amended legislation modified Articles 11, 25, 29, 30, 34, 39-45, 48, 50-52 and 63 of the PRC Patent Law. Article 1(c) of the MOU stated that "the term of protection for a patent of invention will be 20 years from the date of filing of the patent application."

120. Angela Mia Beam, "Piracy of American Intellectual Property in China," *Journal of International Law and Practice*, vol. 4, iss. 2, Summer 1995:344. In China State Council, *White Paper: Intellectual Property Protection in China*, BBC Summary of World Broadcasts, June 20, 1994. Consistent with Article 1 of the MOU, "patents shall be available for all chemical inventions, including pharmaceuticals and agricultural chemicals, whether products or processes."

121. Patent Law of the PRC. *Zhonghua Renmin Gongheguo Zhuanlifa (1992 Nian Xiuding Ben).*

122. Ibid., art. 1.

123. Ibid., art. 1.

124. Ibid., art. 2.

125. Jianyang Yu, 1994:146.

126. Administrative Protection of Pharmaceuticals Regulations, *China Law & Practice*, (Mar. 25, 1993):37.

127. Ibid., 37.

128. Jianyang Yu, 1994:147.

129. Jill Chiang Fung, 1996:632.

130. Jianyang Yu, 1994:141.

131. Melville B. Nimmer et al., *International Copyright Law and Practice - China* § 1, 1992:10.

132. Angela Mia Beam, "Piracy of American Intellectual Property in China," *Journal of International Law and Practice*, vol. 4, iss. 2, (Summer 1995):347, cited in China State Council, *White Paper: Intellectual Property Protection in China*, BBC Summary of World Broadcasts, June 20, 1994.

133. Gao Lulin, "Taking a Stand," *China Business Review*, (Nov. 1994):9.

153. Ibid., 49.

154. Stephen Hayward, "China: Practical Protection of IP Rights," *IP Asia*, (May 1994):2, 5. In Derek Dessler, Comments "China's Intellectual Property Protection: Prospects for Achieving International Standards," vol. 19, no. 1, *Fordham International Law Journal*, (October 1995):207.

155. "Anti-Unfair Competition Law," *China Laws for Foreign Business*, 3 Business Regulation (CCH), art. 5(1), at 21.853. See Derek Dessler, 1995:207.

156. Ibid., 207.

157. 1995 Sino-U.S. Agreement Regarding Intellectual Property Rights, February 26, 1995, 34 *International Legal Material*, 1995:892.

158. Ibid, 890.

159. William P. Alford, *To Steal A Book is Elegant Offense*, 1995:17.

160. Geoffrey T. Willard, 1996:428.

161. James Cox, "U.S. Firms: Piracy Thrives in China," *USA Today*, (August 23, 1995):2B (reporting that many factories suspected of piracy are wholly or partly owned by local governments or those with strong Communist Party connections). See Geoffrey T. Willard, 1996:429.

162. M. Margaret McKeown et al., "IP Protection in China: Reality or Virtual Unreality?" *Legal Times*, (May 15, 1995):24. In Geoffrey Willard, 1996:435 (footnote 200).

163. *See* Amy Borrus et al., "Will China Scuttle Its Pirates?" *Business Week*, (Aug. 15, 1994):40.

164. Amy Borrus, et al., "Counterfeit Disks, Suspect Enforcement," *Business Week*, (September 18, 1995):29.

165. Amy Borrus et al., "Will China Scuttle Its Pirates?" *Business Week*, (Aug. 15, 1994):40.

166. Kenneth Lieberthal, *Governing China, From Revolution Through Reform*, 1995:335.

167. *China News Digest* based in North America, February 22, 1996:5.

168. Ibid., 5.

169. Donald C. Clarke, "Justice and the Legal System in China," *China in the 1990s*, 1995:91-92. (discussing the limited role played by courts and noting that courts in the PRC "are just one bureaucracy among many" and finding that limited competence of courts stems naturally from traditional Chinese views of relationship between government and law).

170. Tan Loke Khoon, "Counter Feats: The Art of War Against Chinese Counterfeiters," *China Business Review*, (November 1994):12.

171. As a general observation, the PRC suffers from a serious shortage of lawyers, and there is a particlular need to train new lawyers in intellectual property law matters because even those qualified to handle intellectual property cases need to improve their services and raise their levels of competency. See Jianyang Yu, 1994:161.

172. FBIS-CHI-95-018, (27 January 1995):54.

173. Harry Harding, "Comment," in Shirk's *How China Opened Its Door*, 1996:104-7.

174. Alford, *To Steal A Book is An Elegant Offense*, 1995:118.

CONCLUSION

SINO-AMERICAN IPR RELATIONS

This thesis has asserted that international relations theories of neorealism and interdependence help explain the mixed nature of Sino-American trade conflict and cooperation in the area of intellectual property protection. An IPR regime is emerging between China and the United States. The theory helps us clarify both countries' approach to their respective national interests and the opportunities and challenges of interdependence. There is a mix of constant adjustment and compromise in Sino-US IPR relations. Significant cooperation has been achieved despite substantive differences and conflicts. The US and the PRC approached cooperation from different standpoints. The US tended to force the issue while the PRC adapted to political and economic reality. Sino-U.S. IPR relations certainly confirm Keohane and Nye's assumption that situations in world politics "fall somewhere on a continuum between the ideal type of realism and complex interdependence."

The thesis has systematically compared Western neorealism and Chinese neorealism, Western liberal interdependence and Chinese interdependence and highlighted comparative points of convergence and divergence. There is still sufficient similarity to make comparison worthwhile. These theoretical constructs have been applied in the detailed case study of IPR protection between the United States and China. The two countries sought tactically to solve the IPR issue on the basis of parallel insights into their respective national interests, despite substantial differences in ideology, culture, economy, and politics.

