

**THE POLITICS OF
INTELLECTUAL PROPERTY RIGHTS IN POST-MAO CHINA:
TECHNOCRATIZATION OF POWER, CORPORATE COALITIONS AND
MULTILATERAL LEGALISM**

by

MARCELO GARCIA

**B.A., (Honours), McGill University, 2001
M.A., The University of British Columbia, 2003**

**A THESIS SUBMITTED IN PARTIAL FULFILMENT OF
THE REQUIREMENTS FOR THE DEGREE OF**

MASTER OF ARTS

in

**THE FACULTY OF GRADUATE STUDIES
(Department of Political Science)**

**We accept this thesis as conforming
to the required standard**

**THE UNIVERSITY OF BRITISH COLUMBIA
April, 2003**

© Marcelo Garcia, 2003

In presenting this thesis in partial fulfilment of the requirements for an advanced degree at the University of British Columbia, I agree that the Library shall make it freely available for reference and study. I further agree that permission for extensive copying of this thesis for scholarly purposes may be granted by the head of my department or by his or her representatives. It is understood that copying or publication of this thesis for financial gain shall not be allowed without my written permission.

Department of Political Science

The University of British Columbia
Vancouver, Canada

Date April 25th, 2003

ABSTRACT

This is a multidisciplinary analytical effort intended to grasp the rapid development of a market-oriented intellectual property regime in post-Mao China. The time framework covered in this study originates in the early years of reforms conducted under the leadership of Deng Xiaoping, and stretches its scope until the latest set of amendments before China's accession to the World Trade Organization (WTO) in 2001. This thesis postulates that, despite the great attention given to intellectual property rights protection issues in economic and legal circles, the process of domestic reforms in that field remains fundamentally political, deeply embedded in particular historical legacies, particularly influenced by the norms and values of international trade institutions, and at times, subject to diplomatic pressures from commercially-driven corporate coalitions.

In order to understand the dynamics and political interactions behind China's intellectual property reforms, two systemic variables have been considered. First, the nature of the international trade regime, namely its norms, rules, principles and internal functioning. Second, the configuration and distribution of power among state and non-state actors in the international sphere. At the same time, the relationship between these two extraterritorial variables and the ongoing process of disaggregation of power within the Chinese political system has been closely examined.

The conclusion adopted is that the evolutionary process of intellectual property reforms in post-Mao China was affected by three main variables. First, it was reinforced by the growing importance of IPR protection concerns among intellectual property-dependent multinationals and technologically-advanced countries in the late 1980s. Second, and perhaps more explicitly during the 1990s, China's intellectual property reforms were shaped by the norms, rules, principles of an emerging world trade system built around multilateral legalism. Finally, at the domestic level, its evolution was facilitated by a pro-liberalization economic agenda during the initial phase of reforms, and increasingly framed within a process of continuous bureaucratization and depoliticization of IPR issues in the past decade. Especially in the wake of China's WTO accession, it can be observed that a new elite of highly educated technocrats speaking the language of market economics has started to dominate the process of intellectual property reforms.

TABLE OF CONTENTS

Abstract	ii
Table of Contents	iii
Preface	vi
Acknowledgments	vii
 Chapter 1 - Introduction	
<i>The Emergence of Intellectual Property Rights, China's Reformist Agenda and Multilateral Legalism</i>	1
<i>The Emergence of Intellectual Property Rights</i>	4
<i>The Chinese Case: Current Explanations</i>	5
<i>An Evolutionary-Historical Model</i>	7
<i>Brief Roadmap</i>	8
 Chapter 2 - Theoretical Model	
<i>The Politics Behind the Evolution of China's Intellectual Property Regime: From Domestic Legal Formalism to Multilateral Legalism</i>	10
 I. Intellectual Property Reforms in China Since 1978	12
<i>A. First Phase: 1978-1989</i>	12
<i>B. Second Phase: 1990-1997</i>	14
<i>C. Third Phase: 1997-200?</i>	15
 II. Some Insights on The Evolution of China's Intellectual Property Regime	16
<i>A. Chinese Legal Studies Literature</i>	17
<i>B. Political Science Literature</i>	20
 III. The New Evolutionary-Historical Model	22
<i>A. Domestic Legal Formalism: 1978-1989</i>	25
<i>B. Combative/reactive Diplomacy: 1990-1997</i>	26
<i>C. Multilateral Legalism: 1997-2001</i>	27
 Conclusion:	
China's Intellectual Property Regime and Globalization	28

Chapter 3 - First Phase of Reforms	
<i>From Domestic Legal Formalism to Aggressive Trade Diplomacy</i>	29
I. Domestic Legal Formalism	31
<i>A. Intellectual Property Reforms in the Deng Era</i>	31
<i>Laws and Regulations</i>	31
<i>Bureaucracies, Administrative Agencies, International Treaties</i>	32
II. Behind the Scenes of Legal Formalism	34
<i>The Political (Ideological) Debate</i>	35
<i>The Role of International Forces: Cooperation in the Absence of Commercial Interests?</i>	37
III. International Framework: the Multilateral Trade Agenda	39
<i>A. IPR Lobby: Building up Support for IPR Protection</i>	40
<i>Multilateral Approach Through GATT Negotiations</i>	40
<i>Bilateral Approach Through Domestic Lobbying</i>	42
Conclusion	44
Chapter 4 - Second Phase of Reforms	
<i>From Aggressive Trade Diplomacy to Multilateral Legalism</i>	45
I. Legal Reforms in the Early 1990s: Pressures and Constraints	47
<i>Major Laws and Regulations</i>	47
<i>Behind the Reforms: Delegation and Bureaucratization</i>	49
II. The Issue of Enforcement and American Unilateralism	54
A Powerful Domestic Tool: Section 301	56
<i>Whose Interests Does the USTR Represent?</i>	
<i>The Power of Lobbying and American Trade Diplomacy</i>	56
<i>Aggressive Trade Diplomacy and the Role of the IPR Lobby</i>	58
<i>When the Logic of the Short-term Invades Political Circles: Combative/reactive Diplomacy</i>	59
III. Reading Between the Lines: the End of American Unilateralism	64
Conclusion	70

Chapter 5 - Third Phase of Reforms	
<i>China Embraces International Legalism: WTO and TRIPS</i>	71
I. Towards Compliance: Late 1990s Reforms	73
<i>A. Intellectual Property Reforms in the Pre-WTO Era</i>	75
<i>Laws and Regulations</i>	75
<i>B. International Legalism: Framework and Institutions</i>	77
<i>A Rules-based Multilateral Institution:</i>	
<i>The World Trade Organization (WTO)</i>	77
<i>A Legally Binding Agreement:</i>	
<i>Trade-related Aspects of Intellectual Property Rights (TRIPS)</i>	78
II. Behind the Support for Multilateral Legalism	78
<i>The Good Old IPR Lobby</i>	79
<i>The Victory of Reformists</i>	81
<i>US-China Bilateral Relations</i>	83
Conclusion	85
Chapter 6 - Conclusion	
<i>The Politics of Intellectual Property Rights in China:</i>	
<i>Corporate Coalitions, Technocratization of Power</i>	
<i>and Multilateral Legalism</i>	86
Bibliography	88

PREFACE

This project grew out of my first trip to China in June 2001. While travelling in Shanghai, I was particularly astonished by the dynamism and ambition of the young generation of Chinese, and the impressive futuristic architecture of the new financial district. Soon after, I understood that China could not be simply reduced to an agrarian communist society. Later, by interacting with locals, I also realized that this emerging economic and cultural power was ready to leave its mark in the twenty-first century. Upon my arrival to Canada, a strong desire to understand the current developments in the middle kingdom was going to define the orientation of my graduate work at the University of British Columbia.

Where is China coming from, and where is it going? Despite high levels of development in urban centers like Shanghai, how are Chinese citizens in the countryside involved in the process? How can a communist regime maintain a hybrid version of a market-oriented economy while keeping the political arena closed to its opponents, if any? Which are the forces behind this economic miracle?

Having studied Latin American politics during my undergraduate years and often debated issues of development and democracy, China appeared as a counterintuitive case of development where sustained economic growth was possible, even under a theoretically undemocratic communist regime. From the very beginning, I knew that the complexity of post-Mao China, especially in the wake of its accession to the World Trade Organization (WTO) could not be easily compared to cases of export-oriented authoritarianism in South Korea or Taiwan during the 1970s. I also concluded that examples of neoliberal populism and post-transitional democracies in contemporary Latin America would not suffice to fully enlighten my understanding of the Chinese process

In order to pursue my intellectual development, I decided to turn the page and start a new chapter in October 2001. This new experience appeared challenging on the surface, but definitely a very promising one in the long run. After having studied the Chinese process of economic reforms in the post-Mao era for seven months, I decided to focus my analysis on the parallel process of legal development for two main reasons. First, I consider law the matrix that ensures cohesion and regulates the many actors of increasingly complex, integrated and interdependent societies. Given the fact that China is at a crucial point in the process of its international integration, it seemed a logical field to explore for me at that point. Furthermore, the selection of intellectual property rights as a case study emerged from a personal interest in that particular field of law, especially in the context of globalization, but also represents an indirect attempt to explore the role that cultural industries play in the world economy today.

ACKNOWLEDGMENTS

The arduous process of writing such a research-intensive project requires the support, guidance, and inspiration of many people. Although not all of them have been directly involved in the process, I consider that the positive impact they have left in my life has helped me to become a more rigorous and disciplined student, a more critical and socially-involved citizen, and ultimately a better person.

First and foremost, I would like to express my sincere gratitude to Alain-G Gagnon, professor of Canadian politics at McGill University, who I consider one of the most remarkable intellectuals and scholars that Quebec has produced in the past two decades. I feel extremely fortunate of having had the opportunity to work and interact with him during the many activities organized by the Quebec Studies Program in Montreal. His unconditional support has been an unlimited source of energy that kept my intellectual curiosity intact, despite the hardships I encountered when I began my university education in 1998. His continuous encouragement over the years has definitely favoured my personal and academic development. Merci Alain!

I also would like to thank Philip Oxhorn and Alan Patten, two of my best and most inspiring professors at McGill University. Especially in my last year as an undergraduate student, they strongly encouraged me to pursue my studies in the field of Political Science at a graduate level. They were right.

My experience at the University of British Columbia has been fruitful in many aspects. Not only I have developed a certain expertise in a region that was completely unknown to me when I first arrived in Vancouver during the summer of 2001, but I have also had the chance to walk this fabulous path of knowledge and academic progress with very valuable persons to whom I am profoundly indebted.

First, I would like to thank Pete Chamberlain, professor emeritus in the department of Political Science at UBC. I still remember that sunny afternoon of October when I stepped into his office and asked him to give me an introduction to the complex and fascinating world of Chinese politics. He gladly accepted to guide me, and to feed my intellect by emphasizing rigor and critical thinking at all times.

Also, I would like to express my great appreciation to my main supervisor, Yves Tiberghien, who has been extremely helpful before and during the process of writing this thesis. His genuine curiosity vis-a-vis the topic of legal reforms in a political context has helped me focus on my research while working full-time. I admire a lot his great life achievements and philosophy, and I am looking forward to read and follow his contributions to the field of Political Science. Cher Yves, merci d'avoir contribué de manière aussi significative à cette étape cruciale de ma vie académique. Je vous en suis très reconnaissant. Pour l'instant, je vous dis: "à très bientôt".

Last but not least, I would like to thank Pitman B. Potter, one of the greatest and most respected scholars in Chinese legal studies. During this process, he has indirectly influenced my framework of analysis by making me consider the nature of globalization of law and the response of local legal cultures. I feel very honoured having him as a member of my reading committee.

On a more personal note, I would like to acknowledge the great moral support that my family has provided me during these two years in the West Coast. First, my mother Silvia, who has always been a unique and great example of strong will, dedication and discipline. Her influence remains present in all aspects of my life. Gracias por ser mi madre y enseñarme el camino del éxito y de la sabiduría. Also, I wish to thank my father Leonardo, who nurtured my interest for politics since I was in elementary school, at the dinner table or simply by inviting me to various civic events. Because of his own political experience in Chile, he has greatly influenced my views on justice, social equality and progress. Mil gracias por tu dedicación y cariño a través de los años. I also thank my brother Rodrigo, for having given me the opportunity to see society and globalization through a different lense. Ton sens critique et ta soif d'apprendre sont admirables.

Finally, I would like to thank the Goto family in Vancouver, for all their words of encouragement since I started my degree at UBC. More especially, I would like to thank Ayuchi for all her unconditional love and support. She has been here since the beginning of this wonderful experience, and I am looking forward to continue evolving, learning and growing with her so that we can achieve our ideals in life.

Marcelo Garcia
Vancouver, April 25th, 2003.

CHAPTER I

Introduction

THE EMERGENCE OF INTELLECTUAL PROPERTY RIGHTS, CHINA'S REFORMIST AGENDA AND MULTILATERAL LEGALISM

As the People's Republic of China (PRC)¹ enters the twenty-first century, a considerable set of political, economic, social and cultural challenges is emerging. These challenges are not the result of sudden structural changes or revolutionary agendas, but rather the consequence of almost 25 years of reforms that have affected the evolution of almost all spheres of Chinese society.

Politically, the Chinese state is no longer a monolithic, unitary and cohesive force. Today, we assist to a considerable disaggregation of power within and outside the state itself, in which the Chinese Communist Party (CCP) is no longer the sole judge, initiator and monitor of change. As the composition of the newly elected leadership in March 2003 confirms, political power has increasingly been transferred into the hands of highly educated technocratic elites using a socialist rhetoric. Economically, the extensive package of gradual reforms initiated by Deng Xiaoping in the 1980s, and continued by Jiang Zemin in the 1990s, has transformed China into a successful economy enjoying sustained growth rates and high levels of Foreign Direct Investment (FDI).² In 2003, China is *de facto* integrated into the global economy through constant flows of trade and investment, and *officially* as a member of the World Trade Organization (WTO). Put in perspective, the rise of China as an economic power has no comparison in the developing world.

A key catalyst of such unparalleled success has been the building of a market-oriented legal system. In post-Mao China, legal reforms have clearly remained at the center of the reformist agenda, have been mainly implemented in the economic sphere and instrumentally used to foster development.³ The scope and speed of reforms are definitely breathtaking by any standards, and particularly unique in

¹ Hereinafter "China"

² "Asia 2002 Yearbook." *Far Eastern Economic Review*, p.10 "Between 1990 and 1999, China has experienced an average annual growth (GDP) of approximately 10.7%." It must be noted, however, that several studies have attempted to quantify possible overstatements by Chinese officials, especially in the wake of WTO accession. See Thomas G. Rawski. 2000. "China's Move to Market: How Far? What Next?" In Ted Galen Carpenter and James A. Dorn (eds.) *China's Future: Constructive Partner or Emerging Threat?* Cato Institute. pp.317-39

³ This argument is extensively developed by Chinese law scholars. For reference, see Pitman B. Potter. 1994. "Riding the Tiger: Legitimacy and Legal Culture in Post-Mao China." *The China Quarterly*, Vol. 3; and Stanley Lubman. 1996. "Introduction: The Future of Chinese Law." In Stanley Lubman (ed.) *China's Legal Reforms* Oxford: Oxford University Press. pp.1-21

comparative historical terms. In recent years, as China became increasingly linked to the world economy, the framework of reforms has been constantly extended in order to include foreign actors seeking for more transparency and predictability in their interactions with Chinese authorities. In the case of foreign investors, the inconsistent application of current economic laws has become one of the greatest structural and institutional challenges to enter and survive inside the Chinese market.⁴

In the wake of WTO accession, China has prompted the implementation of substantive legal revisions in various economic sectors including customs, foreign exchange, taxation, intellectual property, enterprise law, bankruptcy and pricing.⁵ More than 2000 laws and regulations have been reformed through the State Council. Of these, 830 have been abolished and 325 modified. Similarly, the Ministry of Foreign Trade and Economic Cooperation (MOFTEC) revised 1413 rules and regulations at the beginning of 2001, including 6 laws, 163 administrative legal regulations and 887 departmental regulations. The National People's Congress (NPC) has modified 140 laws and abolished 570 laws and regulations.⁶ No matter how impressive these numbers appear on surface, it is important to notice that these reforms represent, in strict terms, only a small fraction of China's legal evolution since 1978, and take generally account of purely technical calibrations in order to comply with WTO standards and obligations. Despite this reality, a fundamental puzzle on the nature and implications of economic integration emerges: *why did the Chinese communist regime voluntarily agree to comply with the many complex rules that govern global trade, including "behind the border" agreements in intellectual property and services?*

In its broadest expression, this question is crucial because it aims to tackle two political debates at once. First, it attempts to understand the role of the state in a context of multilateral legalism in international trade where supranational institutions provide the rules of the game and member-states comply to a set of predefined standards and obligations. More particularly, this observation falls right into current debates on the sovereignty of nation-states in a context of interdependence resulting from the increased globalization of the world economy.⁸ Second, it explicitly seeks to grasp the significance of

⁴ Daniel H. Rosen. 1999. Behind the Open Door: Foreign Enterprises in the Chinese Marketplace. Washington DC: Institute for International Economics. See especially Chapter 6.: Of Laws and Privileges. Rosen observes that "the vitality of commerce in the PRC and the volume of FDI flowing indicate that China's legal system deficiencies do not fatally impede investment. However, its effects on transaction costs are clear, they are higher wherever predictability and redress are absent." p.224

⁵ Pitman B. Potter. 2001. "The WTO: Legal Implications" China Quarterly. September. no.167. p.102

⁶ Nan Xianghong. 2001. Legal Reforms in China before WTO accession. Interview with Li Shun De, Vice-director of the IPR Center at the Chinese Academy of Social Sciences. <http://www.sinopolis.com/Archives/TOPSTORY/ts_011107_04.htm

⁷ This expression is used in Christopher Arup. 2000. The New World Organization Agreements: Globalizing Law Through Services and Intellectual Property. Cambridge: Cambridge University Press. Professor Arup provides the following explanation: "It will be my contention that these two agreements are much more than a logical extension of the GATT and the arrangements which its parties have made to trade industrial goods over national borders. Because the agreements deal with personal services (GATS) and intellectual endeavors (TRIPS), they reach 'behind the border' into social fields that were not regarded on the whole as related to trade. In extending the notion of trade, they press for domestic laws and legal practices to be adjusted in distinctive ways to the expectations of foreign suppliers." p.8

⁸ See Ethan Kapstein. 2000. "Winners and Losers in the Global Economy" International Organization. vol.54. Spring. pp.359-384; Bhagwati Jagdish. 1997. "Globalization, Sovereignty and Democracy" in Axel Hadenius (ed.) Democracy's Victory and Crisis. Cambridge: Cambridge University Press. pp.263-296; Susan Strange. 1998. Mad Money: When Markets

compliance for developing countries (like China) with trade-related issues highly valued and vigorously defended in negotiations by most developed countries.⁹ In other words, this second component seeks to explore the dynamics and functioning of “behind-the-scenes” arrangements obtained by economically developed countries and powerful private actors pushing for their interests in *theoretically neutral* institutions while others simply comply. Evidently, this presupposes that not all member-states within the WTO are at the same level of development, neither economic nor legal, when it comes to enforce “behind the border” agreements. In a sense, this second observation highlights a division largely pointed out by anti-globalization movements (North v/s South), but more importantly, it also strives to unveil a rather counterintuitive reality, vaguely explored by essays on globalization, the fissures existing *within* the developed world and threatening the so-called global consensus on development.