From the outset, the American government wanted "interdependence" on its own terms. The

US consciously pursued a pragmatic policy of coercion encompassing a neorealist approach towards China's intellectual property protection. The intellectual property dispute was not just a commercial dispute. It was also fundamentally a political dispute. According to statistics released by *The Hong Kong Standard*, Germany and Japan cost U.S. industry far greater losses in copyright piracy than did the PRC. As a matter of fact, the largest losses to United States firms were in Japan, where piracy cost legimate producers $ 1.26 billion.[1] The former American Secretary of State Warren Christopher admitted on record that the U.S. had ulterior political motives in the IPR dispute. Mr. Christopher stated that the U.S. was using the IPR row to "promote the rule of law and human rights in the PRC."[2]

The American government linked trade issues with IPR protection for the purpose of reducing the U.S. trade deficit. In 1972, the U.S. President Nixon visited China "to open the door" to normalization of their relations. Nixon and Mao signed the Shanghai Communique, which increased trade and exchanges in "science, technology [and] culture."[3] This laid the foundation for the two countries to establish their IPR relations. Thus, the 1979 Sino-American Trade Agreement was one of the first agreements to recognize reciprocal IPR protection, including trademarks, patents, and copyrights protection.

The US repeatedly employed Section 301 investigation of the American Trade Act to combat foreign countries' unfair trade practices. The United States applied a strong and constant pressure to China to pass laws strengthening the protection of intellectual property. The threat of Special 301 acted as a catalyst to the process of promulgating Chinese IPR legislations and enforcement. The application of threats/retaliations through Special 301 worked for the United States. The magnitude of the trade penalty threat consistently correlated with a higher level of Chinese compliance and

enforcement.

On the other hand, international IPR protection is important to orderly international trade and investment. It has been in the US best interest to avoid any adverse consequences of an actual trade war because interdependence "makes the relationship costly to disrupt." The US has engaged in an interdependent relationship with the PRC, which was proclaimed by the Clinton Administration as "constructive engagement." The U.S. could not stand to lose China's lucrative market and it felt the need to cooperate with China. It was quite evident from several rounds of IPR negotiations and the conclusion of several MOUs on IPR protection between China and the United States. Power and cooperation have simultaneously informed the formation and development of the Sino-American IPR regime.

Moreover, US pressure and the domestic Chinese desire for Western technology and investment, have played a part in the development of IPR protection in China. Ironically, Mao Zedong's epistemology, "seeking the truth from the facts," was used to justify policy change. Deng Xiaoping developed a pragmatic approach to IPR relations with the United States. China's neorealism is reflected in China's tactical compromise with the US on a number of MOUs in order to promote its own national interest. It indicates China's pragmatic motivation and desire for a workable solution. China is aware of the need to bend its IPR laws to international commercial realities. And China is willing to adopt internationally accepted rules, regulations, and conventions governing IPR protection.

The new Sino-American trade relation profoundly affected the protection and enforcement of China's IPR regime. Most of the recent changes in IPR legislation and enforcement can be correlated with Western pressure on Chinese government. Changes in Chinese intellectual property

laws have been sweeping and complex. China had to make hard choices. In terms of the threat of Special 301 sanctions, China could not stand to lose billions of dollars in exports to the United States. The need to trade with foreign countries, especially with the United States, necessitated the enactment and enforcement of Chinese laws to protect American IPR products. China has managed its adaptation to the world economy by adopting the precepts of Western laws and internationally accepted principles of the Western world. The conclusion of a sequence of Sino-American IPR agreements signaled the formal Chinese commitment to adapt to international norms which have characterized the globalization process.

China's current interdependence relationship with the Western world is a contrast with the autarky and isolation of the Mao`s era. Trade globalization has encompassed China. It is recognized that China could not develop fully in isolation from the rest of the world. Chinese leaders sought commercial interaction and technology exchange with rest of the world. Since China's open door policy, China has become increasingly interdependent with the Western trading system. China's new trade dependence on the American market has left China more vulnerable to American trade pressure.

Nevertheless, intellectual property rights originated from a system of private ownership. The traditional Chinese concept of intellectual property rights is very different from that of capitalist countries. Paul Geller introduces a concept of "legal transplant" to explain this cultural phenomenon. He defines legal transplant as "any notion or rule which, after being developed in a 'source' body of law, is introduced into another, 'host' body of law."[4] He points out, in effect, intellectual property law in East Asia is a contemporary problem of legal transplants.[5]

This issue of "legal transplant" certainly applies to China. The adoption of Western-style

Chinese IPR laws does not, in and of itself, guarantee local compliance in the Chinese context. In response to enormous pressure from the United States, China passed laws foreign to its culture and history. Subsequent non-enforcement of these laws could hardly come as a surprise. The PRC's present legal system has been described as "a complex mix of socialist ideology, ancient practices, traditional values, and modern legal principles."[6] Sino-American disagreement over IPR reflected differences of legal tradition, culture, philosophy, and vested economic interests. These differences must be integrated into a properly balanced and comprehensive analysis. Such differences cannot be discussed as a disingenuous matter of cultural relations. As R. P. Anand argued, "international law can win the respect of the new states only if it reflects the attitudes toward law and justice that correspond with the attitudes held by these countries in their own cultural backgrounds."[7] The new Chinese IPR regime has to be anchored in a changing socio-economic reality and legal culture.

Several generalizations flow from the preceding analysis.

First, a new IPR regime is emerging. This regime has reflected the complexity of interdependence and competing national interests. Collaboration makes it possible for China and the US to establish a regime of IPR protection and enforcement. The Sino-US IPR regime also reflects considerable mutual adherence to the IPR norms and practices. This regime has minimized the bilateral IPR conflict and enhanced the prospects for cooperation.

Secondly, the IPR relation has been an essentially complex process for the PRC and the US. It reflects both the trends of globalization, informed by interdependence, and protectionist tendencies informed by neorealism in international relations. Both countries recognize the importance of cooperation and IPR protection. Factors of national interest and interdependence were simultaneously at play in the forced formation and development of a Sino-US IPR regime.

1. "Intellectual Property: China, Turkey, India, Brazil Faulted for Inaction on Intellectual Property," *International Business & Finance Daily*, (BNA), at D5 (Feb. 15, 1995). In Richard E. Vaughan, "Defending Terms in the Intellectual Property Protection Debate: Are the North and South Arguing Past Each Other When We Say 'Property'? A Lockean, Confucian, and Islamic Comparison."*Journal of International & Comparative Law*, vol. 2, no. 2, (Winter 1996):317.

2. "U.S. using copyright row to push human rights." *Hong Kong Standard*, February 22, 1995:1. Cited in Winston Paul Kiang, "Technology Transfers to the People's Republic of China: A Canadian Lawyer's Perspective," *Canadian Intellectual Property Review*, vol. 12, no. 1, October 1995, endnote 6, at 142.

3. "Quarterly Documentation," *China Quarterly*, 50, (April 1972):402.

4. Charles R. McManis, "Introduction," *UCLA Pacific Basin Law Journal*, vol. 13, no. 1, (Fall 1994):7.

5. Ibid., 7.

6. Michael D. Pendleton & Zheng Chengsi, "The Chinese Copyright Law - Opportunities for Foreign Investors and for China," *Copyright World*, (July-Aug. 1991):42.

7. James W. Peters, Comment, "Toward Negotiating a Remedy to Copyright Piracy in Singapore," *Northwest Journal of International Law & Business*, 1986. See Richard E. Vaughan, 1996:335.

8. Harry Harding, *A Fragile Relationship: The United States and China Since 1972*, Washington (DC): Brookings Books, 1992:330.

BIBLIOGRAPHY

A. Chinese Sources

Government Publications and Law

Jisuanji ruanjian baohu Tianli (Computer Software Protection Rules), 1991. Translated in *China Laws for Foreign Business: Business Regulation* (CCH Austr.) 14,681 (1993).

Shishi zhuanlifa tianli (Regulations for Implementing the Patent Law), The Patent Office of China, January 19, 1985.

Zhishi chanquan baohu de baipishu (White Paper on IPR Protection), China State Council, July 22, 1994.

Zhonghua renmin gongheguo banquanfa (Copyright Law of the PRC). 15th Session of Standing Committee of the 7th National People's Congress, September 7, 1990. Reprinted in 11 *European Intellectual Property Review*, 1, (Zhelun Zhao tran. 1990).

Zhonghua renmin gongheguo he meilijian hezongguo beiwanglu, January 17, 1992. Also rendered in English as *Memorandum of Understanding Between the United States of America and People's Republic of China*, January 17, 1992.

Zhonghua renmin gongheguo minfa tongze (The General Principles of the Civil Law of the PRC). 4th Session of the 6th National People's Congress, April 12, 1986.

Zhonghua renmin gongheguo shengbiaofa (The Trademark Law of the PRC), 1982.

Zhonghua renmin gongheguo xianfa (The Constitution of the People's Republic of China). 1982.

Zhonghua renmin gongheguo zhuanlifa (The Patent Law of the People's Republic of China). Fourth Session of the Standing Committee of the Sixth National People's Congress, April 19, 1985.

Zhonghua renmin gongheguo zhuanlifa (1992 Nian Xiuding Ben) [Patent Law of the PRC (1992 Revision]. Translated in *China Laws For Foreign Business: Business Regulation*, (CCH Austr.) 14.201 (1993).

Newspapers and Journals

Xinhua yuebao (Chinese Xinhua Monthly).

Fazhi ribao (Legal Daily).

Zhuanli, shangbiao, & banquan fabao (Patent, Trademark & Copyright Legal Daily).

Renmin Ribao (People's Daily) overseas edition.

Xinhua General Overseas News Service.

Zhongguo Xinwen She (Xinhua News Agency).

Books and Articles

Deng Xiaoping. "Achieving the Magnificent Goal of Our Four Modernizations, and Our Basic Policies, October 6, 1984." *Build Socialism with Chinese Characteristics*, Foreign Languages Press, Beijing, China, 1985.

Dong, D. *Zhonghuo Zhuanli Jiangzuo* (Lectures on China's Patent Law), 1987:12.

Duan, R. *A Brief Introduction to Patent Law*, 1981:39.

Li Tianran, "Guanyu zhonghe guoli wenti" [On the Question of Comprehensive National Strength]. *Guoji wenti yanjiu* (Research on International Relations). No. 2, (April 1990):52-58.

Mao Zedong. "On New Democracy," *Selected Works*, II, Peking: Foreign Languages Press, 1965:358.

Mao Zedong. "On Practice," *Selected Works of Mao Tse-Tung*, {cited hereafter as Selected Works, followed by volume and page reference}, I, Peking: Foreign Languages Press, 1964:296-97.

Qian Qichen. "Toward a Better World," Editor of Diplomatic History. *Overview of Chinese Foreign policy*, Beijing: Ministry of Fairing Affairs, 1988:16.

Shen. " A Talk in the Formation and Development of China's Trademark Laws," *FAXUE YANJIU* (Legal Research), 1980.

--- "State Forms Intellectual Property Rights Courts." *FBIS-CHI-93-150*, 30.

--- "Some Problems on the Acceleration of the Industrial Development," *Chinese Law & Government*, (1979):75,95.

The Analects of Confucius, book 7, chapter one. In William P. Alford, *To Steal A Book is a Beautiful Offense*, 1995.

Wang Zhengfa. "The Chinese Intellectual Property System at the Turning Point," *China Patents and Trademarks*, vol. 1, 1992:28.

Xu. "On Wage Reform." in DANGQIAN ZHONGGUO JINGJI WENTI TANTAO [*The Exploration of Contemporary Economic Problems in China*]. 1985.

B. English Sources

Government Publications

Archer. *Disapproval of Most-Favored-Nation Treatment for China.* Congressional Record, NewsBank, inc. - Global NewsBank, 1997.