In a second time, and considering the context of relative isolation in which earliest legal reforms were implemented, we could question ourselves on *why did the Chinese communist regime accept to implement legal reforms that, in both principle and practice, are imposed by a supranational structure setting standards and obligations?* From a purely political perspective, we could reflect on *why and how China is integrating a rules-based multilateral trade system that imposes greater pressures on a central government whose institutional-capacity has been eroding since the early 1990s?* Finally, *what are the implications for the configuration and overall organization of China’s central government, its internal bureaucracies, top level ministries, provincial and local authorities?*

Finally, considering that the WTO is an international institution with the mandate to create codes of conduct among its member-states in order to favor cooperation on trade-related matters, two legitimate questions arise. First, *to what extent and how did foreign interests influence the form of these reforms?* Second, *which actors (political or not) were the originators, enablers and architects in the process?*

At this stage, it is important to acknowledge that developing a political argument on less than controversial legislations could certainly restrict our main analysis and eventually make our findings appear insignificant. In order to surpass this limitation, it would be more appropriate to select one particular set of interrelated laws and examine their evolution since the very first draft. Such an approach would postulate that *the act of drafting or enforcing a particular law in the Chinese context is not only driven by neutral principles of market economics, but involves a multiplicity of divergent interests envisioning different outcomes while pushing for the same reform.* The advantages can be listed as follows. First, an evolutionary historical approach to study the politics of legal reforms in China allow us

Outgrow Governments. Ann Arbor: The University of Michigan Press. ; and

⁹ Christopher Arup. 2000. The New World Trade Organization Agreements: Globalizing Law Through Services and Intellectual Property. Cambridge: Cambridge University Press.; Duncan Matthews. 2002. Globalizing Intellectual Property Rights. London: Routledge.; and Robert Howse. 2002. “From Politics to Technocracy - and Back Again: The Fate of the Multilateral Trading Regime.” (Symposium: The Boundaries of the WTO) American Journal of International Law. vol. 96 no.1 pp.94-117.

to better understand the many events and debates that have accompanied each law at different stages of its development. Second, it better clarifies the role played by each actor and how their interests have evolved over time. Third and last, by extending our analytical framework outside the domestic realm, we will be able to highlight the impact that foreign actors or international institutions have had on a particular set of reforms, while taking into account that the interests of the former could have evolved as well. This will be the approach used throughout this essay.

Also, it is important to acknowledge that because of the inherent ambiguity of China's political and lawmaking processes, and as a measure of methodological precaution, our forthcoming analysis demanded a great deal of generalization. The reader must rest assured, however, that the empirical evidence presented in the following chapters has been the result of a rigorous and careful research in all official documents available in the English language. Interviews would have certainly helped to specify the role of certain actors, but time and academic constraints forced our analysis to remain at a macro-analytical level. This approach has not compromised the validity or testability of our central thesis.

The Emergence of Intellectual Property Rights

The issue of piracy and counterfeiting figures among the most controversial and biggest challenges associated with post-Mao legal development, and one that has attracted particular attention in both public and private sectors, as well as academics over the years. In the wake of China's accession to the WTO, intellectual property protection has been the focus of trade negotiators, foreign investors and MNCs preoccupied to obtain a serious (legal) commitment from Chinese authorities in the field. One year after, the protection of IPR still occupies a prominent place in the diplomatic trade agenda of member-states like the United States, the European Union and Japan.

It must not be forgotten, however, that the emergence of IPR in international trade has not been primarily caused by high levels of piracy in Newly Industrialized Countries (NICs) or exports of counterfeited merchandise to Less Developed Countries (LDCs). It has been rather the result of changes in economic structures and modes of production in technologically-advanced countries (shift from a manufacturing to a knowledge-based economy) that have rendered intellectual property-dependent industries vulnerable to illegal reproduction in developing countries where the majority of citizens enjoy low levels of purchasing power.¹⁰ In recent years, China has become "the Mecca" of fake brands, cheap software and audiovisual products. This reality is easily grasped by walking the streets of Beijing, Shanghai or Shenzhen. Virtually hundreds of illegally-reproduced products are made available for locals

¹⁰ It must be noted here that the issue of intellectual property rights violations cannot be exclusively attributed to developing countries. In the United States, creative industries have suffered from Internet piracy and continue to pressure the Congress to protect their rights. For an introduction to the issue, see Charles C. Mann. 2000. "The Heavenly Jukebox" *The Atlantic Online*. September. Online version <www.theatlantic.com/issues/2000/09/mann.htm> .

and tourists in public markets and shops, ranging from a US\$15 *Microsoft Office* software to a US\$12 trilogy of *The Godfather*, months before it was released in North America.¹¹

In the last two decades, intellectual property-based industries around the world have tried to remedy, or at least alleviate, the problem by launching campaigns of sensibilization and training in those countries identified as infringers. With little tangible success, these MNCs have literally turned their attention toward those domestic or international institutions that are considered the most capable to secure their global commercial interests. Domestically and abroad, MNCs (predominantly US-based) have engaged in strategies of coalition formation, aggressive lobbying linked with government action, and vigorous negotiations in international trade forums. These initiatives, in turn, have given MNCs sufficient political leverage to defend their *rights* through bilateral and multilateral means. In the case of China, these industries have used all their domestically-embedded political power to put pressure on central government authorities so that effective enforcement of intellectual property laws is ensured, criminal penalties for infringers strengthened, and massive raids and anti-counterfeiting campaigns continued.

The Chinese Case: Current Explanations

Presently, a multidisciplinary body of literature attempts to cover the content and implications of intellectual property reforms in China. However, no clear theoretical model is provided to grasp the evolution of domestic legal reforms *in conjunction* with China's relations with ever-evolving international trade structures and the political role that, *theoretically apolitical* corporate actors have played in the process. The complex nexus between the Chinese government's agenda, MNCs and international trade structures is, in itself, enough counterintuitive to capture our attention. Two elements are particularly striking. First, the gradual yet selective "*ouverture*" offered by a traditionally isolated and highly ideological Chinese government to foreign interests since 1978, leading to the signature of a legally binding agreement (TRIPS)¹² that provides clear guidelines to the very political process of lawmaking. Second, the political role played by intellectual property-based MNCs in putting their *economic rights* into the global trade agenda, not only by using domestic tools to exert bilateral diplomatic pressures on infringers, but also in creating a formidable and enduring coalition of convergent interests that have put enormous human and financial resources to achieve their objectives under the banner of multilateralism.

More than often, the few analysis that exist about the politics of intellectual property rights in China focus their attention on fascinating trade diplomacy stories¹³ and tend to offer a rather American

¹¹ Personal Observation during trip to Shanghai in June 2001. I include this anecdote because I consider it the beginning of my interest for intellectual property rights in general, and for Chinese politics and culture more specifically.

¹² A component of the 1995 World Trade Organization (WTO) legal framework, TRIPS stands for the Agreement on Trade-Related Aspects of Intellectual Property Rights.

¹³ Michael P. Ryan. 1998. Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property Rights Washington DC: Brookings Institution Press. ; Peter K. Yu. "*From Pirates to Partners: Protecting Intellectual Property in*

perspective on an issue that has become, since the establishment of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement, essentially international in nature and highly intrusive in application, at least from a developing country perspective. Other accounts are concerned with legal structures and institutions, and point out usually to issues like the role of courts in enforcing IPR, the challenges of local protectionism and judicial independence, as well as the pressures that the globalization of law poses to domestic legal culture and practices.¹⁴

The technocratic approach adopted by the current literature on Foreign Direct Investment (FDI) generally adopts a tone of urgency when assessing the necessity of proper enforcement in IPR protection.¹⁵ The overall assumption is that China's ability to sustain rapid and continuous growth in the absence of stable and fairly enforced rules could be compromised in the medium- and long-term. Considering foreign trade and capital crucial engines of domestic economic growth and modernization, this body of literature tends to limit its analysis to a set of recipes based on market economics and generally expects the Chinese government to respond pragmatically to governance and economic imperatives.¹⁶ The fundamental weakness of this type of literature is that it treats the political dynamics and motivations behind the reforms as externalities rather than legitimate levers of change.

Because of the unique features of China's political development in the twentieth century, Chinese politics scholars have always been more interested in leadership struggles, the role of bureaucracy on policy-making and organizational politics.¹⁷ Their analytical scope has been usually reduced to domestic politics, without really considering external forces (multinationals, foreign investors, international trade organizations) as potential political catalysts of reforms. In fact, no authors have seriously attempted to establish clear linkages between the evolution of China's intellectual property regime and the transitional and increasingly integrated nature of its economic reforms. Moreover, none of the current analysis focus on the evolution of such a particular, yet fundamentally political issue within

China in the Twenty-First Century" American University Law Review, vol.50 ; Warren H. Maruyama. "US-China IPR Negotiations: Trade, Intellectual Property, and the Rule of Law in a Global Economy." In Mark Cohen, Elizabeth Bang and Stephanie Mitchell (eds.) 1999. Chinese Intellectual Property Law and Practice. Boston: Kluwer Law International. pp.165-213

¹⁴ Pitman B. Potter. 2001. The Chinese Legal System: Globalization and Local Legal Culture London: Routledge.; Louis Putterman. 1995. Pitman B. Potter and Michel Oksenberg. 1999. "A Patchwork of IPR Protections." China Business Review. No.28. January- February.; Michel Oksenberg, Pitman B. Potter and William B. Abnett. 1996. "Advancing Intellectual Property Rights: Information Technology and the Course of Economic Development in China" NBR Analysis, vol.7 no.4.; Christopher Arup. 2000. The New World Trade Organization Agreements: Globalizing Law Through Services and Intellectual Property. Cambridge: Cambridge University Press.; and Stanley B. Lubman. 1996. China's Legal Reforms Oxford: Oxford University Press.

¹⁵ Daniel H. Rosen. 1999. Behind the Open Door: Foreign Enterprises in the Chinese Marketplace. Washington DC: Institute for International Economics.; Nicholas Lardy. 1998. China's Unfinished Economic Revolution. Washington DC: Brookings Institution Press.

¹⁶ Supachai Panitchpakdi and Mark L. Clifford. 2002. China and the WTO: Changing China, Changing World Trade. John Wiley & Sons.

¹⁷ Joseph Fewsmith. 1994. Dilemmas of Reform in China: Political Conflict and Economic Debate. ME Sharpe.; Roderick MacFarquar. (ed.) 1997. The Politics of China: The Eras of Mao and Deng. Cambridge: Cambridge University Press.; Carol Lee Hamrin and Suisheng Zhao (eds.) 1995. Decision-Making in Deng's China: Perspectives from Insiders. ME Sharpe.; Kenneth Lieberthal and Michel Oksenberg. 1988. Policy-Making in China. NJ: Princeton University Press.; Kenneth Lieberthal and David Lampton (eds.) 1992. Bureaucracy, Politics and Decision Making in Post Mao China. Berkeley: University of California Press.; Susan Shirk. 1993. The Political Logic of Economic Reform in China. Berkeley: University of California Press.; Joseph Fewsmith. 2001. Elite Politics in Contemporary China. ME Sharpe.

the evolving legal framework that regulates international trade. Finally, this literature does not emphasize the possible common objectives that state and/or non-state actors share when interacting in both domestic and international spheres.

From a more general perspective, it can be said that the current literature makes little efforts to identify strategic shifts in the path of China's intellectual property reforms over the years, and certainly fails to assess the impact that changes on the nature of international trade structures have caused domestically or even the role played by foreign corporate actors in the process. Instead, it concentrates on particular institutional changes at the domestic level and generally highlights the political and social challenges associated with the each set of economic reforms. Hence, it can be concluded that current accounts do not establish clear parallels between the inclusion of intellectual property rights in world trade negotiations and the evolution of China's IP regime.

An Evolutionary -Historical Model

The theoretical framework proposed seeks to link the historic evolution of China's intellectual property reforms to two contextual variables. First, the nature of the international trade regime, and more precisely its norms, rules, principles and internal functioning, as well as its capacity to efficiently deal with IPR violations. Second, the configuration and distribution of power among state and non-state actors in both domestic and international spheres, namely the balance of power between central governments, trade negotiators and corporate lobbyists. For further analysis, an evolutionary historical framework takes as a point of reference both China's reformist agenda and the emergence of multilateral legalism. In addition, it tries to find the historical foundations and linkages between such intuitively disconnected variables.

Our findings indicate a positive correlation between China's desire to integrate the global economy and its permeability to foreign influence. This is to say that *the more the Chinese leadership advances in its strategy to integrate China into the global economy, the more foreign actors and international institutions have a voice on the pace, content and timing of domestic intellectual property reforms*. Also, we also observe a negative correlation between the efficiency of the international trade regime to harmonize and ensure uniform respect of IPR, and the level of political involvement of the so-called IPR Lobby in bilateral and multilateral forums. In other words, *the less efficient the international trade regime is in protecting intellectual property rights in developing countries, the more activist and conflictual the IPR Lobby strategy is likely to become*.

Hence, the argument defended throughout this essay goes as follows: ***The rapid evolution of China's intellectual property regime has been reinforced by the growing importance of IPR protection in international trade and particularly among developed countries, as illustrated by high levels of***

political activism among concerned MNCs. Second, it has been facilitated by a reformist agenda at the leadership level during the early years of reforms, and increasingly framed within a process of continuous bureaucratization and depoliticization of IPR issues, as exemplified by the emergence of a highly-educated technocratic elite speaking the language of Adam Smith. Lastly and perhaps more explicitly in the last decade of reforms, it has been shaped by the norms, rules, principles and internal functioning of an emerging world trade system built around multilateral legalism.

Interestingly, this argument challenges the overly optimistic, yet misguided, view that reigns in the media, some think tanks and public discourse about the “fast-pace liberalization” or “impressive commitment to integration” shown by China in the wake of its accession to the World Trade Organization (WTO). Additionally, the following chapters will demonstrate how the top leadership has gradually delegated discretionary power to technocrats and specialists in the process of building and reforming China’s IP regime. It will be argued that China’s integration into the world economy, and more particularly in terms of respecting international standards and adopting foreign values, has started before its accession to the WTO and has been shaped considerably by non-state actors (MNCs), the world trade system itself, and foreign legal traditions. In fact, a careful analysis of the evolution of China’s intellectual property regime shows that the communist regime started its compliance with international standards and commercially-driven agendas way before its membership to the table of multilateralists was accepted in 2001.

Brief Roadmap

Our central argument will be developed in three chapters, each one exploring a particular phase of reforms. The division of phases have been arbitrarily defined according to certain key turning points, political realignments, but mostly considering the relation that the Chinese government established with foreign actors, whether national or supranational since 1978.