Country Reports on Economic Policy and Trade Practices:. Report submitted to the Committee on International Relations, Committee on Ways and Means, U.S. House of Representatives, Committee on Foreign Relations, Committee on Finance of the U.S. Senate by the Department of State in accordance with Section 2202 of the Omnibus Trade and Competitiveness Act of 1988, February 1995:45.

Federal News Services. *Economic Outlook for 1993, Hearings Before the Joint Congressional Economic Committee*. January 27, 1993.

Hon. Mel Levine, "Protecting U.S. Patents," 137 *Cong. Rec. E* 1201, vol. 137, no. 53, April 11, 1991.

Intellectual Property Protection in China, Information Office of the State Council, 1994.

Memorandum of Understanding Concerning Market Access. International Legal Material. Art. VIII(2), Oct. 10, 1992, 31, 1274.

Protection of Intellectual Property Rights. U.S. Department State Dispatch. 5, 1994:126.

Punta del Este Ministerial Declaration of the Uruguay Round of Multilateral Trade Negotiation. GATT DOC. Min.Dec. (Sept. 20, 1986) [hereinafter Uruguay Declaration].

Sino-American Trade Agreement. China-United States, art. 1, 31 U.S.T. 4651, T.I.A.S. No. 9630, July 7, 1979.

Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Revision of the Paris Convention on Industrial Property Committee, H.R. Doc. No. 23, 97th Congress, 2nd Session, 1982:4-6

United States. Congress. *Unfair Foreign Trade Practices: Hearings Before the Energy and Commerce Committee*. 99th Congress, 2nd Session, 1986.

United States. Congress. *Intellectual Property, Domestic Productivity and Trade: Hearing Before*

the Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the Committee on the Judiciary. 101st Congress, 1st Session, 68, 1989:33.

United States. Congress. *The U.S.-China Intellectual Property Rights Agreement and Related Trade Issues*. Joint Hearing before the Subcommittee on International Economic Policy and Trade and Asia and the Pacific of the Committee on International Relations, House of Representatives and the Subcommittee on East Asian and Pacific Affairs of the Committee on Foreign Relations Senate, 104th Congress, Second Session, March 7, 1996.

United States. Department of Commerce. *Highlights of U.S. Export and Import Trade*. Report FT990, 1986.

United States. Department of Commerce. *Statistical Abstract of the United States*. 1951 (1952) in Nicolas S. Gikkas "International Licensing of Intellectual Property: The Promise and the Peril," vol. 1, Journal of Technology Law & Policy, Spring 1996, available on <http://journal.law.ufl.edu/~techlaw/1/gikkas.html>.

United States. General Accounting Office. *GAO Report: U.S. China Trade-Implementation of Agreement on Market Access and Intellectual Property*. January 31, 1995.

The United States. Information Agency. *U.S.-China IPR Agreement Commits China to IPR Enforcement* (USTR Fact Sheet on 2/26/95 U.S.-China IPR Agreement). The Release as of February 26, 1995.

United States. Trade Representative. *1995 Trade Policy Agenda and 1994 Annual Report*. vol. 58. 1994.

United States. Trade Representative. *Intellectual Property, Domestic Productivity and Trade: Hearing before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the Committee on the Judiciary*. 101st Congress, 1st Session, 68, 1989.

World Intellectual Property Organization. *Background Reading Material on the Intellectual Property System of China*. 1993.

Newspapers and Journals

Asian Business.

Bangkok Post.

Beijing Review.

Business Week.

Deutsche Presse-Agentur.

East Asian Executive Representatives.

Economist.

Far Eastern Economic Review.

Globe and Mail.

Halifax Chronicle Herald.

Hong Kong Standard

International Business & Finance Daily.

International Trade Representatives (BNA).

Los Angeles Daily Journal.

Montreal Gazette.

New York Times.

Patent. Trademark & Copyright Legal Daily

Publishers Weekly.

USA Today.

Vancouver Sun.

The Washington Post.

Books and Articles

Alford, William P. "Don't Stop Thinking About...Yesterday: Why There Was No. Indigenous Counterpart to Intellectual Property Law in Imperial China." *Journal of Chinese Law.* vol. 7, no. 3, (1993):18-34.

Alford, William P. "How Theory Does-And Does Not-Matter: American Approaches to Intellectual Property Law in East Asia." *UCLA Pacific Basin Law Journal.* vol. 13, no. 1, (Fall 1994):8-

24.

Alford, William P. *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization*. Stanford University Press, Stanford. California. 1995.

Armstrong, J.D. *Revolutionary Diplomacy: Chinese Foreign Policy and the United Front Doctrine*. Berkley, Los Angeles, London: University of California Press, 1977:5.

--- *Background Reading Material on the Intellectual Property System of China*. World Intellectual Property Organization. 1993.

Barnett, A. Doak. *China's Economy in Global Perspective*. The Brookings Institutions, Washington, D.C., 1981.

Barron, Brian. "Chinese Patent Legislation in Cultural and Historical Perspective." *Intellectual Property Journal*. vol. 6, 1991:491-508.

Beam, Angela Mia. "Piracy of American Intellectual Property in China." *Journal of International Law and Practice*. vol. 4, iss. 2, (Summer 1995):335-358.

Berliner, Brian Mark. Notes, "Making Intellectual Property Pirates Walk the Plank: Using 'Special 301' to Protect the United States Rights." *Loyola of Los Angeles International and Comparative Law*. vol. 12, no. 3, (May 1990):725-752.

Bilzi, Carol J. "Towards an Intellectual Property Agreement in the GATT: View from the Private Sector."*Georgia Journal of International and Comparative Law*. vol. 19, iss. 2, 1989:343-351.

Birden, Paul B, Jr. "Technology Transfers to China: An Outline of Chinese Law." *Loyola of Los Angeles International & Comparative Law Journal*. vol. 16, no. 2, (Feb. 1994):412-453.

Bliss. "The Amendments to § 301: An Overview and Suggested Strategies for Foreign Response." *Law & Policy of International Business*. 20, 1988.