The chapter covering the period of *domestic legal formalism* (1978-1989) basically argues that reforms in China’s intellectual property regime were more or less isolated from foreign influences and that the drafting of new laws were part of a central state strategy of building a legal system to facilitate economic reforms. On one side, the power within the Chinese state is still moderately centralized and the top leadership clearly asserts its influence in the process of reforms. On the other, intellectual property-based MNCs are reaching a political momentum in the international sphere, given their growing importance as engines of growth for developed countries and the homogeneity of their commercial interests. Incidentally, they start mobilizing at the end of the 1980s in different arenas in order to include IPR in the Uruguay Round of trade negotiations. Also at the end of this phase, we observe that the

leadership of the worldwide IPR coalition was assumed by US-based MNCs. Finally, it is important to notice that the pre-WTO international trade system (GATT) is based on mediation and diplomatic negotiations rather than rules-based compliance.

The second period of *combative/reactive diplomacy* (1990-1997) marks the formal inclusion of foreign commercially-driven interests into the framework of China's intellectual property reforms. On the domestic arena, the Chinese state is increasingly decentralized and the bureaucracy takes a leading role in drafting most intellectual property laws. Seen from another perspective, the imperatives of specialization in a growing economy seem to have provoked a slight transfer of power from the top leadership to the high levels of bureaucracy. The US-based, MNCs-driven IPR Lobby manages to push its interests in different arenas and a visible fissure is identified. Copyright-dependent industries favor the bilateral aggressive trade diplomacy undertaken by the United States Trade Representative (USTR) according to section 301 of US trade law. Patent-dependent MNCs choose rather to push for broader multilateral agreements in the GATT negotiation rooms. They would eventually succeed in 1993 when TRIPS was made a component of the WTO legal framework. Near the end of this phase, we assist to a change in trade regime. The old GATT diplomatic framework is replaced by the rules-based WTO architecture.

The last and third period is termed *multilateral legalism*. It follows the signature of a Joint Statement¹⁸ by both countries during a US-China Summit in October 1997 and falls right into the last phase of bilateral negotiations before China's WTO accession. In general, this phase illustrates the withdrawal of aggressive unilateralism practiced by the USTR in the early 1990s, and demonstrates the great efforts made by both the Chinese government and its international counterparts to make multilateral legalism function according to its specific rules and principles. In other words, trade threats and last minute agreements have given place to a more conciliatory multilateral approach that supports the rule of law as a principle for international trade regulation. At the Chinese state level, amendments to IP laws remain technical and more than ever in the hands of specialists and technocrats at the bureaucracy level. Despite great expectations, the National People's Congress (NPC) does not show high levels of dissidence, and therefore remains a sort of representative bureaucracy. The top leadership strongly supports China's accession and SOEs reforms, but IPR protection never becomes a top priority in their agenda. Interestingly, a political realignment can be identified on the IPR Lobby front: MNCs overwhelmingly support China's accession and, despite high levels of piracy, remain confident that compliance will be respected under TRIPS.

¹⁸ "Joint US-China Statement" October 29th, 1997. Found online at: <<http://www.usconsulate.org.hk/uscn/jiang97/1029.htm>>
"The United States and China agree that China's full participation in the multilateral trading system is in their mutual interest. To this end, they agree to intensify negotiations on market access, including tariffs, non-tariff measures, services, standards, agriculture, and on implementation of WTO."

CHAPTER II

The Politics Behind The Evolution Of China's Intellectual Property Regime

FROM DOMESTIC LEGAL FORMALISM TO MULTILATERAL LEGALISM

Since 1978, China has made continuous efforts to rehabilitate the framework for the regulation of intellectual property that had existed prior to the Cultural Revolution, and to build a market-oriented legal system along with a strategy of socialist modernization based on incremental economic reforms. During the 1980s, China sought primarily to establish a legal system that strove to adapt foreign models to Chinese "circumstances" and "national interest" as defined by central communist authorities. This system was primarily based on the subordination of the rule of law¹ at the expense of political objectives and economic policy-making.² In addition, the system was relatively closed to direct international influence and exempt from the political and legal authority of international organizations.

However, since the early 1990s, China's reformist framework for intellectual property regulation has gradually included a multiplicity of diverse international interests. On one side, intellectual property-dependent multinationals (MNCs) have constantly put Chinese central authorities under pressure to enforce domestic intellectual property laws. In this process, powerful institutions like the United States Trade Representative (USTR) have played a key role, not only in forcing China to respect international standards of intellectual property protection through the signature of three Memoranda of Understanding (MOU), but also in employing a strategy of aggressive trade diplomacy, based on threats of trade sanctions, as a bargaining tool to defend American corporate interests. More recently, in its efforts to satisfy the multiplicity of domestic economic interests, the USTR reached an important and

¹ Randall Peerenboom. 2002. "Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China." *Michigan Journal of International Law*. pp.472-536. Peerenboom provides the following definition of the rule of law: "Rule of law, like any other important political concept such as justice or equality, is an essentially contested concept. As its most basic, rule of law refers to a system in which law is able to impose meaningful restraints on the State and individual members of the ruling elite, as captured in the rhetorically powerful if overly simplistic notions of a government of laws, the supremacy of law, and equally before the law (...) Although rule of law has ancient roots and may be traced back to Aristotle, the modern conception of the rule of law is integrally related to the rise of liberal democracy in the West. (...) The liberal democratic version of rule of law incorporates free market capitalism (subject to qualifications that would allow various degrees of legitimate government regulation of market), multiparty democracy in which citizens may choose their representatives at all levels of government, and a liberal interpretation of human rights that gives priority to civil and political rights over economic, social, cultural, and collective or group rights." p.473

² Pitman B. Potter. 1994. "Riding the Tiger: legitimacy and Legal Culture in Post-Mao China" *The China Quarterly*. p.325 As Potter explains, the development of a socialist legal system was conceived as a complement to economic reform and as a source of legitimacy for government's reform policies.

comprehensive bilateral agreement with the Ministry of Finance, Trade and Economic Cooperation (MOFTEC) in 1999,³ prior to China's accession to the World Trade Organization (WTO) in November 2001. On paper, China's shift from purely "domestic legal formalism" in the 1980s to "multilateral legalism" in the late 1990s has formally given substantial weight to a rules-based trade system functioning under the principles of nondiscrimination, reciprocity, enforceable commitments, transparency and safety values.⁴ In fact, the WTO has imposed on China a binding contract to which domestic intellectual property reforms must comply: the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS).

The main objective of this chapter is to introduce a theoretical model based on an evolutionary approach that divides the historical development of China's intellectual property regime in three phases: *domestic legal formalism* in the 1980s, *combative/reactive trade diplomacy* in the early 1990s, and *multilateral legalism* in the late 1990s. Each phase aims to analyze the evolution of China's intellectual property reforms in conjunction with two systemic variables: the nature and functioning of the world trade regime, and the configuration and distribution of power among state and non-state actors in the international scene. At the same time, our approach seeks to unpack/demistify the complex nexus of relationships between the Chinese government, multinationals and the world trade system.

The chapter will start with a brief overview of China's legal development on intellectual property since 1978. While further discussed in the following chapters, the enumeration of IP laws seeks to illustrate the great scope and complexity of reforms, as well as to highlight the rapid expansion of a legal system aiming compatibility with market economics and globalization imperatives. Thereafter, a more detailed discussion will be necessary in order to identify the most influential actors and institutions associated with all three phases of intellectual property reforms, both domestically and internationally, and to understand the origins of their interactions and political agendas. It must be clear, however, that our ultimate objective is not to present an entire account of each actor's behavior and influence during the process of reforms, but rather to provide the foundations for our theoretical model.

³ For a good summary on the agreement, see H.C.H. Lee and J.M. Brazzil. 2000. "The Sino-American WTO Agreement: Sectoral Summary" *China Law and Practice*. January. pp.30-34.

⁴ A detailed description of each of these principles can be found at Hoekman, Bernard. 2002. "The WTO: Functions and Principles." In Bernard Hoekman, Aaditya Mattoo and Philip English. *Development, Trade and the WTO: A Handbook*. World Bank. Washington DC. pp.41-49

I. INTELLECTUAL PROPERTY REFORMS IN CHINA SINCE 1978

A. First Phase: 1978-1989

The first phase of IP reforms in post-Mao China can be primarily traced back with Deng Xiaoping's adoption of a national policy of economic reform and opening to the outside world in 1978, and to a lesser extent, as a result of the increased use of advanced technology for modernization purposes during the 1980s. In cruder terms, this phase illustrates "early post-Cultural Revolution efforts to use law to foster economic change"⁵ and "reflects the uneasiness at the introduction of a form of private property fundamentally new to China."⁶ In addition, it must be noticed that intellectual property reforms were not simply restricted to the drafting, debate and enforcement aspects, but also to the creation of a number of administrative agencies.

In March 1979, the State Council initiated the process of drafting the Patent Law of China and passed onto the adoption and implementation of such law to its "rubber-stamp" institution, the National People's Congress (NPC) and its Standing Committee. The Patent Law of the People's Republic of China was adopted on March 1984 and its Implementing Regulations were approved by the State Council on January 1985 and went into force on April of the same year.⁷ The other major piece of legislation enacted in the early 1980s, the Trademark Law of the People's Republic of China, was officially enacted by the Standing Committee of the National People's Congress (SCNPC) on August 1982, followed by its Implementing Regulations adopted by the State Council in 1983.

Additionally to the adoption of IP laws, an institutional effort was made to facilitate the administration of patent and trade issues by the State Council. In 1980, the Patent Office⁸ was created and short after made responsible for drafting revisions of the 1984 Patent Law as well as coordinating foreign-related affairs concerning intellectual property protection.⁹ Also, in its efforts to make domestic intellectual property reforms relevant internationally, China became a member of the World Intellectual Property Organization (WIPO) in 1980 and the Paris Convention for the Protection of Industrial Property in 1984.¹⁰

⁵ William P. Alford. 1995. To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization Stanford: Stanford University Press. p.74

⁶ Alford. 1995. p.70.

⁷ Flora Wang. 1999. "An Overview of the Development of China's Patent System." In Mark A. Cohen, A. Elizabeth Bang and Stephanie J. Mitchell. Chinese Intellectual Property Law and Practice. Kluwer Law International. Boston. p.5

⁸ The Patent Office was formally replaced by the State Intellectual Property Office in 1998.

⁹ Information found at the State Intellectual Property Office (SIPO)'s web site:

<http://www.sipo.gov.cn/sipo_English> "Moreover, the office was also in charge of the organization and promotion of both 1982 Trademark Law and 1984 Patent Law, and the coordination and formulation of education and training in intellectual property."

¹⁰ Peter K. Yu. 2002. The Second Coming of Intellectual Property in China. Occasional Papers in Intellectual Property from Benjamin N. Cardozo School of Law Yeshiva University. Number 11. p.8.

The adoption of the Trademark and Patent Laws and the creation of China's Patent Office were completed with numerous other laws of relative importance or indirectly related to intellectual property protection.¹¹

In the late 1980s, three crucial developments were going to propel China's IP reforms into the international scene. First of all, China's desire to integrate the world economy reflected in its application to resume its status as a contracting party of the GATT in 1986.¹² Although the result of a domestic political decision, this initiative was going to leave bitter memories among Chinese leaders as they realized that integration also implied confrontation and international exposure. For example, after the massacre of Tiananmen Square in June 1989, western countries decided to impose economic sanctions and brought GATT negotiations with China almost to suspension. Soon after, bilateral negotiations between China and the United States reached an impasse on issues including illegal transport of textiles, protection of intellectual property rights, trade imbalance and market access.¹³ Despite an undeniable commitment to further bilateral cooperation, this first "*clash of civilizations*" was going to set the standards for a rather cautious, strategic and potentially volatile relationship between both countries in the 1990s. Indirectly, these disagreements were also going to confirm the status of the US as the spokesman of developed countries in international trade forums, and more precisely in intellectual property rights.

Indeed, profound disagreements between both countries led to a second major turning point: the inclusion of China in the USTR's "priority watch list" in 1989 under the pressure of American intellectual property-based industries.¹⁴ Eventually, these initiatives gave birth to a period of American unilateralism and combative/reactive diplomacy that brought increased international attention through media to the intellectual property situation in China. Since then, China has topped all ratings and broke all records of international piracy and counterfeiting. The third and last event can be linked to the

¹¹Zheng Chengsi. 1987. "*The Chinese Legal System: An Overview*." In Zheng Chengsi and Michael D. Pendleton. *Chinese Intellectual Property and Technology Transfer Law*. London: Sweet & Maxwell. pp.11-12 "*The 1979 Criminal Law (article 127), the 1979 Chinese-Foreign Joint Venture Law (article 5), the 1982 Law concerning Protection of Cultural and Historical Relics, the 1985 Law of Succession (article 3), the 1985 Foreign Economic Contract Law, and the 1986 Law on Enterprises Operated Exclusively with Foreign Capital.*"

¹²Yang Guohua and Cheng Jin. 2001. "*The Process of China's Accession to the WTO*." *Journal of International Economic Law*, p.297-328. As the authors explain: "*On July 10 1986, the PRC presented a note to the Director General of the GATT and officially applied to resume China's status as a contracting party. In this note, the Chinese Government recollected the fact of China being one of the original contracting parties of the GATT and now decided to resume its status (...) The process of China's economic reform would help to extend its economic and trade relations with the contracting parties.*" p.302

¹³Guohua and Jin. 2001. p.313

¹⁴A. Lynne Puckett and William L. Reynolds. 1996 "*Rules, Sanctions and Enforcement Under Section 301: At Odds with the WTO?*" *American Journal of International Law*. October. vol.90. no.4 pp.675-689 As Puckett and Reynolds explain: "*Section 301 arose from the need perceived by the United States to strike back against unfair trade practices that went unchanged despite GATT panel condemnation. Decision of this panel, however, could be blocked by any member. Failure to comply with a panel ruling resulted in no further action. This dearth of enforcement power left the vacuum that section 301 was designed to fill.*" p. 687. For further analysis, see Kim Newby. 1995. "*The Effectiveness of Special 301 in Creating Long Term Copyright Protection for US Companies Overseas*." *Syracuse Journal of International Law and Commerce*. vol. 29. no.33. Newby explains that: "*The enacting of 301 was seen as a direct result of Congressional dissatisfaction with the manner in which US trade was being protected under GATT.*"

inclusion of intellectual property rights in the Uruguay Round's agenda which caused intense disagreements between so-called Third World and Industrialized countries over the scope of negotiations on the Trade-Related Aspects of Intellectual Property Rights (TRIPS). As analyzed in the following chapters, the inclusion of nontraditional issues into the world trade agenda also affected the speed and content of China's reforms agenda as well as IP-related policy initiatives.

B. Second Phase: 1990-1997

The reformist agenda in this phase included not only the drafting and reviewing of key intellectual property laws, but also highlighted central government's efforts to further professionalize a number of administrative agencies in charge of enforcement. In essence, we assist to a bureaucratization of intellectual property reforms in which the content and scope of reforms depends more than ever on a group of top specialists, fighting to gain influence within the bureaucratic apparatus. At the same time, we can observe that IPR issues remain at the periphery of the top leadership agenda. Other initiatives launched during this period were the improvement of the judicial system and the establishment of tribunals for intellectual property.¹⁵ Key to our central argument is the first direct foreign intervention on the process of domestic reforms: USTR unilateralism legitimized by section 301, and a period of intensive bilateral negotiations between the American and Chinese governments and a saga of last minute agreements. Put in perspective, it can be said that China's willingness to take into consideration foreign commercial interests in its reformist agenda was particularly driven by the leadership's desire to improve its international credibility, to compensate for the Tiananmen stagnation, and to increase its chances to conclude the required bilateral negotiations to become an official member-state of the World Trade Organization (WTO).

The first Copyright Law was adopted by the SCNPC and its Implementing Regulations by the State Council in 1990, and an innovative legislation, the Software Computer Protection Implementing Regulations, followed in 1991. Both Patent and Trademark Laws were amended in 1992 and 1993 respectively. In addition, China also acceded to the Berne Convention, officially ratified the Geneva Convention in 1993, and signed the Patent Cooperation Treaty in 1993.¹⁶ In July 1995, the NPC promulgated the Regulations for the Customs Protection of Intellectual Property. These regulations have come to safeguard fair competition in foreign trade and maintain the reputation of China's export commodities.¹⁷ China also signed three bilateral agreements with the United States, continued to participate in different international IPR forums, and focused on formal training for officials and judges with the help of Europeans and Japanese.

¹⁵The Building of the Legal System in China. 2001. Beijing: New Star Publishers. p.45

¹⁶Peter K. Yu. 2002. The Second Coming of Intellectual Property Rights in China. p.9

¹⁷Idem p. 47

C. Third Phase: 1997-200?

In the late 1990s, as negotiations with China's major trade partners (US, EU, Japan) were concluded, a new round of amendments, initiated by the State Council, was promulgated by the National People's Congress (NPC) and its Standing Committee (SCNPC). In short, it can be argued that the last group of amendments has been driven mostly by WTO imperatives of compliance imposed to all full-status members on one side, and China's desire to show its serious commitment to the newly-created trade regime on the other.