Bodde, Derk & Morris, Clarence. *Law in Imperial China*. Harvard University Press. (1967):18-21.

Borrus, Amy., et al. "Counterfeit Disks, Suspect Enforcement." *Business Week*. Sept. 18, 1995:29.

Borrus, Amy and Barnathan, Joyce. "This is One Showdown the White House Can't Duck." *Business Week*. Iss. 3470, (April 8, 1996):52.

Bull, Hedley. *The Anarchical Society: A Study of Order in World Politics*. New York: Columbia University Press, 1977.

Butterton, Glenn R. "Pirates, Dragons and U.S. Intellectual Property Rights in China: Problems and Prospects of Chinese Enforcement." *Arizona Law Review*. Vol. 38, No. 4, (Winter 1996):1081-1123.

Buzan, Barry. *People, States and Fear*. Chapel Hill: University of North Carolina Press, 1991:152.

Carr, E. H. *The Twenty Years' Crisis, 1919-1939*. 2nd. ed., London and Basingstoke: the Macmillan Press Ltd., 1946 edition reprinted in 1984:10.

Chang, T. K. Chapter 3 "Some Thoughts on Government Control and Intellectual Property Law in China." In Sandra M. Stevenson ed., *Annual Conference on Intellectual Property*, 3, October 4-6, 1989. Albany Law School and Rensselaer Polytechnic Institute.

Chwang and Thurston. "Technology Takes Command: The Policy of the People's Republic of China with Respect to Technology Transfer and Protection of Intellectual Property." *International Law*. 21, 1987:129-167.

Clark, Aubert. *Movement for International Copyright in 19th Century America*. Washington, D.C., Catholic University, 1960.

Clarke, Donald C. "Justice and the Legal System in China." *China in the 1990s*, 1995:91-92.

Cox, Robert W. "Social Forces, States and World Orders." In Robert Keohane ed., *Neorealism and Its Critics*, 1986:204-253.

--- "Copyright Relations Between the US and the PRC: An Interim Report." *Brooklyn Journal of International Law*. 10, 1984:411.

Cutshaw, Kenneth A and Zhang Jianyi. *International Quarterly*. vol. 8, no. 1, (January 1996):49-75.

Damrosch, Lori F. "GATT Membership in a Changing World Order: Taiwan, China, and the Former Soviet Republic." *Columbia Business Law Review*. vol. 1, 1992:55-78.

Dessler, Derek. Comments "China's Intellectual Property Protection: Prospects for Achieving International Standards." *Fordham International Law Journal*. vol. 19, no. 1, (October 1995):181-246.

Doane, Michael L. "TRIPs and International Intellectual Property Protection in an Age of Advancing Technology." *American University Journal of International Law & Policy*. vol. 9, (1994):492.

Emmert, Frank. "Intellectual Property in the Uruguay Round - Negotiating Strategies of the Western

Industrialized Countries." *Michigan Journal of International Law*. vol. 11, (1990):1319-20.

Errico, J.P. *Pacific Rim Intellectual Property Law*. Licensing Law Handbook, Licensing Law Library, 1995-96 edition, 1995.

Feinerman, James V. "Protection of Intellectual Property in the Asian-Pacific Region: Regime Overlap and New Challenges." Georgetown University, *Asia Pacific Issues*, The East-West Centre, Honolulu. no. 23, August 1995.

Floum, Joshua R. "Counterfeiting in the People's Republic of China: The Perspective of the 'Foreign' Intellectual Property Holder." *Journal of World Trade*. vol. 28, no. 5, (October 1994):35-59.

Frieman, Wendy and Robinson, Thomas W. "Costs and Benefits of Interdependence: A Net Assessment." In *China's Economic Dilemmas in the 1990s: The Problems of Reform, Modernization and Interdependence*. Edited by the Joint Economic Committee, Congress of the United States, 1993:732-33.

Fuller V, William P. "The Protection of Computer Software in the People's Republic of China." *Boston College Third World Law Journal*. vol. IX, no. 1, (Winter 1989):57-79.

Fung, Jill Chiang. Notes and Comments, "Can Mickey Mouse Prevail in the Court of the Monkey King? Enforcing Foreign Intellectual Property Rights in the People's Republic of China." *Loyola Los Angeles of International & Comparative Law Journal*. vol. 18, no. 3, June 1996:613-639.

Gale, Barden N. "The Concept of Intellectual Property in the People's Republic of China: Inventors and Inventions." *The China Quarterly*. 74, (1978):334-355.

Gao Lulin. "Taking a Stand." *China Business Review*. (November 1994):9.

Goldstein, Paul. *Copyright's Highway*, 1994:186.

Goldstein, Paul. *Copyright, Patent and Related State Doctrines*. 3rd ed. 1990.

Goonatilake, Susantha. *Aborted Discovery: Science and Creativity in the Third World*. London: Zed Books, 1984.

Gould, J.M. "Protecting Owners of U.S. Process Patents from the Importation of Pharmaceuticals Made Abroad by Use of the Patented Process: Current Options, Proposed Legislation, and a GATT Solution."*Food Drug Cosmetic Law Journal*. vol. 42, 1987:59-68.

Grieco, Joseph. "Anarchy and the limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism" In Charles W. Kegley, Jr. ed., *Controversies in International Relations*

Theory: Realism and Neoliberal Challenge. St. Martin Press, New York, (1995):151-171.

Grieco, Joseph. "The Foundations of International Relations Theory and the Resurrection of the Realist-Liberal Debate", in Charles W. Kegley, Jr. ed., *Controversies in International Relations Theory: Realism and Neoliberal Challenge*. St. Martin Press, New York, 1995:32.

Griffiths, Martin. "Order and International Society: the Real Realism." *Review of International Studies*. 18, (July 1992):217-240.

Han, Anna M. "Technology Licensing to China: The Influence of Culture." *Hastings International & Comparative Law Review*. vol. 19, no. 4, (Summer 1996):638.