Newly approved amendments of China's copyright law were enacted on October 2001 and the revised law took effect immediately after its publication. In addition, the State Council promulgated a New Computer Software Protection Act on January 2002. The more recent amendments to the Patent Law took effect on July 2001 after a period of revision by the NPC Standing Committee in June and August 2000. Also, the Trademark Law was amended and ratified by the NPC on October 2001, took effect on December, and its new Implementing Regulations were approved by the State Council on September 2002. In terms of institutional development, the Patent Office (State Patent Bureau) was replaced by the State Intellectual Property Office (SIPO)¹⁸ in 1998, a more comprehensive administrative and regulatory body run by officials possessing a better knowledge of China's intellectual property laws under the authority of the State Council. Other initiatives enhanced research and provided formal legal training for Chinese officials, lawyers, agents and business people was the establishment of the China Intellectual property Training Center in Beijing in 1997. Finally, a joint effort by the China Software Alliance and the Business Software Alliance to promote the use of original software among ministries was launched in 1998 and consisted in opening a "training center for fostering personnel for the country's intellectual property department."¹⁹

In the light of a steady evolution in the attitude of Chinese leaders and central-top officials in responding to diplomatic pressures, and their willingness to embrace an emerging rules-based multilateral trade regime during the 1990s, an exploration of the current literature on Chinese legal studies and politics becomes a prerequisite to interpret not only the evolution of reforms, but also the possible correlation between China's global economic integration and the increase/decrease of foreign influence in domestic IP legal developments.

¹⁸Peter K. Yu. 2001. "From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century." *American University Law Review*. vol.50. As Yu explains: "This new office is responsible for the country's improvement on trademark, copyright, patent application and management and other intellectual property rights aspects. It coordinates regional intellectual property rights departments to identify laws and regulations enforcement and works closely with the State Administration of Industry and Commerce and the State press and Publication Administration." p.13

¹⁹Idem. p.14

II. SOME INSIGHTS ON THE EVOLUTION OF CHINA'S INTELLECTUAL PROPERTY REGIME

The evolution of China's intellectual property regime since 1978 is certainly admirable by any international standards and incomparable to other historical experiences. No other country in history has achieved such levels of legal development in so little time. At present, a multidisciplinary body of literature covers the content, evolution, significance and implications of China's legal and economic reforms. Despite the many useful analytical tools that the current scholarship provides, no clear theoretical model has attempted to grasp the complexity of relations linking domestic intellectual property reforms, China's place within international ever-evolving trade structures and legal frameworks, as well as the role played by key international economic players. More than often, the few analysis that exist on the politics of intellectual property rights in China tend to fall into fascinating descriptions of trade diplomacy stories²⁰ and usually offer an American perspective²¹ of an issue that has become, since the establishment of TRIPS as a component of the WTO legal framework in 1995, essentially international in nature and highly intrusive in application.²² Other accounts point out to issues like the role of courts in intellectual property rights enforcement²³, local protectionism, judicial independence, and the many challenges that the globalization of law poses to local legal culture.²⁴

The majority of authors in international law literature rigorously identify important changes and challenges faced by China's legal system in the field of intellectual property rights, but tend to exclude the driving forces behind such developments from their main analysis. Other scholars focus rather on US-China bilateral trade relations highlighting the constant diplomatic pressures that the American government used to push Chinese central authorities to reform and review domestic IP laws and ensure enforcement.²⁵ On the other side, political scientists have been more interested in leadership struggles,

²⁰Ryan. 1998. Peter K. Yu. 2002.

²¹These studies are concerned with American trade policy formation and aim to highlight the downsides of aggressive unilateralism. Martha L. Gibson. 2000. Conflict Amid Consensus in American Trade Policy. Washington DC: Georgetown University Press.; Philip A. Mundo. 1999. National Politics in A Global Economy: The Domestic Sources of US Trade Policy. Washington DC: Georgetown University Press.; Thomas O. Bayard. And Kimberly Ann Elliott. 1994. Reciprocity and Retaliation in US Trade Policy. Washington DC: Institute for International Economics.; Jagdish Baghwati and Hugh T. Patrick. 1990. Aggressive Unilateralism: America's Trade Policy and the World Trading System. Ann Arbor: The University of Michigan Press.

²²Christopher Arup. 2002. The New World Trade Organization Agreements: Globalizing Law Through Services and Intellectual Property. Cambridge: Cambridge University Press. p.5

²³Pitman B. Potter and Michel Oksenberg. 1999. "A Patchwork of IPR Protections." China Business Review. No.28 February.

²⁴Pitman Potter. 2001. The Chinese Legal System: Globalization and Local Legal Culture. London: Routledge

²⁵Charles Baum. 2001. "Trade Sanctions and the Rule of Law: Lessons from China" Stanford Journal of East Asian Affairs. Spring. Vol.1; Michael P. Ryan. 1998. Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property. Brookings Institution Press. Washington DC.; Peter K. Yu. 2002. The Second Coming of Intellectual Property in China. Occasional Papers in Intellectual Property from Benjamin N. Cardozo School of Law Yeshiva University. Number 11.

the role of bureaucracy on policy-making and organizational politics.²⁶ However, relatively few authors have tried to frame China's intellectual property reforms with the transitional nature of its economic reforms and the top leadership political agenda; and more important, within a dominant international framework based on very specific rules and principles. China scholars have not yet developed a substantial body of literature dealing with issues of domestic political sovereignty in an era where trade rules are dictated from and by international organizations and membership often becomes synonymous of binding unalterable agreements. Today, there is a clear necessity to develop a literature where the links between domestic political-legal developments and the international trade structure are explored in conjunction with the politics behind their own evolution. Therefore, in studying other emerging economies in the developing world, it would be risky to affirm that the phenomenon of inter-legality²⁷ results from simple selective adaptation of domestic regimes to international structures in a context of globalization.

Because China is so often described as an emergent economic power that is gradually shaping international politics as well as trade and security issues, not only in the Pacific Rim but also in the world, it is extremely important to understand its evolution in a field of important international concern: intellectual property rights protection.

A. CHINESE LEGAL STUDIES LITERATURE

A key study in the field is William P. Alford's harsh critique of American trade diplomacy in China during the 1990s concerning intellectual property protection. His argument is based on a deep understanding of China's imperial history and interpretation of its political culture. He basically insists on the necessity to develop a culture-sensitive approach to legal reforms that takes into account specific historical foundations. On one side, he observes that American trade policy has ignored "both the legacy of the Chinese past and the implications of its current political, legal, and economic circumstances" when pushing for the development of the rule of law.²⁸ He also criticizes the neutral technocratic approach used by American trade negotiators and their lack of understanding of Chinese history and values.²⁹ On the

²⁶ Joseph Fewsmith. 1994. Dilemmas of Reform in China: Political Conflict and Economic Debate. ME Sharpe.; Roderick MacFarquar. (ed.) 1997. The Politics of China: The Eras of Mao and Deng. Cambridge: Cambridge University Press.; Carol Lee Hamrin and Suisheng Zhao (eds.) 1995. Decision-Making in Deng's China: Perspectives from Insiders. ME Sharpe.; Kenneth Lieberthal and Michel Oksenberg. 1988. Policy-Making in China. NJ: Princeton University Press.; Kenneth Lieberthal and David Lampton (eds.) 1992. Bureaucracy, Politics and Decision Making in Post Mao China. Berkeley: University of California Press.; Susan Shirk. 1993. The Political Logic of Economic Reform in China. Berkeley: University of California Press.; Joseph Fewsmith. 2001. Elite Politics in Contemporary China. ME Sharpe.

²⁷ Christopher Arup. 2000. "We shall be suggesting that the subsuming phenomenon is one of inter-legality. But the concept of inter-legality nicely conveys the sense that the plural legalities of the world encounter and interact with each other. They clash on occasions but they can also intermingle and create new hybrid legalities. Hence, while it seems unfamiliar, inter-legality proves a more accommodating notion than, for instance, the traditional notion of conflict of laws." p.5

²⁸ William P. Alford. 1998. "Making the World Safe for What? Intellectual Property Rights, Human Rights, and Foreign Economic Policy in the Post-European Cold War World" in Mark A. Cohen, A. Elizabeth Banh and Stephanies J. Mitchell. Chinese Intellectual Property Law and Practice. Boston: Kluwer Law International. P. 151

²⁹ Idem.p.157

other, he reminds that China's imperial history shows no signs of a functional intellectual property regime as defined by Western developed countries and links the low levels of intellectual property development to its Confucianist political culture.³⁰ In short, he relates the underdevelopment of an intellectual property regime in China to its political culture. In making reference to the role of the US during the phase of combative/reactive diplomacy, he highlights the narrowness of its trade policy by pointing out the over dominance that commercial gains and electoral interests have had in setting the USTR's diplomatic agenda towards China in the early 1990s.³¹

Despite the great influence that Alford's work has had in the development of Chinese legal studies, some critiques can still be outlined. First, and perhaps due to the period in which his work was written, he fails to mention how the so-called "fundamental misconceptions" of American trade policy regarding intellectual property rights protection in China fit into the important shift from unilateralism to multilateralism that we have identified after 1997, and that has tempered the combative/reactive pattern of negotiations between both countries in the early 1990s. His arguments remain convincing roughly for the 1990-1995 period, but tend to ignore China's ambitions at the international level as well as the political and legal authority that the WTO exercises in today's domestic regimes. Furthermore, he does not develop a clear argument on how US-China bilateral relations evolved within the relatively new multilateral and highly legalistic trade regime, and how China's legal developments have gradually been influenced by the nature of the international trade system and the commercial interests of key players.

In another widely cited book, Stanley Lubman summarizes his own view on the evolution of China's legal reforms since 1978: "Law has been a major instrument of governance, it has provided a legal framework for a marketizing economy, and it has helped to the creation of a judicial system."³² In exploring the nature of the post-Mao legal system, he observes that China suffers from legal fragmentation because no legal institution in China has either the authority or desire to impose order on the legal system.³³ Similarly, he correctly points out that unrestrained and undefined bureaucratic discretion is a systemic flaw of the current legal system.³⁴ Without specifying whether his argument

³⁰Idem.p.154

³¹Idem p.161. Alford directs an aggressive critique toward US creative industries: "*The industries that have been behind US intellectual property policy toward China are obviously important to the nation's well-being, economically and otherwise, and they surely deserve to have their views taken seriously. It also ought not mean that our national interest should be predominantly equated with the interests of Disney and Microsoft any more than we would predominantly equate our national interest at home with the interests of such companies or our national interests in Latin America with the interests of United Fruit and Citicorp.*" See also William P. Alford. 1995. *To Steal a Book is an Elegant Offense* : "*And the fact that a sizable number of key industries raising these concerns were located in such electorally important areas as Southern and Northern California, Texas, and New York, and were involved in mass communications, only made such temptations more appealing.*" p. 115

³²Stanley Lubman. 2000. "*Bird in a Cage: Chinese Law Reforms After Twenty Years.*" Northwestern Journal of International Law and Business. Vol.20. No.383-394.

³³To read more on legal fragmentation, see Perry Keller. 1994. "*Sources of Order in Chinese Law.*" American Journal of Comparative Law. Vol.42. pp.711-734.; and Anthony Dicks. 1995. "*Compartmentalized Law and Judicial Restraint: An Inductive View of Some Jurisdictional Barriers of Reform.*" In Stanley Lubman (ed.) China's Legal Reforms, p.99-103.

³⁴ For example, Lubman mentions that the new Law on Legislation adopted by the NPC in March 2000 did not advance the development of doctrine or institutions to deal with the ongoing need for legal interpretation. He adds that even if new legislation clarifies rulemaking authority and provides guidelines for its control, however, only energetic and consistent enforcement could

applies to all legal aspects, he makes reference to certain influential actors behind China's legal reforms: non-state economic sectors, local governments, business groups, SOEs managers.

Although Lubman's arguments are well targeted and clearly illustrate the enormous evolution of China's legal system towards the rule of law, he fails to explicitly mention the role played by these so-called "influential groups" in domestic lawmaking, as well as their international counterparts in regulatory trade institutions like the WTO. Finally, he does not explore the more than possible direct role that external forces might have played in recent legal developments, and more particularly in regards to intellectual property protection and implementation during the 1980s and 1990s. Because his argument somewhat ignores a parallel process of economic integration reflected in China's activism in the international scene, he fails to sketch a convincing analytical framework that would specifically include the role of "international forces" in shaping domestic lawmaking through bilateral pressures first, and within a rules-based and highly legalistic framework lately.

When looking at parallels in Asia, the cases of South Korea and Taiwan are excellent case-studies in which intellectual property reforms were more effectively enforced after repetitive aggressive diplomatic tactics on the part of the USTR. In order to put the Chinese case into perspective, Warren H. Maruyama's three phases model provides many helpful insights.³⁵ The first phase is when external pressure leads to changes to specific domestic laws and regulations with the objective to make the system conform with international standards and treaties. The second follows an explicit commitment made by domestic stakeholders to fight piracy at home. The last stage is when the adequate enforcement of intellectual property laws becomes self-sustainable and direct foreign pressures turns redundant. In referring to the Korean and Taiwanese cases, he observes that effective levels of intellectual protection only emerged when both countries achieved to develop indigenous innovative technologies, and thus there were clear domestic stakeholders interested in ensuring adequate protection.³⁶ As we will see in the next three chapters, it is unclear where China stands in Maruyama's model.

Peter K. Yu refers to American-Sino trade diplomacy in the 1990s as a "cycle of futility" in which both countries constantly threatened each other and came to eleventh-hour compromises by signing bilateral agreements to ensure enforcement of intellectual property laws.³⁷ While he recognizes that American unilateralism has been highly coercive and business-dominated through the 1990s, he also notes that diplomatic pressures have also strengthen the enforcement of intellectual property laws and

increase more orderly law- and rulemaking by local governments and ministries. Stanley Lubman. 2000. *Bird in a Cage: Chinese Law Reforms After Twenty Years*

³⁵ Warren H. Maruyama. 1999. "US-China IPR Negotiations: Trade, Intellectual Property, and the Rule of Law in a Global Economy." In Mark. A. Cohen, Elizabeth Bang, and Stephanie Mitchell (eds.) Chinese Intellectual Property Law and Practice. Boston: Kluwer Law International. p.207.

³⁶ Warren H. Maruyama. 1999. p.208

³⁷ Peter K. Yu. 2002. The Second Coming of Intellectual Property Rights in China p.17

“provided the reformist leaders in China with the needed push that helps reduce resistance from their conservative counterparts.”³⁸

Finally, Michael R. Ryan presents a rather business perspective based on the politics of intellectual property rights in the world emphasizing the central role that the US has played. First, he highlights the interplay between the USTR and the IPR Lobby in pushing for further enforcement in China during the 1990s. Second, he points out the compact nature of the IPR Lobby³⁹ by describing them as interest groups with a clear mission, effective in lobbying leaders, with a solid membership, financial structure and competent staff.⁴⁰ Despite the fact that he fails to measure the success or failure of American unilateralism in the field of IPR and its impact on China’s domestic reforms, he nevertheless illuminates our central arguments by recognizing that American aggressive trade diplomacy was “conducted with multilateral trade negotiation objectives in mind reflected in rule-writing efforts.”⁴¹

B. POLITICAL SCIENCE LITERATURE

Meanwhile, Murray Scot Tanner presents an extremely detailed account of China’s lawmaking process and traces new directions taken by top legislative institutions such as the State Council, the National People’s Congress and its Standing Committee.⁴² Although his study does not directly relate to the “politics” of intellectual property in particular, and is more concerned about the prospects for democracy in China, he recognizes the central importance of lawmaking in the post-Mao period and highlights the increasing role played by NPC delegates since 1978. His study is particularly important because of the many insights that it brings to our understanding of lawmaking processes, its sources of power, its internal level of contestation and its interactions with other ministries that are involved in foreign affairs and trade relations. In short, he argues that the NPC has become more than a “rubber stamp” in the past few years, especially when controversial economic legislations were proposed by the State Council. Through empirical data, he proves that the NPC is not simply a “rubber stamp” of the State Council and its legislative/political department, but rather a forum of debate where laws are often contested by delegates. According to him, the NPC has become an active and influential actor in Chinese politics and has even come to challenge the central power once monopolized by the CCP.⁴³ Although

³⁸Idem p.17

³⁹Michael P. Ryan. 1998. p.68

⁴⁰Idem p. 88.

⁴¹Idem. p. 86 Ryan argues that: “From its beginning with the Korea negotiations, including the Special 301 policy initiated in 1989, and through the signing of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in 1994, US intellectual property rights diplomacy was in the main a rule-writing effort. Negotiators used bilateral and multilateral diplomacy to encourage governments, especially in developing countries, to draft legislation, sign international treaties, and reach agreement on TRIPS.”

⁴²Murray Scot Tanner. 1999. The Politics of Lawmaking in Post-Mao China: Institutions, Processes and Democratic Prospects. Clarendon Press. His analysis is well documented and based on two case-studies in which friction between the executive and legislative powers arose in the 1980s: the case of the Enterprise Bankruptcy Law in 1986 and the case of the State-Owned Industrial Enterprises Law in 1988.

⁴³Murray Scot Tanner. 1999. p.10

Tanner's analysis results extremely helpful in underlying the dynamics of the lawmaking process, its scope and applicability seem limited to cases in which the spirit of contestation in the NPC arises exclusively from state-sector interests. In the case of intellectual property reforms, there is no real indication of NPC delegates building opposition blocs. Moreover, it is not clear how and to what extent Tanner's model applies to the politics of intellectual property reforms since China has not yet developed a sufficiently big group of domestic stakeholders in favor of effective enforcement. Since China seems to be somewhere in the second phase of Maruyama's model, we intuitively see intellectual property reforms remain a phenomenon linked to international interests.

In a remarkable effort to actualize China's path of reforms and the central government's goals of socialist modernization within a framework of accession to the WTO, Scott J. Palmer makes a strong argument based on China's interaction with international forces in the latest phase of reforms. He argues that the promulgation of new laws and accession to multilateral trade regimes can be interpreted as central government's efforts "to facilitate foreign investment and transfer of technology", and a way for the government to "establish and legitimate associated modernization and reform policies."⁴⁴ He also notes that the latest amendments have been minor if compared to the changes instituted in the 1980s and 1990s, and are to be considered more like technical calibrations to TRIPS than any wide sweeping change.⁴⁵ He also emphasizes the fact that China's system of intellectual property protection is far from being an effective system of enforceable rules to protect foreign investors' rights. Finally, he argues that given the improvements in China's administrative system, and the fact that Beijing relies on local authorities to ensure enforcement of intellectual property rights, foreign investors should concentrate their efforts on the localities rather than at the center.⁴⁶

Generally, according to international law and US politics literature, it remains clear that business interests have overwhelmingly dominated American trade diplomacy in the early 1990s. As pointed out by most observers, this dominance has been conducted at the expense of other issues such as human rights.⁴⁷ On the other side, it is fair to say that because of the authoritarian nature of China's political regime, intellectual property reforms have been easily dictated by the top leadership's pro-liberalization agenda emphasizes continuous economic development, stability and further global integration. Once again, pragmatism and commitment to economic growth have won against popular consultation and political deliberation.

⁴⁴Scott J. Palmer. 2001. "An Identity Crisis: Regime Legitimacy and the Politics of Intellectual Property Rights in China." *Indiana Journal of Global Studies*. Spring, pp.449-478

⁴⁵Idem p.468

⁴⁶Scott J. Palmer. 2001. p.471

⁴⁷William P. Alford. 1998. "Making the World Safe for What? Intellectual Property Rights, Human Rights, and Foreign Economic Policy in the Post-European Cold War World" in Mark A. Cohen, A. Elizabeth Banh and Stephanie J. Mitchell. *Chinese Intellectual Property Law and Practice*. Boston: Kluwer Law International.; and Robert Z. Lawrence. 1999. *International Trade Policy in the 1990s*. Occasional paper: John F. Kennedy School of Government. Harvard University.

Above all, the fundamental weakness found in most studies is the lack of linkages between domestic developments in intellectual property, MNCs commercial-driven interests and the world trade system. In addition, they don't seem to consider the geopolitical agendas that both countries are pursuing through their engagement in combative/reactive trade diplomacy and later, multilateral legalism. On one side, China is the emergent power trying to selectively integrate itself into the global trade system and shows a quasi-obsession with stability and economic growth at the expense of political rights and procedural democracy. On the other, the United States is the economic and military leader in the post-Cold war era, trying to reposition its values, but without any clear agenda. It seems that without a common enemy, the United States foreign policy and trade diplomacy agenda are still strongly influenced by the political dynamics and shifts inside its own political system. By including both countries in our analytical framework, we aim to better grasp the role that private/commercial interests play before, during and after the shift towards rules-based multilateralism becomes a tangible reality. Also, we attempt to deeply scrutinize the political strategies that an authoritarian-pragmatic leadership is forced to take when bilateralism becomes counter-productive and politically risky to the advance of trade interests in the international sphere, and multilateralism is imprinted by a double-sided value called "stability".

III. A NEW EVOLUTIONARY-HISTORICAL MODEL

The development of China's intellectual property laws has followed a tortuous but nevertheless expanding pattern since 1978. Taking into account China's interactions with international forces and institutions, three "phases of development" or "shifts of strategy" can be identified. The first phase consisted in developing an intellectual property regime that would protect individual rights over creations and inventions while preserving state control and protecting national interests.⁴⁸ Generally uncomfortable with the conflict between the introduction of private property and socialist ideology, the Communist leadership placed substantial limitations on the rights granted by the 1982 Trademark Law and the 1984 Patent Law.⁴⁹ At this early stage of development, China's interactions with international organizations and industrialized countries were mainly instrumental and consisted primarily in dispatching delegations overseas to learn about patent and trademark systems. In general, these interactions were solicited by the Chinese top leadership, did not involved any substantial participation from the legislative bureaucracies within the State Council, were not the result of diplomatic pressures, and certainly were not framed

⁴⁸This is often referred to in the literature as "socialist legality with Chinese characteristics."

⁴⁹William P. Alford. 1995. To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization. As Alford explains: "*The Patent Law largely limits itself to administrative or criminal remedies, each of which leaves principal remedial powers in the hands of officialdom.*" p.74 and "*The Trademark Law denied protection to service marks, collective marks, certification marks, and defensive marks, as well as to trademarks falling into such undefined categories as being detrimental to socialist morality*" p.75

according to any world trade regime. Consequently, it is fair to argue that the processes of drafting, implementing and enforcing intellectual property laws remained a purely domestic initiative until the end of the 1980s.

In the early 1990s, as China integrated de facto into the global economy through trade and investment flows, international actors naturally became part of the equation and began to exert pressures on China to further reform its intellectual property regime (namely ensure appropriate enforcement of existing laws) through different diplomatic means (threats of trade sanctions) and institutions (USTR). Simultaneously, a pro-reform leadership increasingly restricted by domestic challenges and preoccupied to improve its image abroad, accepted to play the rules of so-called "international standards" and reached a serie of bilateral agreements with the USTR. At the end of the 1990s, a new set of reforms (more technical in nature) were implemented in order to comply with the intellectual property component of the WTO agreement: TRIPS. Hence, a new era of international legal formalism was initiated under the WTO institutional umbrella.

When observing the evolution of China's intellectual property regime since 1978, two striking points are identified. First, the actors (variables) involved in each major period of reform vary in number and nature, and seem to be driven by self-interested agendas. Second, the nature of these self-interested agendas seem to obey to a more powerful logic, one based on the architecture of the world trade system. A model that would help us to illustrate patterns, identify shifts, and better define the forces behind each phase of reforms is therefore necessary to explain the rapid evolution of China's intellectual property regime as well as its current challenges. In order to successfully proceed to a more analytical stage, important guiding questions ought to be posed. First, *which actors, institutions, mechanisms or events can explain the tortuous path of reforms in China and the slowly but steady inclusion of foreign forces into the equation in the early 1990s?* Second, *why does the Chinese leadership allow foreign actors to shape the pace and content of reforms in the early 1990s? What has changed domestically or internationally from the 1980s?* Third, *how different is the strategy adopted by China's leadership at the beginning of the 1990s and the end of the same decade?*

As shown in the last section, the current literature makes little efforts to identify the specificity and dynamic in each phase of China's intellectual property development since 1978, and does not establish clear parallels between the increasing role accorded to intellectual property rights in world trade and their own evolution in China. According to a dominant paradigm in political science, China is a unique case and hardly comparable to other experiences in the world. This view is certainly correct when we take into account China's historical and political development. However, a post-WTO account would be imprinted of certain analytical conformism if it was to ignore the interactions between China's internal developments, and the political behavior adopted by commercially-driven international forces, as

well as the nature of the international trade architecture in place. In the post-WTO era, it becomes imperative to recognize the interdependence inherent to economic global integration for mainly two reasons. First, the Chinese government cannot pretend anymore that internal developments are insulated from international criticisms. Second, by focusing on the possible links between international and domestic actors (including NGOs), we could be in a better position to predict, or at least assess, the impact that integration creates in the Chinese political arena.

Despite the many useful insights the literature provides to understand the “politics of intellectual property rights protection” and the important role played by the USTR and multinationals in the early 1990s, no clear links are established between the pure short-term objective of improving protection for intellectual property rights and the actual meaning and evolution in importance of these rights in the international sphere. More precisely, no mention is made about the ineffectiveness of the GATT system to deal with intellectual property rights violations and the political implications resulting from the inclusion of intellectual property in the Uruguay Round of trade negotiations. Similarly, no parallel is clearly established between MNCs activism domestic and international institutions, their direct influence on the processes of lawmaking in Newly Industrialized Countries (NICs) and their prominent role during the Uruguay Round. Finally, none of these analysis has provided a convincing answer to a question that concerns more generally trade liberalization in a globalized world: *why have IPR protection been included in the agenda of GATT negotiations leading to the establishment of the World Trade Organization and what is the impact that such inclusion has had on developing countries like China?*

The theoretical model proposed attempts to analyze the evolution of China’s intellectual property reforms by considering two international contextual variables: *the nature of the international trade regime (more precisely its norms, rule, principles and functioning, as well as the capacity to efficiently deal with intellectual property rights violations), and the configuration and distribution of power among actors in the international scene (more particularly the balance of power between central governments, trade negotiators and corporate lobbyists)*. Our findings find a direct positive correlation between China’s leadership desire to integrate the global economy and its permeability to foreign influence. This conclusion does not implies direct foreign intervention in policy-making and lawmaking processes. The term permeability seeks to highlight the transfer of values from international organizations to the Chinese polity. Examples of values are the increasing technocratization in policy-making, and to some extent a general tendency to negotiate behind closed doors, far from public opinion. On the other side, it finds a negative correlation between the efficiency of the international trade regime to ensure uniform and proper respect for intellectual property rights and the level of aggressiveness of the IPR lobby’s strategy to push for reforms in developing countries like China. In other words, *the more the Chinese leadership insists on its strategy to continue domestic economic*

reforms through global economic integration, the more foreign actors and international institutions have an influence on the pace and content of intellectual property reforms. Also, the less effective the international trade regime is in protecting and enforcing intellectual property rights in developing countries, the more activist and conflictual the IPR lobby strategy is likely to become.

Hence, the overall argument of this thesis goes as follows. *The rapid evolution of China's intellectual property regime has been reinforced by (1) the growing importance of intellectual property rights in technologically-advanced countries, more particularly illustrated by high levels of political activism among MNCs, (2) it has been facilitated by a post-Mao reformist leadership in the early years, and has been increasingly framed within a process of bureaucratization and depoliticization of IPR issues. In the last decade of reforms, (3) China's intellectual property regime has been undoubtedly shaped by the norms, rules, principles and functioning of an emerging multilateral trade system.*

Within the limits of this thesis, each of these arguments will be presented, explained and analyzed in the following chapters. For now, an overview of our theoretical model will be provided with the objective to better orient and target the forthcoming empirical analysis.

A. DOMESTIC LEGAL FORMALISM: 1978-1989

China's intellectual property regime is more or less isolated of foreign influences during the 80s, and the drafting of new laws fall into an overall strategy of building a legal system to facilitate domestic economic reforms.⁵⁰ Both patent and trademark laws were drafted and implemented in this context. The Chinese state can be divided into cells, each of them taking part to the process of reforms according to their official role and evolving responsibilities: the Central Committee of the Communist Party, the State Council, the National People's Congress and its Standing Committee, the Chinese intelligentsia, and the central administrative agencies in charge of enforcing the laws. The role of foreign actors remain limited to technical assistance.⁵¹ The international framework associated with this period is the General Agreement on Tariffs and Trade (GATT), a trade regime severely criticized by the developed world (especially the US) that fails to include an efficient dispute settlement mechanism, and one that does not consider intellectual property rights a trade issue.⁵² At the same time, technology-based multinationals and creative industries are reaching a momentum in the international sphere given their growing importance as engine of economic growth in developed countries.⁵³ The international trade system is based on mediation and diplomatic negotiations rather than formal compliance and to well-specified

⁵⁰ William P. Alford. 1995.; Pitman B. Potter. 2001.; and Stanley Lubman. 1999.

⁵¹ William P. Alford. 1995.

⁵² Gilbert R. Winham. 1994. *The Evolution of International Trade Agreements* Toronto: University of Toronto Press.

⁵³ Charles Baum. 2001. "Trade Sanctions and the Rule of Law: Lessons from China"

binding agreements.⁵⁴ The international political system is bipolar and China is tied with the communist one-party regimes bloc despite the fact that it has started a period of economic liberalization in 1978.

B. COMBATIVE/REACTIVE DIPLOMACY: 1990-1997

This second phase is marked by the inclusion of foreign influences into the framework of China's intellectual property reforms. On the "domestic forces" front, the Chinese state is still divided into cells, giving predominance to the State Council and the NPC Standing Committee, as well as the ministry of foreign and economic affairs.⁵⁵ The communist leadership remains a crucial actor because it gives direction and form to new reforms,⁵⁶ the responsibilities of drafting, debating and implementing are increasingly bureaucratized, and at the same time depoliticized, and administrative institutions take a greater role in enforcing laws as result of foreign requests. In this phase, the Central Committee of the Communist Party (CCP) seems less involved. On the "international forces" front, a heterogeneous international IPR Lobby manages to push for its interests in different arenas. At the domestic level, copyright-dependent industries favor the use of aggressive trade diplomacy against infringers in Newly Industrialized Countries (NICs) and at the international level, mostly-patent dependent industries conduct strategies of coalition formation in order to obtain a binding agreement on intellectual property rights at GATT.⁵⁷ In the United States (where most of copyright-dependent industries are based and where their organizational structure was the best suited to voice their concerns through lobbying activities),⁵⁸ the IPR lobby furthers its demands through the United States Trade Representative (USTR) and the use of Section 301 becomes a tool of negotiation with Chinese authorities over intellectual property rights violations.⁵⁹ In short, the nature of foreign actors into the equation of China's intellectual property reforms can be best described as unilateral, aggressive, and short-sighted.⁶⁰

As we have observed, the international context and evolution of trade talks over IPR in the Uruguay Round have changed significantly. Whereas no consensus has yet been reached over the content and regulatory powers of the international trade regime, talks between developed and developing countries continue.⁶¹ In 1990, intellectual property rights are officially included in the agenda and heated debates follow until the end of 1993. The GATT regime proves its inefficiency in dealing with

⁵⁴Christopher Arup. 2002; Gilbert R. Winham. 1994; Michael J. Trebilock and Robert Howse. 1995. *The Regulation of International Trade*. London: Routledge.

⁵⁵Michel Oksenberg, Pitman B. Potter, and William B. Abnett. 1996. "Advancing Intellectual Property Rights: Information Technologies and the Course of Economic Development in China." *NBR Analysis*. Vol.7 no.4

⁵⁶Idem

⁵⁷Duncan Matthews. 2002. *Globalizing Intellectual Property Rights*. London: Routledge.

⁵⁸Michael P. Ryan. 1998.

⁵⁹Michael P. Ryan. 1998. William P. Alford. 1995.

⁶⁰Philip A. Mundo. 1999. *National Politics in A Global Economy: The Domestic Sources of US Trade Policy*. Washington DC: Georgetown University Press.; Jagdish Bhagwati and Hugh T. Patrick (eds.) *Aggressive Unilateralism: America's 301 Trade Policy and the World Trading System*. Ann Arbor: University of Michigan Press.

⁶¹Gilbert R. Winham. 1994

intellectual property rights violations and US strategy of aggressive seeks to compensate the losses suffered by domestic industries (MNCs). Nearly at the end of this period, a global consensus is reached to create a rules-based multilateral trade regime and a new dispute settlement mechanism (DSB) and the TRIPS agreement are officially enforced.⁶² In addition, the bipolarity of the international political system during the cold war era ends and a new multilateral system slowly emerges.

C. MULTILATERAL LEGALISM: 1998-2002

Following the signature of a US-China Joint Statement of Cooperation in 1997, the aggressive trade diplomacy conducted by the USTR virtually disappeared and American diplomatic efforts began, in a reality, to concentrate towards “helping” China join the World Trade Organization (WTO). At the same time, China continued its primary goals of global economic integration and negotiated bilateral agreements with more than 35 WTO members-states.⁶³ Although less tumultuous in political terms compared to the last phase, this last period of reforms reaffirms China’s accession to a multilateral trade regime in which the rule of law predominates⁶⁴ and where dispute mechanisms are obligatory and compliance to principles and rules clearly specified.⁶⁵ In short, trade wars have given place to international binding agreements based on the rule of law. At the Chinese state level, amendments to existing intellectual property laws remain technical and involve mainly the State Council and the NPC Standing Committee, as well as the political-legal apparatus. Administrative agencies are not directly involved despite the fact that they remain of central focus for non-enforcement issues at the local and provincial levels. Concerning the IPR lobby strategy, both on domestic grounds through the USTR and at the international level through the Uruguay Round, it widely supports China’s accession to the WTO and shows confidence that compliance will be respected.⁶⁶

In this phase, two points are of particular significance: the inclusion of intellectual property rights in the legal framework of the World Trade Organization (WTO) and the effectiveness of dispute settlement mechanisms in dealing with intellectual property issues. Although no major dispute regarding TRIPS violations has emerged yet between China and other developed country over the issue of IPR, the rules-based system is expected by many to function better than a diplomatic system based on bilateral

⁶²Christopher Arup. 2000.