Harding, Harry. *A Fragile Relationship: The United States and China since 1972*. The Brookings Institution, Washington, D.C., 1992.

Harrington, Lawrence P. "Recent Amendments to China's Patent Law: The Emperor's New Clothes?" *Boston College International and Comparative Law Review*. vol. XVII, no. 2, (Summer 1994):337-374.

Hass, Ernst B. "The Balance of Power: Perception, Concept, or Propaganda." *World Politics*. vol. 5, no. 4, (July 1953):442-77.

Haas, Ernst B. "Why Collaborate? Issue-Linkage and International Regimes." *World Politics*, vol. 32, no.3, (April 1980):357-405.

Haas, Ernst B. "Indian Proposal Says Developing Countries Should Get Patent, Trademark Concessions." *International Trade Representatives*. (BNA), (July 19, 1989):953.

Hayward, Stephen. "China: Practical Protection of IP Rights." *IP Asia*. (May 1994):2, 5.

Hope, Tom, and et al. "The MIPAsia and Pacific Rim Update." *Managing Intellectual Property*. iss. 59, (May 1996):39-47.

Horsley. "Protecting Intellectual Property." *The China Business Review*. (Nov.-Dec. 1986):17.

Hughes. "The Philosophy of Intellectual Property." *Georgia Law Journal*. 77, (1988-89):287.

Hughes, Dale E. "Opening Up Trade Barriers With Section 301 - A Critical Assessment." *Wisconsin International Law Journal*. vol. 5, (June 1987):176-206.

--- "IPR Industry to Offer USTR Mixed Assessment of Chinese Enforcement," *Inside U.S. Trade*, (Aug. 11, 1995):20.

James. Patrick. "Neorealism as a Research Enterprise: Toward Elaborated Structural Realism." *International Political Science Review*. vol. 14, no. 2, 1993:123-148.

Jacobson, Harold K & Oksenberg, Michel. *China's Participation in the IMF, the World Bank, and GATT*. 1990:94.

Kegley, Charles W. Jr. ed., *Controversies in International Relations Theory: Realism and Neoliberal Challenge*, St. Martin Press, New York, 1995.

Kent, Ann. "Waiting for Rights: China's Constitutions-1989." *Human Rights Quarterly*. 13. 1991:174.

Keohane, Robert and Joseph Nye, *Power and Interdependence: World Politics in Transition*, Little, Brown and Company, 1977.

Keohane, Robert. *After Hegemony: Cooperation and Discord in the World Political Economy*, Princeton: Princeton University Press, 1984.

Keohane, Robert. "The demand for international regimes." *International Organization*. 36(2), 1982:325-355.

Kiang, Winston Paul. "Technology Transfers to the People's Republic of China: A Canadian Lawyer's Perspective." *Canadian Intellectual Property Review*. vol. 12, no. 1, (October 1995):119-146.

Kim. Samuel S. 3rd ed., *China and the World*. Boulder. Colo.: Westview Press. 1994.

Kim, Samuel S. *China In and Out of the Changing World Order*, Princeton University. 1991:46.

Kolton, Gregory S. "Copyright Law and the People's Courts in the People's Republic of China: A Review and Critique of China's Intellectual Property Courts." *University of Pennsylvania Journal of International Economic Law*. vol. 7, no. 1, (Spring 1996):415-460.

Krasner, Stephen D. ed., *International Regime*, Ithaca, NY: Cornell University Press, 1983.

La Croix, Sumner J. *Intellectual Property Rights in ASEAN and the United States: Harmonization and Controversy*. East-West Center, no. 14, November 1994.

Leaffer. Marshall. "Protecting United States Intellectual Property Abroad: Toward a New Multilateralism." *Iowa Law Review*. 76, 1990:273.

Leung. "The Development of Intellectual and Industrial Property Law in China." *Asian Pacific Commerce Law*. 1. Feb.-Mar. 1984.

Lieberthal, Kenneth. *Governing China, From Revolution Through Reform.* 1995:335.

Lindgren, John C. & Yudell, Craign J. "Articles Protecting American Intellectual Property in Japan." *Computer & High Technology Law Journal.* 10, no. 2, 1994.

Marcuss, Stanley J. and Watson, Arthur R. "Technology Transfer in the People's Republic of China: An Assessment." *Syracuse Journal of International Law and Commerce.* vol. 15, no. 2, (Winter 1989):178.

Marshall, Janiece. "Current Developments in the People's Republic of China: Has China Change?" *The Transnational Lawyer.* vol. 1, no. 2, (Fall 1988):529.

Marx, Karl. *Early Writings.* T. Bottomore Translation and ed., 1963:157.

McElligott, Suzanne. "A Better Mindset on Intellectual Property? Beijing Moves to Curb Infringement." *Chemical Week.* Supp. (Aug. 30/Sept. 6, 1995):S7, S8.

McManis, Charles R. "Introduction." *UCLA Pacific Basin Law Journal.* vol. 13, no. 1, (Fall 1994):7.

McMillan, M. Sean. *Attitudes of the People's Republic of China to International Commercial Trade.* Monograph 3, published under the auspices of the American Bar Association's Section of International Law Committee on the People's Republic of China, 1979.

Mesevage, Thomas. "The Carrot and the Stick: Protecting U.S. Intellectual Property in Developing Countries." *Rutgers Computer & Technology Law Journal.* vol. 17, no. 2, 1991:428.

Meyer, Jennifer A. "Let the Buyer Beware: Economic Modernization, Insurance Reform, and Consumer Protection in China." *Fordham Law Review.* vol. 62, 1994:2125.

Mitrany, David. *The Functional Theory of Politics.* London: St. Martin's Press for the London School of Economics and Political Science, 1975.

Morici, Peter. "Barring Entry? China and the WTO." *Current History.* (September 1997):275.

Morgenthau, Hans J. *Politics Among Nations,* 4th. Ed., New York: Alfred A. Knopf, 1967.