⁶³Yuo Guohua and Cheng Jin. 2001. “*The Process of China’s Accession to the WTO.*” Journal of International Economic Law, pp.297-328

⁶⁴Michael J. Trebilock and Robert Howse. 1995.

⁶⁵Christopher Arup. 2000.

⁶⁶ An Open Letter in Support of China PNTR from America’s Creative Industries, February 23th, 2000. Found at <http://www.iipa.com/rbi/2000_CHINA_PNTR.PDF.IIPA> The signature in this letter included: The Business Software Alliance (BSA), the Recording Industry Association of America (RIAA), the Association of American Publishers (AAP), the Software and Information Industry Association (SIIA), the Interactive Digital Software Association (IDSA), the National Music Publishers’ Association (NMPA), the International Intellectual Property Alliance (IIPA) and the Motion Picture Association of America (MPAA).

negotiations and optional compliance. It must be noticed, however, that a full evaluation of the system today, especially after China's accession, is next to impossible at this point.

CHINA'S INTELLECTUAL PROPERTY REGIME AND GLOBALIZATION

It is fair to say that the evolution of China's intellectual property regime is quantitatively admirable and qualitatively unachieved. Twenty years of legal reforms have created an intellectual property regime respective of most international agreements and standards. However, enforcement problems remain even after China has joined the World Trade Organization (WTO), a regulatory institution based on market rules and principles whose backbone is the rule of law.

In this chapter, there has been an attempt to briefly explain the content and scope of intellectual property reforms since 1978 and describe the actors, institutions and international frameworks involved in this process. It has been argued that an accurate analysis of China's intellectual property reforms must be linked to the evolution of these rights in the international scene as well as to its most aggressive advocates. To put it simply, the intervention of foreign influences was not simply result of sudden American unilateralism or imperialism, but rather the product of a larger and growing component of trade negotiations: the prominence of intellectual property rights. Bold arguments giving only credit to the activist role of MNCs and American government interests often tend to lose grip from a larger phenomenon: the growing importance of intellectual property rights protection around the world, and their impact on trade negotiations (Uruguay Round) resulting in the entrenchment of a legally binding document: TRIPS. This is not to say that American geopolitical interests have not played a major role in pushing for intellectual property rights as a trade issue in international forums, but it must be clear that China's "responses" (in terms of drafting, implementation and enforcement) since the early 1990s are far from being a direct outcome of US aggressive diplomacy. The possible responses correspond to a larger, complex and multifaceted phenomenon called globalization. Defined in political terms, and measured according to levels of national sovereignty, the evidence presented in this essay suggests that China integrated the global system (including the multiplicity of interests that make part of it) by making its political system open for external pressures and values even before its accession to the WTO.

In the next three chapters, the evolution of China's intellectual property regime will be discussed in detail and three main arguments will be defended: First, the Chinese state remains the main architect of 1980s reforms and international forces play a secondary role in assisting the former in building a market-oriented legal system. Second, the early 1990s reforms are the result of a previous interaction between domestic and international forces. The interaction among the Chinese state and the IPR lobby can be described as bilateral and highly conflictual. Third, the latest reforms are driven by international legalism under the WTO umbrella (TRIPS) and China's desire to comply to its rules and principles.

CHAPTER 3

First Phase of Reforms

FROM DOMESTIC LEGAL FORMALISM TO AGGRESSIVE TRADE DIPLOMACY

The year 1978 marks a historical rupture in Chinese political and economic development.¹ The shift towards a more pragmatic approach to economic development is at the origin of a large process of gradual reforms and opening-up policies led by the first post-Mao leadership under the commands of Deng Xiaoping. Yet, it is worth noticing that this process has been accompanied by breathtaking efforts to build effective legal institutions in order to support China's new economic reforms and orientations. The slow implementation of the "rule of law"² became central to this era of reforms and the creation of an effective body of intellectual property law became an important component of market-oriented economic reforms.

In the case of intellectual property rights, a western notion foreign to Chinese legal culture³, the process of reforms began in the early 1980 with the drafting of key legislations, the signature of various international treaties and the creation of some administrative institutions responsible of enforcement. This process of domestic legal formalism, highly focused in drafting laws compatible with socialism, and relatively isolated from direct foreign intervention ("diplomatic pressures") ended at the end of the 1980s when intellectual property rights took a particular importance at the Uruguay Round of GATT negotiations and among developed countries under the leadership of US-based industries.

The process of reforms continued in the early 1990s on what can be considered the most fruitful era for the protection of intellectual property rights. During this particular period, China amended its

¹ The 1978 Communiqué of the Third Plenary Session of the Eleventh Central Committee of the Chinese Communist Party envisioned the development of a socialist legal system as a basis of legitimacy for the new leadership's efforts to reform economic policy. For a broader analysis on the content of reforms, see Harry Harding. 1987. China's Second Revolution: Reform after Mao. Washington DC: Brookings Institution. ; Joseph Fewsmith. 1994. Dilemmas of Reform in China: Political Conflict and Economic Debate. Armonk NY: ME Sharpe. On the content of legal reforms, see Pitman B. Potter. (ed.) 1994. Domestic Law Reforms in Post-Mao China. Armonk NY: ME Sharpe.

² Charles Baum. 2001. "Trade Sanctions and the Rule of Law: Lessons from China" Stanford Journal of East Asian Affairs. Vol.1 Spring. p.49. Baum explains that: "the phrase *fazhi guojia* (rule of law) is generally translated as rule the nation according to law, but the exact meaning of *fazhi* can imply advocacy of either rule of law or rule by law. The former implies the use of law as a process, potentially in accordance with the view of law as a system of enabling rules, while the latter indicates an instrumental use of law solely as a tool of governance to facilitate social control, and compatible with Confucian and Communist views of law."

³ William P. Alford. 1995. To Steal a Book is an Elegant Offense: Intellectual Property Law and Chinese Civilization. Stanford: Stanford University Press. Professor Alford presents an account on the history of intellectual property rights in Chinese civilization. (chapters 2 and 3)

existing patent and trademark laws, drafted a brand new copyright law, acceded to more international treaties, continued the creation of specialized regulatory agencies in charge of enforcing the law, and more important, signed three bilateral agreements with the United States (USTR). However, it is important to put in perspective China's strategy of intellectual property reforms before it became pressured by foreign commercial interests. A pure political analysis of bilateral trade diplomacy followed by an argument of international legalism could not provide the necessary tools to grasp the gradual integration of the "foreign interests" variable into China's IP reforms. Simply stated, such analysis would ignore two crucial points. First, the nature of the relationship between the Chinese state and its counterparts during the 1980s. Second and more important, the turning point that transformed this state-to-state relationship into a more complex and conflictual one including private commercial interests.

Hence, this chapter will provide the basic framework of analysis for our central thesis: *The evolution of China's intellectual property regime has been reinforced by the growing importance of IPR in international trade as illustrated by high levels of activism among intellectual property-dependent MNCs, facilitated by a pro-reform leadership that has increasingly delegated IPR issues to top bureaucrats, and lately shaped by the dominant norms, principles, rules and functioning of the emerging multilateral trade system.* First, it will seek to highlight both domestic and international developments and establish possible correlations among them while answering to this particular puzzle: *Why did China made such progress in improving the protection of intellectual property rights in the 1980s?* Second, it will attempt to uncover the political implications of the following questions: *Which are the forces pushing for intellectual property reforms in post-Mao China and which mechanisms do they use to achieve their objectives? Which forces behave as mediators, enablers or architects of reforms? Which factors or events favored the processes of drafting, implementation and enforcement in this periods? Finally, to which larger/international process does China's progress in intellectual property rights protection correspond? Which domestic developments can explain such progress?*

This chapter will seek to enlighten a phenomenon that could easily be considered domestic in nature and formation: the process of China's intellectual property reforms since 1978, until approximately 1989. The overall argument goes as follows: *the Chinese state remains the main architect of reforms and international commercially-driven forces (governments and multinationals) play a secondary role in assisting the former in building a market-oriented intellectual property regime.* More specifically, we will take a look at the role of the Chinese state, the internal conflicts that have resulted from the leaderships' activism in the economic sphere, and the main actors that have shaped this first era of domestic legal formalism (Communist leadership and intelligentsia, State Council,

Standing Committee of the National People's Congress and Administrative agencies). Also, we will discuss the level of involvement of international forces in the process of IP reforms, together with the status of intellectual property rights in the eve of the Uruguay Round.

I. DOMESTIC LEGAL FORMALISM

This section offers an overview of China's legal efforts from 1978 to 1989. It includes a brief summary of key intellectual property legislations and a description of newly created regulatory bureaucratic institutions. On one side, it will demonstrate how the creation of an intellectual property regime during the 1980s in China has been mainly dominated by the Communist intelligentsia under the authority of the State Council and shaped by pragmatic economic orientations and "top-down" policy-making. On the other, it will investigate the role of legislative and newly-created bureaucratic institutions in fostering the reforms.

A. Intellectual Property Reforms in the Deng Era

In the ten years that would follow Deng's announcement of the four modernizations strategy in 1978 and the reinstatement of intellectuals as a part of the proletariat, the State Council promulgated a vast array of laws and regulations in the field of intellectual property rights, constantly pushed for the creation of bureaucratic agencies to enforce the laws, and signed several international treaties.⁴

Laws and Regulations

Although China's trademark system can be traced back in the 1950s,⁵ the 1983 Trademark Law of the PRC can be considered an important foundation of its modern intellectual property regime. The final draft of the Trademark Law was ready in 1982, but was only passed by the Standing Committee of the National People's Congress (SCNPC) one year after. In short this new legislation gave explicit recognition to trademarks and offered protection based on their role in fostering development of a socialist market economy.⁶ Besides its compatibility with China's instrumental view of law, the 1983 Trademark Law did not tackle properly the issue of enforcement and remained at the stage of legal formality without any consequences for infringers.⁷

The initial movement towards the creation of a new law protecting patents in China started in December 1978 when the State Council reissued the 1963 Patent regulations which stated financial and

⁴ For a summary of Chinese legal initiatives on intellectual property rights, see Michael N. Schlesinger. 1995. "A Sleeping Giant Awakens: The Development of Intellectual Property Law in China." *Journal of Chinese Law*. Vol.9. no.1. Spring. pp.93-140

⁵ Charles Baum. 2001. p.55

⁶ Idem. p.54

⁷ Idem. p.54

honorific rights for inventors.⁸ The Patent law was adopted by the Standing Committee of the National People's Congress (SCNPC) in 1984, its implementing regulations were approved by the State Council, and went officially into practice in 1985. In terms of content, this legislation had the merit to clearly recognize the validity of inventor's rights, but imbedded inside the notion of "rule by law", placed them under the subordination of the state.⁹ Also, it aimed to promote inventions rather than protect the rights of investors themselves and ironically gave the impression of granting greater legal privileges to foreigners at the expense of Chinese nationals.¹⁰ Moreover, the General Principles of Civil Law adopted in April 1986 formally recognized "the rights of individuals and legal entities to hold copyrights, patents and trademarks."¹¹

Overall, we could conclude that these newly promulgated IP laws failed to identify procedures, specify responsibilities and define the standards to be used by the many bureaucratic and administrative agencies in charge of enforcement. Despite the apparent reformism inherent to the promulgation of both laws, domestic legal formalism remains dominant. The only measure of efficiency used by Chinese bureaucratic authorities and widely circulated through state-controlled media is the number of patent or trademark applications per annum.¹² Interestingly, this measure does not permit us to judge on the internal functioning of such system, neither on the efficiency of judges to handle cases, nor the capacity of institutions to provide effective enforcement.

Bureaucracies, Administrative Agencies, International Treaties

These two major legislations were also accompanied with the establishment of administrative agencies in charge of regulating and enforcing the law.

The China Patent Office (CPO) was created in 1980.¹³ Traditionally, it fell under the authority of the State Council (the government body that oversees all ministries) and was responsible for drafting revisions of the Patent Law, as well as coordinating foreign-related affairs in the field of intellectual property.¹⁴ An additional responsibility of the Patent Office was the organization and promotion of

⁸ David Kay. 1985. "The Patent Law of the People's Republic of China in Perspective" UCLA Law Review. Vol.33. No.1. p. 351

⁹ Charles Baum. 2001. p.54

¹⁰ See William P. Alford. 1995. P.71; and Charles Baum. 2001. P.54. Alford points out that: "The 1984 Patent Law ironically gave the appearance of reprising treaty port days in granting greater legal privileges to foreigners and their local partners than to other Chinese." Baum explains that "Article 29 allowed foreigners who had filed patent applications abroad a 12 month priority period in which to seek protection in China, but made no concession to Chinese nationals."

¹¹ Michel Oksenberg, Pitman B. Potter, William B. Abnett. 1996. "Advancing Intellectual Property Rights: Information Technologies and the Course of Economic Development in China." NBR Analysis. Vo.7 no.4.

¹² "China Issues First Patent Certificates." Xinhua News. January 1st, 1986; "China Receives More than 14000 Patent Applications" Xinhua News. February 16th, 1986; "Number of Applications Grow 17% Since 1984 Patent Law" People's Daily. April 10th, 1989.

¹³ The CPO also has a branch in Shanghai and smaller agencies in Liaoning, Shandong and Hunan. "China Forms Patent Service Network." Xinhua News. March 14, 1984.

¹⁴ State Intellectual Property Office (SIPO) web site: <http://www.sipo.gov.cn/sipo_English>

China's Patent Law and the coordination and formulation of education and training in intellectual property.¹⁵

The State Copyright Administration (SCA) was established in 1985 under the authority of the State Press and Publications Administration, one of the governmental agencies supervised by the CCP Propaganda Department. Because the Propaganda Department was in charge of gaining national support for Deng's economic reforms, and disseminating information about intellectual property rights was not its main *raison d'être*, the SCA remained limited in its functions and it is therefore not surprising that a new copyright law was only promulgated at the beginning of the 1990s.

Other state organs under the ultimate authority of the State Council and actively involved in the drafting of both patent and trademark laws were the State General Administration for Industry and Commerce (SAIC) led by Ren Zhonglin and the China Council for the Promotion of International Trade (CCPIT) led by Ren Jianxin.¹⁶ According to Alford, these agencies "strove to reestablish both China's system of internal trademark regulation and its international trademark relations, each of which had suffered during the Cultural Revolution"¹⁷ In addition to the State Patent Bureau led by Huang Kunyi, these agencies also participated in the numerous central initiatives destined to learn from foreign experience.¹⁸ In its efforts to coordinate the many agencies in charge of enforcement, the State Council approved the establishment of a National Association of Patent Agencies in 1988.¹⁹ However, the treatment of patents remained divided along a clear domestic/international demarcation.²⁰

More technical debates used to happen within the legislative power, namely with Special Committees under the authority of the National People's Congress (NPC). The Law Committee included 13 famous jurists and experts in the political and legal fields.²¹ Zhang Youyu²², a famous jurist, was the Vice-Chairman of the Law Committee of the NPC and deputy director of the Commission of Legislative Affairs under the SCNPC.

¹⁵ *Idem*.

¹⁶ "Ren Zhonglin explains China's Draft Trademark Law." *Xinhua News*. August 19, 1982.

¹⁷ William Alford. 1995. p.66

¹⁸ "China Drafts Patent Law" *Xinhua News*. October 20, 1982.

¹⁹ "China Sets Up National Association of Patent Agencies." *Xinhua News*. December 29, 1988

²⁰ There were two types of patent agency in China. The first represents Chinese applicants before the China's Patent Office and these agencies were set up in every single province and municipality. The second type dealt with all applications from overseas and was made of these main agencies: the China Council for the Promotion of International Trade (CCPIT), the Shanghai Patent Agency, the China's Patent Office.

²¹ "An Analysis of Six NPC Special Committees." *Xinhua News*. June 7, 1983

²² Along with the presidency of the Chinese Academy of Social Sciences (CASS), a position as a deputy director of the Commission of Legislative Affairs under the SCNPC and the deputy secretary-general of the National Constitutional Revision Committee, Zhang Youyu was also president of the China Law Society established in 1982. This institution devoted its efforts to promote research and academic exchange, organizing seminars on the principles of law, the constitution, criminal law and procedures and civil law. The China Law Society was also the editor of a quarterly journal, "Chinese Law". In addition, its members' main focus was the study of Marxist legal theories, summing up Chinese experience in building a socialist legal system, spreading information about China's constitutions and increasing academic exchange with foreign scholars. "Jurist Zhang Youyu on Deletion of Four Bigs" *Xinhua News*. September 7, 1980. "Several Law Seminars to be Established in China" *Xinhua News*. November 23, 1983.

In respect to international conventions, China became a member of the World Intellectual Property Organization (WIPO) in 1980, and four years later joined the Paris Convention for the Protection of Industrial Property. As will be analyzed in the next section, the internationalization of China's intellectual property reforms went beyond a simple adhesion to international treaties, it included continuous transmission of foreign legal expertise through various forums and exchanges.