Morrison, Wayne M. "The China-U.S. Trade Dispute on Intellectual Property Rights." *CRS Report for Congress.* 95-294 E, February 21, 1995.

Nimmer, Melville B et al. *International Copyright Law and Practice - China* § 1. 1992:10.

Oehler, Ross J. Comment, "Patent Law in the People's Republic of China: A Primer." *New York Law*

Ryan, Allan. "Property." in John Eatwell, Murray Milgate and Peter Newman ed., *The New Palgave: Dictionary of Economics*, New York: Stockton Press, 1987:1092-31.

Sadler, Brent W. "Intellectual Property Protection Through International Trade." *Houston Journal of International Law*. vol. 14, 1992:403.

Sands, Lee M. "IPR Watchdogs." *China Business Review*. Nov.-Dec. 1994.

Schlesinger, Michael N. Note "A Sleeping Giant Awakens: the Development of Intellectual Property Law in China." *Journal of Chinese Law*. vol. 9, no. 1, (Spring 1995):93-140.

Schumann, Gunda. "Economic Development and Intellectual Property Protection in Southeast Asia: Korea, Taiwan, Singapore, and Thailand." In Francis W. Rushing and Carole Ganz Brown eds., *Intellectual Property Rights in Science, Technology, and Economic Performance: International Comparison*. Westview Special Studies in Science, Technology, and Public Policy, 1990:159.

Sell, Susan K. "Intellectual Property Protection and Antitrust in the Developing World: Crisis, Coercion, and Choice." *International Organization*. 49, 2, (Spring 1995):315-49.

Shih, Chih-Yu. *China's Just World: The Morality of Chinese Foreign Policy*. Lynne Rienner Publishers, Boulder & London. 1993:212.

Shih, Chih-yu. *Interdependence, Independence and Chinese Neorealism*. Working Paper Series: No. 59, Joint Centre for Asia Pacific Studies, Toronto, 1993.

Shirk, Susan. *How China Opened Its Door*. International Economics Brookings Institutions Press. 1994.

Shriver, Ernest P. "Separate but Equal: Intellectual Property Importation and the Recent Amendments to Section 337." *Minnesota Journal of Global Trade*. vol. 5, iss. 2, (Summer 1996):441-465.

Sidel, Mark. "Copyright, Trademark and Patent Law in the People's Republic of China." *Texas International Law Journal*. vol. 21, no. 2, (Spring 1986):259-289.

Silverstein, D. *Patent Protection and Technology Transfer in Less Developed Countries: A Reappraisal of the Legal Framework for Producing and Transmitting Knowledge*, 1986:12.

Simone, Jr, Joseph T. "A stronger front line." *China Business Review*. vol. 23, iss. 2, (March/April, 1996):29-35.

Simone, Jr, Joseph T. "Improving Protection of Intellectual Property." *China Business Review*.

vol.19, iss.2, (March/April 1992):9-11.

Simone, Joseph T. "PRC: Protective Progress." *Asian Law Journal.* (October 1992):47.

Sobel, Lionel S. "Technology Transfer and Protection of Intellectual Property in China." *Loyola of Los Angeles of International & Comparative Law Journal.* vol. 12, no. 1, 1989:61-90.

Stein, Arthur A. *Why Nations Cooperate: Circumstance and Choice in International Relations.* Ithaca, NY: Cornell University Press.

Tan Loke Khoon. "Recent Development in Intellectual Property Law in the People's Republic of China." *European Intellectual Property Review.* vol. 15, iss. 5, (May 1993):176-179.

Tan Loke Khoon. "Counter Feats: The Art of War Against Chinese Counterfeiters." *China Business Review.* (November 1994):12.

Thurston, Richard L. "Country Risk Management: China and Intellectual Property Protection." *The International Lawyer,* vol. 27, no.1, (Spring 1993):51-64.

Vaughan, Richard E. "Defining Terms in the Intellectual Property Protection Debate: Are the North and South Arguing Past Each Other When We Say 'Property'? A Lockean, Confucian, and Islamic Comparison." *Journal of International & Comparative Law.* vol. 2, no. 2, Winter 1996:307-369.

Walker, Charles E. and Mark A. Bloomfield eds. *Intellectual Property Rights and Capital Formation in the Next Decade.* University Press of America, 1988.

Waltz, Kenneth. "Anarchic Orders and Balances of Power," in Robert Keohane ed., *Neorealism and its Critics.* New York: Columbia University. 1986:101-102.

Waltz, Kenneth. *Man, the State and War.* New York: Columbia University Press, 1959.

Waltz, Kenneth. "Realist Thought and Neorealist Theory." *Journal of International Affairs.* 44, (Spring-Summer):21-37.

Waltz, Kenneth. *Theory of International Politics.* Reading, Mass.: Addison-Wesley. 1979.

Wang Liwei. "Political and Cultural Perspectives of the PRC Patent Law: The Role of Article 14." *Wisconsin International Law Journal.* vol. 6, no. 2, (Spring 1988):193-229.

Warshofsky, Fred. *The Patent Wars: The Battle to Own the World's Technology.* 1994.

Whiting, Allen S. "Foreign Policy of China." In Roy C. Macridis ed., *Foreign Policy in World*

Politics. Prentice Hall, Englewood Cliffs, New Jersey, 1992.

Willard, Geoffrey T. "An Examination of China's Emerging Intellectual Property Regime: Historical Underpinnings, the Current System and Prospects for the Future." *Indiana International & Comparative Law Review.* vol. 6, no. 2, 1996:411-437.

Williams, Phil., Goldstein, Donald M., and Shafritz, Jay M. Section IV, "Anarchy and Society in the International System." *Classic Readings of International Relations.* John A. Vasquez. 3rd eds. Harcourt Brace. 1994:180.

Wineburg, Arthur. "The Close of Round Two." *The China Business Review.* (July-August 1995):21.

--- "WIPO Convention Accession: China." *Industrial Property.* (April 4, 1980):123.