The increasing professionalization of the bureaucracy in charge of intellectual property rights enforcement and the influence of prominent figures like Zhang Youyu, Ren Jianxin and Huang Kunyi are signs of a certain decentralization and openness in the process. It also underlines that the process of reforms is not monopolized at the Politburo level and that the Chinese intelligentsia inside the bureaucratic apparatus is trusted by the top leaders. Moreover, as the forthcoming analysis will demonstrate, market-oriented intellectual property reforms remained within the top leadership sphere of influence, and state bureaucracies and administrative agencies kept de facto regulatory and poorly defined enforcement powers. Finally, it is fair to say that in the field of intellectual property reforms, the National People's Congress (NPC) kept its title of "rubber-stamp" because its responsibilities remained limited to the revision of legal technicalities and the promulgation of final drafts. In a sense, it is possible to conclude that the first phase of intellectual property reforms ("domestic legal formalism") is compatible with the nature of Deng's reformist political process: victory of pragmatism over ideology, slow decentralization (disaggregation) of power within the state, and a top-down approach to policy-making with the Chinese Communist Party (CCP) as the higher authority.²³

II. BEHIND THE SCENES OF LEGAL FORMALISM

The political debates over intellectual property reforms during the 1980s are complex in nature and content.²⁴ It must be clear, however, that the Chinese state played an important role in coordinating and implementing intellectual property rights protection in the post-Mao era. Also, it must be noted that the notions of "Chinese state" and "domestic lawmaking processes" remain particularly ambiguous²⁵ and therefore, any attempt to grasp the "politics of intellectual property rights in China" is compelled to identify which actors within such complex structure have pushed for reforms and which mechanisms

²³ See Kenneth Lieberthal. 1995. Governing China: From Revolution Through Reform. NY: W.W. Norton & Company. p.127.

²⁴ William Alford. 1995. P.67. Professor Alford explains: "*The debates concerning the drafting of a patent law, which were among the most intense concerning economic legislation during the first decade following Mao Zedong's death, illustrated both the complexity of this particular undertaking and the tensions that characterized Chinese law reform efforts in this era.*"

²⁵ Murray Scot Tanner. 1999. The Politics of Lawmaking in Post-Mao China: Institutions, Processes, and Democratic Prospects. Oxford: Clarendon Press P.32. As professor Tanner explains: "*the Chinese lawmaking system does indeed have an increasingly ill-defined (that is, highly ambiguous) set of decision-making institutions and processes. Formal constitutional provisions and the institutional division of labor among lawmaking institutions remain highly unclear, despite considerable efforts at development since 1979.*"

have they used to attain their final objectives. Not to mention that the role played by key legislative institutions such as the National People's Congress (NPC) is rather ambivalent, its internal functioning often obscure, and generally referred to as a "rubber stamp" of top leadership priorities.

The political (ideological) debate

Roughly, it is possible to argue that the political debates revolving around China's first generation of intellectual property laws were primarily divided along the same lines that separated both Mao and Deng regimes, namely "ideology versus pragmatism". However, as the main outcomes (intellectual property reforms) will demonstrate, the pragmatic reform-oriented group, strongly supported by the top leadership won the battle at the end. Another point to consider when conducting the following analysis is the much more controversial nature of political debates around the Patent Law in comparison with the Trademark Law.

The group of proponents of intellectual property reforms generally emphasized the positive economic effects²⁶ that would follow, especially in the field of scientific cooperation and information transfers within the mainland.²⁷ Without leaving the international variable outside their main rationale, they also insisted that an effective framework for intellectual property protection was necessary to attract advanced technology from economically-advanced countries and accelerate the four modernizations.²⁸ In accord with its strategy of "opening-up", proponents also emphasized the urgency of developing an intellectual property system conducive to international business and the improvement of China's stature among the family of nations.²⁹ Perhaps two of the most well-respected advocates of reforms were Zhang Youyu, a professor of law at Beijing University and the first head of the All-China Bar Association, and Ren Jianxin, president of the Supreme People's Court and a major figure in the state and party security apparatus. Both wrote several domestic publications and media reports in favor of domestic intellectual property laws, more particularly concerning patents.³⁰ Youyu and Jianxin opinions were clearly in accord with Deng Xiaoping's four modernizations theories and an instrumental approach to the rule of law. Their concerns focused more on the necessity to simply enact legislation, without questioning or advancing any further comments about how the enactment was going to be effective. This leads us to

²⁶See "Making the Right Moves" China Trade Reports July 25th, 1987. P.5-7. Also, Cheng Kaiyuan. "Yibu juyou zhongguo tese de zhuanli fa" (A Patent Law with Chinese Characteristics). Faxue Jikan. (Legal Quarterly) No.1. 1985 p.42 (Quoted in William Alford. 1995)

²⁷Duan Ruilin. 1985. Zhuanlifa Shangbiaofa Gailun (An Introduction to Patent and Trademark Law) Jilin: Jilin Daxue Chubanshe.

²⁸Hsia Tao-tai. 1984. "China's New Patent Law and Other Recent Legal Developments." Report prepared for the Special Subcommittee on US Trade with China of the Committee on Energy and Commerce of the US House of Representatives. Washington DC: Government Printing Office. July.

²⁹William Alford. 1995. p.68

³⁰Idem. p.67

believe that they embraced an instrumentalist and rather formalist view of law. In addition, Huang Kunyi, director of the State Patent Bureau, also supported the reformist agenda from an ideological point of view: "...law should be suited to China's realities, a socialist economic base and the building of spiritual civilization, while at the same time benefiting from the policy of opening-up towards foreign countries."³¹

Using more than a optimist (propagandist) tone, certain editorials published in the state-controlled People's Daily acknowledged the fact that enforcing patent protection would encourage the development of science and technology: "a patent system will make it possible for enterprises at home to make use of each other's creations, accelerate technological development and improve the efficiency of economic construction."³² In addition, certain editorials took a rather nationalist tone when supporting the building of an intellectual property regime: "We have failed to value our own inventions and creations, and have occasionally even introduced them to foreigners. Exploiting this situation, some foreigners have taken out patents for things that have actually been invented or created by us (...) Many of our achievements in scientific research can be patented and must be patented in order to find a place on the international market and earn foreign exchange."³³

Those who opposed the adoption of a Patent Law based their critiques on ideological premises such as "intrinsically antithetical to socialist principles and inherently corrupting."³⁴ While reminiscing of the Maoist years, opponents were uneasy with the introduction of private property rights in China and feared that granting these rights would give the control of important technologies to a few individuals.³⁵ In line with a nationalist-protectionist discourse, these officials and intellectuals expressed their concern about China's dependence on foreign knowledge (economic, scientific, military) and its negative effects on the development of indigenous technology.³⁶ In fact, these analysis and critiques were rarely supported by empirical data or evidence, and the general tone and content lead us to believe that they represented a faction of medium- and low-rank communist officials that were reluctant to the scope and speed of Deng's reforms. One important factor to consider is that internal opposition never emerged as a direct threat to the top leadership's reformist agenda and remained more or less peripheral to the main process of intellectual property reforms in the early 1980s.

³¹Huang Kunyi. "Principles Underlying China's Draft Patent Law" People's Daily. December 4th, 1983

³²"It is Absolutely Necessary to Establish a Patent System." (Excerpts from an article by Xia Shuhua) People's Daily. July 15, 1980

³³"People's Daily Calls for the Introduction of the Patent System in China." People's Daily. July 15, 1980.

³⁴Wang Jiafu. 1981. "Shilun zhuanlifa de zhiding" Faxue Yanjiu ("An examination of the Formulation of the Patent Law." Research on Legal Studies) vol.16 no.5 P.27-32 (Quoted in William Alford. 1995. p.68)

³⁵William P. Alford. 1995. p.68

³⁶Idem p.69

The debate around the Patent Law was closed by Deng Xiaping's decision to create a drafting committee in 1979 that would investigate on how to draw such law. At this point, the question on whether China should or not have a Patent Law was publicly declared irrelevant and the drafting committee started to identify the options available.³⁷ Domestically, the committee sought for the views of managers in factories, scientific research institutes and governmental agencies.³⁸ Internationally, Chinese delegations were sent to capitalist industrialized countries (US, Germany, Japan), relatively prosperous communist countries (former Yugoslavia and Romania) and even to Taiwan and Hong Kong with the objective to study the content and functioning of their patent systems. In addition, several symposiums and workshops were organized by the World Intellectual Property Organization (WIPO) in Geneva and Beijing. The process of drafting marked the beginning of post-Mao China's interactions with foreign countries and international organizations. It is important to notice that these interactions remained purely technical in nature and did not included bilateral diplomacy but rather institutional cooperation between the Chinese Patent Office based in Beijing and its counterparts in industrialized countries as well as more technical interactions between the Law Committee of the NPC and WIPO officials.

The Role of International Forces: Cooperation in the Absence of Commercial Interests?

The role of industrialized countries in the early period of intellectual property reforms in China can be considered one of cooperation. Most documents and media articles show constant interactions between China's agencies in charge of enforcement and foreign know-how and experience in the field of intellectual property rights protection. Delegations from Germany³⁹, France⁴⁰, Japan⁴¹ as well as WIPO⁴² worked in close cooperation with China's Patent Office on technical issues regarding the application of intellectual property laws.⁴³ Moreover, no real evidence exists on a possible direct influence or diplomatic pressures coming from these countries in order to ensure "market access" or "respect for intellectual property rights." In that sense, international intervention in China at the beginning of the 1980s can be considered minimal and less political or commercially-driven compared to the 1990s. International forces reinforced China's efforts of reform but did not influenced directly the outcomes as in the early 1990s. Hence, the first generation of intellectual property laws remained highly restrained by domestic legal formalism and isolated from foreign economic interests.

The non-interventionist approach taken by industrialized countries towards China in the early 1980s can be associated to two empirical realities. First, the marginal weight of China as a market for

³⁷William Alford. 1995. p.69

³⁸Hsia Tao-tai. 1984.

³⁹"Kohl Visits China's Patent Office" *Xinhua News*. July 13th, 1987

⁴⁰"PRC and France to Cooperate in Patents" *Xinhua News*. April 10th, 1984

⁴¹"Japan to Help China Train Engineers for Patent Info Retrieval." *Jiji Press*. August 8th, 1986.

⁴²"Huang Hua Meets Leader of the World Intellectual Property Organization" *Xinhua News*. November 23th, 1985

⁴³"NPC Standing Committee Meeting Hears Drafts of Laws" *Xinhua News*. December 1st, 1983.

knowledge-based and creation-oriented multinationals. Second, the emergent role of intellectual property rights in international trade negotiations. Although the first explanation can be easily supported by empirical data such as levels of imports/exports, sector-by-sector or country-by-country trade analysis and corresponds to an argument largely defended by economists, the second variable is of paramount political importance for the construction of our initial argument. This is not to say that the economic potential of China as a market was not considered a primary incentive for intellectual property-dependent industries, but this is clearly not the only motivation behind the MNCs lobby agenda. The inclusion of intellectual property rights protection into the Uruguay Round of GATT negotiations in 1986 is more than a realization by knowledge-based and creation-oriented multinationals of the potential of the Chinese market and/or the amount of losses suffered in developing countries with weak levels of intellectual property rights protection, it is the inclusion of global economic interests into the international trade regime, an attempt to globalize the law.⁴⁴

In the last part of this chapter, it will be suggested that while China was building its intellectual property system and industrialized countries were helping in the process, two parallel phenomena were causing the sudden emergence of intellectual property rights into multilateral trade negotiations. The first one was rather structural and had to do with the shift from manufacturing to intellectual-property based industries in developed countries, and more particularly in the United States.⁴⁵ The second was domestic in nature but international in consequences: the intense lobbying activities from (mostly US) intellectual property-dependent industries that started by the mid-1980s and laid the foundations for the protection of intellectual property protection in a rules-based multilateral trade regime.⁴⁶ As explained by Ryan, "it was the patent and copyright business groups that drove trade-related intellectual property policy in the 1980s and 1990s, although the diplomacy was conducted on their behalf by the United States Trade Representative (USTR)."⁴⁷

Although the role of the USTR will be further described and analyzed in the next chapter, it is necessary to make the point that industry's pressures to improve intellectual property rights protection worldwide happened in two different but interconnected arenas. First, through bilateral (unilateral) negotiations (trade sanctions) with countries where levels of piracy and infringement were particularly

⁴⁴ Christopher Arup. 2000. *The New World Organization Agreements: Globalizing Law Through Services and Intellectual Property*. Cambridge University Press. Arup explains that: "In extending the notion of trade, they (industrialized countries) press for domestic laws and legal practices to be adjusted in distinctive ways to the expectations of foreign suppliers" p.5. Actually, both GATS and TRIPS are considered "two behind the border agreements" by Arup. P.8 (see definition in introduction)

⁴⁵ Charles Baum. 2001. p.55

⁴⁶ Duncan Matthews. 2002. "Trade-Related Aspects of Intellectual Property Rights: Will the Uruguay Round Consensus Hold?" *Paper prepared for the 5th Centre for the Study of Globalization and Regionalization Annual Conference "Globalization, Growth and (In)Equality"* University of Warwick. (This paper summarizes findings presented in Duncan Matthews (ed.) 2002. *Globalizing Intellectual Property Rights*. London: Routledge.)

⁴⁷ Michael P. Ryan. 1998. *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property*. Washington DC: Brookings Institution .

high. Second, through multilateral trade negotiations and ultimately the formal inclusion of these trade-related rights into the Uruguay Round negotiation agenda.⁴⁸

III. INTERNATIONAL FRAMEWORK: THE MULTILATERAL TRADE AGENDA

Business support for the TRIPS agreement has been widely covered in the literature,⁴⁹ but it has been rarely linked to any process of domestic legal reforms. For instance, if one considers the slow evolution of intellectual property rights in industrialized countries (US, UK or Germany), one is most likely to conclude that the scope and pace of legal and administrative reforms are not comparable to the ones China has experienced in the past 20 years.

Taking into account that the economic strategy of China has focused on a constant extension of its boundaries to include international actors, there is definitely a reason to think that the scope and speed of domestic legal reforms have been linked to international legal developments in the field of intellectual property rights at some point. In other words, it is possible to argue that the rise of intellectual property rights together with China's desire to integrate the multilateral trade regime have been two important factors that accelerated the process of domestic reforms. Although the most visible improvements happened in the early 1990s, it would be naive and simplistic to conclude that the vast array of reforms were the result of a sudden tendency to push for intellectual property rights worldwide on the part of MNCs or an American's desire to assert its political and economic hegemony after the end of the Cold War.

In order to put in perspective our analysis, two factors are not to be ignored. First, China was not considered yet a major player in international trade at the beginning of the 1980s by any of the industrialized countries pushing for the inclusion of intellectual property rights at the Uruguay Round, and second, the politics of intellectual property rights and their emergence in multilateral trade talks were mainly the result of a strategic reorganization of the way MNCs articulated their complaints about piracy and counterfeiting worldwide. The first factor explains why China did not suffer from aggressive trade

⁴⁸The Uruguay Round agenda reflected both the importance of trade and the complexity of the international economic system. The negotiating agenda included four main categories: Market access (tariffs, non-tariff measures, natural-resource-based products, textiles and clothing, agriculture and tropical products), Reform of GATT rules (GATT articles, NTM agreements, Safeguards, Subsidies/Countervailing duties) GATT as an institution (dispute settlement, functioning of the GATT system) and New issues (Trade-related Intellectual Property, Trade-related, see Investment Measures, and Services) For more information J. Michael Finger and Andrzej Olechowski (eds.) 1987. The Uruguay Round: A Handbook for the Multilateral Trade Negotiation Washington DC: World Bank.

⁴⁹See G.E. Evans. 1994. "Intellectual Property as a Trade Issue: the Making of the Agreement on Trade-Related Aspects of Intellectual Property Rights." World Competition. Vol.2. No.2. pp.137-180; Michael P. Ryan. 1998. Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property. Washington DC: Brookings Institution ; S.K. Sell. 1995. The Origins of a Trade-Based Approach to Intellectual Property Protection: The Role of Industry Associations. "Science Communication". vol.17.no.2 pp 163-185; J. Braithwaite and P. Drahos. 2000. Global Business Regulation. Cambridge: Cambridge University Press; and P. Drahos. 1995. "Global Property Rights in Information: The Story of TRIPS at the GATT" Prometheus. vol.13 no.1 pp.6-19

diplomacy in the 1980s, and the second highlights the source of American unilateral pressures through the use of Special 301 in the 1990s against China.

A. IPR Lobby: Building Up Support for IPR Protection

Considering the lack of specialization of the USTR in the field of intellectual property rights during the 1980s, American intellectual property-based industries began a sustained strategy of lobbying through multilateral and bilateral means in order to link intellectual property protection to international trade negotiations. The IPR lobby was definitely successful in bringing this specific issue into the spheres of power, both domestically and internationally.