Wu-Ohlson, L. Mark . "A Commentary on China's New Patent and Trademark Laws." *Northwestern Journal of International Law & Business.* vol. 6, no. 1, (Spring 1984):86-162.

Yahuda, Michael. "Deng Xiao ping: The Statesman." *China Quarterly*, (September 1993):550-572.

Yeh, Michael. "Up Against a Great Wall: The Fight Against Intellectual Property Piracy in China." *Minnesota Journal of Global Trade.* vol. 5, iss. 2, (Summer 1996):503-525.

Yu Jianyang. "Protection of Intellectual Property Protection in P.R.C.: Progress, Problems, & Proposals." *UCLA Pacific Basin Law Journal.* vol. 13, no. 1, (Fall 1994):140-162.

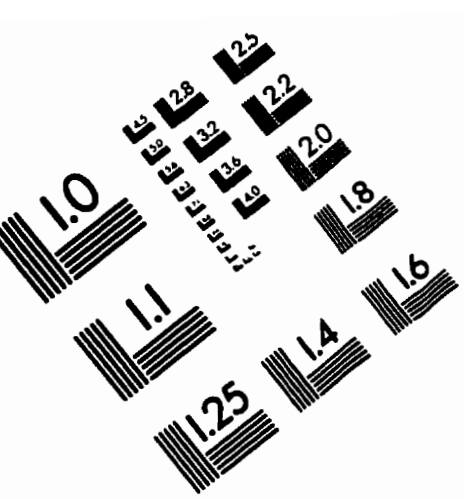
Zheng Chengsi. "The First Unfair Competition Law of the PRC." *European Intellectual Property Review.* 4, 1994:181.

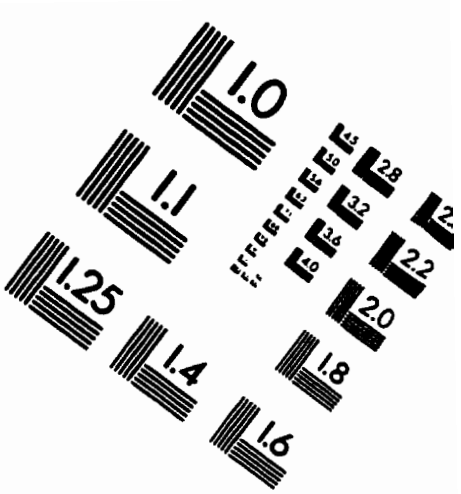
Zheng Chengsi. "TRIPs and Intellectual Property Protection in China." *European Intellectual Property Review.* 5, 1997:244.

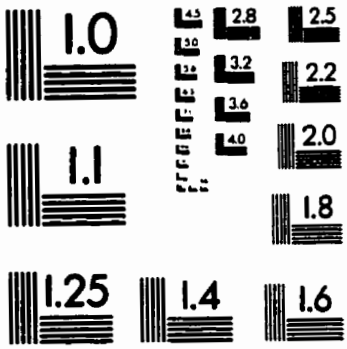
Zhong Jianhua. "Border Protection of Intellectual Property Rights in Hong Kong: A Comparative Study with the Position of Mainland China." *European Intellectual Property Review.* 3, 1997:155.

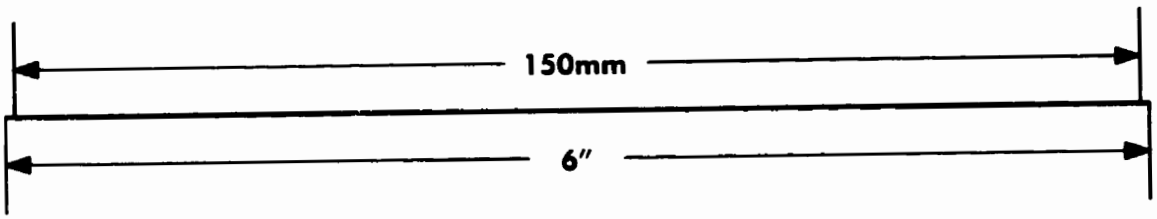
Zhou Xiao-Lin. "U.S.-China Trade Dispute and China's Intellectual Property Rights Protection." *New York University Journal of International Law and Politics.* vol. 24, no. 3, (Spring 1992):1115-1129.

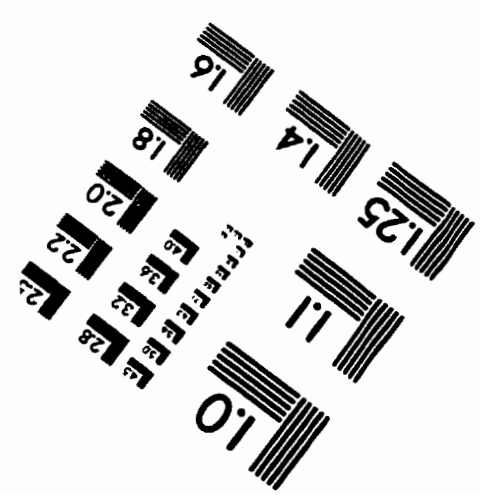
TEST TARGET (QA-3)

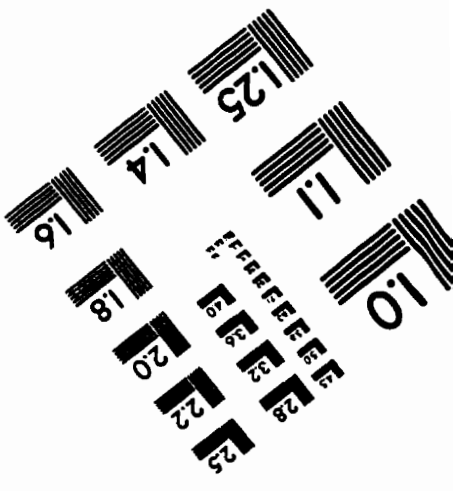












APPLIED IMAGE, Inc
1653 East Main Street
Rochester, NY 14609 USA
Phone: 716/482-0300
Fax: 716/288-5989