Multilateral Approach Through GATT Negotiations

The US business sector provided direct input into American trade policy through the Advisory Committee on Trade Policy and Negotiations (ACTPN), created in 1974 under the Trade Act. According to Enyart, the ACTPN role has been crucial in developing an international code on intellectual property protection and in obtaining political support from a solid nucleus of US companies willing to spend time and money on this issue.⁵⁰ Ed Pratt, CEO of Pfitzer and John Opel, CEO of IBM were the two executives in charge of this organization and the initial promoters of intellectual property inclusion in multilateral trade talks. In 1986, Pratt and Opel launched the idea of an Intellectual Property Committee (IPC) responsible of voicing industry demands inside GATT negotiation rooms. The IPC represented mainly patent-reliant and pharmaceutical industries based in the United States.⁵¹ This self-appointed committee was fully financed by its founding members: Pfitzer, IBM, Merck, General Electric, DuPont, Warner Communications, Hewlett-Packard, Bristol-Meyers, FMC Corporation, General Motors, Johnson & Johnson, Monsanto, and Rockwell International.⁵² The IPC was run by Jacques Gorlin⁵³ and according to Ryan, was well-managed, well staffed, well funded and more effective in dealing with a single-issue agenda which made it more flexible in responding to challenges and influencing government.⁵⁴ As James T. Enyart, Director of International Affairs at Monsanto, has pointed out: "the rules of international commerce are far too important to leave up to government bureaucrats and their academic advisers. But governments, not businessmen, make rules and they only listen when the chorus gets big enough and the

⁵⁰J.R. Enyart. 1990. "A GATT Intellectual Property Code." *Les Nouvelles*. June. pp.53-56

⁵¹For more information on the strategy undertaken by the pharmaceutical industry, see Robert Weissman. 1996. "A Long, Strange TRIPs: The Pharmaceutical Industry Drive to Harmonize Global Intellectual Property Rules, and the Remaining WTO Legal Alternatives Available in Third World Countries." *University of Pennsylvania Journal of International Economic Law*. Vo. 17. No.4 pp.1069-1125

⁵²Michael Ryan. 1998. p.69

⁵³Duncan Matthews. 2002. p.4. Matthews explains that: "Gorlin is a former Washington policy maker, consulting economist to IBM and head to the Gorlin Group which continues to provide secretariat for the IPC to this day."

⁵⁴Michael Ryan. 1998. p.9

singing loud enough.”⁵⁵ It was clear then that business groups had understood that their specific interests were better served by creating strong coalitions ready to lobby in Congress, and that it was more effective to channel their demands through the IPC.

As soon as September 1985, the IPC started its efforts to forge a tripartite coalition with Europeans and Japanese intellectual property-based industries. In Europe, the IPC sought the support of the Confederation of British Industries (CBI), the Federation of German Industries (BDI), the Patronat of France and the Union of Industrial and Employers’ Confederation of Europe (UNICE). Once a clear consensus on the importance of intellectual property rights protection was achieved between Americans and Europeans, the IPC and UNICE met with Japanese officials at the Japanese Federation of Economic Organizations (Keidanren).⁵⁶ Because UNICE and Keidanren had the capacity to use their influential contacts in both European and Japanese⁵⁷ governments, the support for a multilateral agreement on intellectual property protection was easily channeled to the GATT negotiations during the Uruguay Round.⁵⁸ This tripartite coalition was crucial in distilling the fundamental principles of intellectual property (written in a language of business) to be submitted to delegates at the GATT during negotiations.⁵⁹ Therefore, the coalition of industrialized countries in favor of an intellectual property agreement played a key role in setting the agenda in the Ministerial Declaration of Punta del Este in Uruguay.⁶⁰

A turning point emerged in 1988 when the IPC, UNICE and Keidanren issued a joint statement that it was hoped would establish the foundations of a GATT intellectual property code: “The Basic Framework of GATT Provisions on Intellectual Property.”⁶¹ Later known as the “White Book”, the demands and proposals of industry representatives from the US, Europe and Japan were clearly reflected in the final draft of TRIPS.⁶²

Undoubtedly, ACTPN and IPC efforts to produce the basic legal ideas of an intellectual property agreement during GATT negotiations proved to be a productive yet long political strategy for all industries involved in the process. The “White Book” had definitely included a nontraditional trade issue such intellectual property rights in the multilateral trade agenda. At the same time, the strategy

⁵⁵James R. Enyart. 1990. p.53

⁵⁶According to Jacques Gorlin. Interview. (quoted in Matthews)

⁵⁷Apparently, as the representative of all business sectors, Keidanren has excellent relationships with the powerful Japanese Ministry of International Trade and Industry (MITI).

⁵⁸Duncan Matthews. 2002. P.6 As opposed to Ryan who claims that Europeans and Japanese were reluctant to support the initiative of the IPC, Matthews responds the following: “According to business representatives in Europe who recall the formulation of joint US, European and Japanese proposals, the three industry groups worked well together, not least because strong business interests in Europe were to be found in the pharmaceutical and book publishing sectors, while in Japan intellectual property protection for consumer electronics and software was crucial.”

⁵⁹J.R. Enyart. 1990. p.55

⁶⁰Braithwaite and Drahos. 2000. p.87

⁶¹Drahos. 1995. p.14

⁶²Sell. 1998. 138

undertaken by these two lobby groups had indirectly set the path for an intellectual property agreement under the WTO framework. It remains clear, however, that the multilateral strategy of US, European and Japanese corporate interests contributed to make of intellectual property rights protection a "global issue" in trade and a component of international trade law.⁶³ On the domestic side, a strategy of intense lobbying was slowly emerging in the mid-1980s. Its main objective was to put intellectual property rights protection at the top of US trade diplomacy priorities.

Bilateral Approach Through Domestic Lobbying

This coalition of corporate interests was formed in 1984 under the name of International Intellectual Property Alliance (IIPA). The IIPA was formed by 1350 copyright-dependent companies and its membership included eight important associations operating in the film, music and publishing sectors: the Association of American Publishers, the Film Marketing Association, the Association of Data Processing Service Organizations, the Computer and Business Equipment Manufacturers Association, the International Anti-Counterfeiting Coalition, the Motion Picture Association of America, the National Music Publishers' Association and the Recording Industry Association of America.⁶⁴ Initially, the IIPA choose to focus its lobbying efforts domestically by pushing Congress to make intellectual property rights protection an "unfair trade practice" under US Trade Law. Apparently, the main problems encountered by copyright-based industries was not the lack of substantive provisions of national laws, but rather the lack of enforcement. Additionally, it is interesting to note that because the cost of reproducing high quality pirated copies is generally low for music and video materials, these industries have undertaken a more aggressive approach to intellectual property rights violations.⁶⁵ As a result, bilateral trade negotiations and unilateral sanctions under Section 301 was considered to be a more effective mechanism to improve enforcement levels in the short-run. As Stewart recognizes, given the many unsuccessful attempts to strengthen international conventions, the USTR initially preferred to make this linkage through domestic law and bilateral trade agreements.⁶⁶ More important and directly relevant to our central argument is the push that copyright-based industries gave to US Trade Law in the 1980s, a lobbying initiative that paid-off in the 1990s when the USTR launched its "priority foreign country" lists and Special 301 investigations.

⁶³In Chapter 5, this will be termed "*Multilateral Legalism*".

⁶⁴Information found on IIPA website at <www.iipa.com>

⁶⁵This is an important distinction to make in comparing both multilateral and bilateral strategies. Because high-tech and pharmaceutical products take a more advanced technology to counterfeit, these industries have not felt the urgency of requiring immediate sanctions and have therefore ensured that minimum protection is recognized through a legally binding international framework.

⁶⁶T.P. Stewart (ed.) 1993. *The GATT Uruguay Round: A negotiating History (1986-1992)*. Netherlands: Kluwer Law and Taxation Publishers. p.1255

The first initiative of the IIPA was to press the Congress to include intellectual property protection as an "unfair trade practice" under the 1984 amendments to the US Trade and Tariff Act.⁶⁷ One year later, the IIPA wrote two reports entitled "US Government Trade Policy: Views of Copyright Industries"⁶⁸ and "Piracy of US Copyrighted Works in Ten Selected Countries"⁶⁹ in which it urged the USTR to start bilateral negotiations with many NICs in order to force their governments to ensure copyright protection for US works.⁷⁰ Under constant pressure from the IIPA lobby, the Congress passed amendments to Section 301 making global intellectual property protection an annual exercise under the name of Special 301 in 1988.⁷¹ This newly adopted mechanism was a significant change on government-business relations since it formally allowed the IIPA to submit comments supporting its positions through the USTR and to exert more effective pressure against countries that failed to meet the American criteria of minimum protection. Ironically, the 1988 amendments reduced the flexibility and discretion of the USTR in setting its own agenda, and reinforced the use of aggressive trade diplomacy through bilateral or unilateral means to ensure IPR protection.

Near the end of the decade, while intensive negotiations continued at the multilateral level (GATT) with the final objective to achieve a consensus over an intellectual property agreement, a newly-created tool (Special 301) compatible with US trade law and policy priorities was going to become the center of attraction and controversy in the early 1990s. As explored in the next chapter, other motivations were clearly behind USTR actions against China in the 1990s. On one side, we can mention the proliferation of trade deficits, the separation of the human rights and trade agendas by the Clinton Administration, and the desire of China to join the World Trade Organization (WTO). On other, electoral pressures from the states of California and New York, as well as the high levels of organization of corporate like-minded interests, especially amongst copyright-based industries.

⁶⁷ A. Lynne Puckett and William L. Reynolds. 1996. "Rules, Sanctions and Enforcement under Section 301: At odds with the WTO?" *American Journal of International Law*. Vol.90 no.4 October. pp.675-689. As Puckett and Reynolds explain: "The amendments in 1984 provided for the initiation of Section 301 investigations by the USTR. The law required the preparation of an annual National Trade Estimate (NTE) and permitted the president to place restrictions on foreign direct investment" p.677

⁶⁸ Available on IIPA website: <<http://www.iipa.org>>

⁶⁹ The list of countries included: Brazil, Egypt, Indonesia, Malaysia, Nigeria, Philippines, the Republic of Korea, Singapore, Thailand and Taiwan. In this report, the IIPA stipulated that the industries it represented were losing around US\$1.5 billion due to inadequate copyright protection in these countries.

⁷⁰ In 1986, the USTR launched the first IPR-based Section 301 against the Republic of Korea. (South Korea)

⁷¹ Puckett and Reynolds. 1996. The authors explain: "The most recent amendments ("in the Omnibus Trade and Competitiveness Act of 1988") transferred final decision-making authority in Section 301 cases from the President to the USTR. The president retains oversight authority but does not play a significant role in investigation or enforcement. The legislative history of the transfer of authority makes plain that Congress sought to limit the role of the President." p.677

CONCLUSION

This chapter has answered our central puzzle, supported our central argument and opened the door for a new analytical episode on China's intellectual property reforms. First, it has been shown that the early period of reforms was directly linked to Deng's strategy of "opening-up" and consistent with the dominant vision of law in post-Mao China: instrumental in order to introduce economic reforms and heavily oriented towards the drafting of legal documents with enforcement limitations. Second, the inherent gradualism of Deng's reforms combined with the relative importance of China as a "big player" in international trade has kept foreign commercial interests outside the mainland, therefore allowing continuous technical cooperation between Western industrialized countries and Chinese authorities.

Domestically, we have witnessed a clear victory of pragmatism over ideology inside the hallways of power in Beijing. The State Council remained the arena from which reforms originated and the National People's Congress (NPC) kept its "rubber-stamp" role as it continued to vote and promulgate laws which content was decided elsewhere in the system. Interestingly, we have also observed the rise of an influential Chinese intelligentsia occupying important positions within the top bureaucracy and newly-created institutions of enforcement. Undoubtedly, the goal of modernization imposed by Dengist pragmatic philosophy has also been a non-negligible factor in influencing the processes of drafting and promulgating intellectual property laws. Internationally, we have noticed the emergence of intellectual property rights (traditionally a non-trade issue) into multilateral negotiations at GATT, and at the legislative level in the United States through powers granted to the USTR. These two strategies resulted from the reorganization of global business interests on the part of intellectual property-based MNCs and strong lobbying efforts in both domestic and international arenas. As opposed to many analysis that focus mainly on the role of American leadership in introducing the idea of an intellectual property agreement in the GATT agenda, we have discovered that the inclusion of these rights into multilateral trade talks was also widely supported by the European Union and Japan.

The conclusion that emerges at the end of this chapter can be termed as follows: While the Chinese state remains the main architect of reforms domestically and international forces contribute with their technical knowledge, a more important process is maturing in the world, one that will affect the scope and speed of China's intellectual property reform in the early 1990s: the materialization of intellectual property rights as a recognized trade-related issue during the negotiations leading to the establishment of the TRIPS, reinforced by the unilateral strategy taken by the US toward China in the early 1990s.

CHAPTER IV

Second Phase of Reforms

FROM AGGRESSIVE TRADE DIPLOMACY TO MULTILATERAL LEGALISM

In chapter three, we have established the first set of empirical foundations supporting our theoretical model. First, we have concluded that the early period of intellectual property reforms corresponds to the instrumental and highly formalistic approach to law utilized in post-Mao China. In short, we have witnessed the main debates within the communist intelligentsia on the content and purpose of reforms, the important role played by the State Council in putting forward the reforms in the policy agenda, and the paramount influence of the top leadership in pushing for market-oriented reforms. Second, we have seen that the role of foreign countries in reforming the system was limited to technical and financial aid. Close interactions between developed countries (Western Europe and Japan), WIPO and newly created Chinese bureaucracies in charge of administration and enforcement were limited to “savoir-faire” exchanges, and issues based on commercial considerations were generally excluded from the agenda. Third, in our efforts to grasp legal reforms beyond the bilateral aggressive diplomacy framework, a systemic variable was brought into our argument: the gradual emergence of intellectual property rights in multilateral trade negotiations as a result of powerful and well organized MNCs lobbying efforts and the intense activism associated with copyright-based industries inside the spheres of power in the United States.

In the early 1990s, the multi-arena lobby strategy of MNCs to include a nontraditional trade issue such as intellectual property rights into trade negotiations put enormous pressure on developing countries to ensure adequate protection according to so-called “international standards”. Examples of these pressures can be observed in emerging NICs (especially in East Asia) where improvements on domestic intellectual property regimes were achieved after a strategy of aggressive trade diplomacy on the part of the American government.¹ As many scholarly analyses have shown, China has also been a victim of American misguided unilateralism.² However, it would be analytically simplistic to conclude that China’s

¹ Thailand and South Korea are two examples of countries that have suffered from American retaliatory trade diplomacy. For more analysis on South Korea, see Michael P. Ryan and Justine Bednarik. 1995. “*Drugs, Books and Videos: US-Korea Trade Dispute over Intellectual Property Rights*” Georgetown Cases in International Business Strategy. Georgetown University: Institute for the Study of Diplomacy.

² Charles Baum. 2001. “*Trade Sanctions and the Rule of Law: Lessons from China.*” Stanford Journal of East Asian Affairs. Spring. Volume 1. Peter K. Yu. 2002. “*From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First*

intellectual property reforms in the 1990s are a pure and direct result of American pressures and/or hegemonic tendencies. Hence, in accordance to our initial theoretical framework, the inclusion of intellectual property rights protection in the GATT agenda of negotiations during the 1980s that led to the creation of the WTO in 1995 has greatly influenced Chinese foreign trade policy to embrace multilateral legalism.³ It is important as well to acknowledge that the incentive for embracing such system is directly linked to China's own domestic economic reforms⁴ and the leadership's desire to become an influent member-state in a globalized economy.⁵

In this chapter, we will observe the evolution of China's intellectual property regime under a systemic framework that will take into account, not only American unilateralism as widely analyzed in the literature, but also the impact that GATT negotiations have on China's reformist agenda. In a sense, this chapter will support our central thesis: *The second phase of China's intellectual property reforms is (1) reinforced by the growing importance of intellectual property rights in international trade negotiations principally vindicated by knowledge-based economies and the strong activism of US-based copyright-dependent MNCs through bilateral means; and (2) shaped by the emergence of a rules-based multilateral trade system that forces China's IP regime to comply with TRIPS obligations on one side, and constraints the reformist leadership to accept the sovereignty tradeoffs that global economic integration demands. In addition, a shift toward the bureaucratization of IPR issues is observed.*

In addition, this chapter will seek to answer to the following puzzle: *Why did China react so vividly to American aggressive trade diplomacy in the 1990s?* Our main argument will be developed around these questions: *Which actors are pushing for intellectual property reforms in post-Mao China and which mechanisms/ institutions do they use to achieve their objectives? Which actors behave as mediators, enablers or initiators of reforms? Which domestic or international factors have favored the process of drafting, implementation and enforcement? Finally, to which domestic or international*

Century." American University Law Review, vol.50. Peter K. Yu. 2002. "The Second Coming of Intellectual Property Rights in China" Occasional Papers in Intellectual Property from Benjamin N. Cardozo School of Law Yeshiva University, Number 11. Warren H. Maruyama. "US-China IPR Negotiations: Trade, Intellectual Property, and the Rule of Law in a Global Economy." In Mark A. Cohen, Elizabeth Bang and Stephanie Mitchell (eds.) Chinese Intellectual Property Law and Practice. Boston: Kluwer Law International. 1999. P.161. William P. Alford. 1995. To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization. Stanford University Press.

³ Multilateral legalism corresponds to the central role played by the rule of law in international trade after the 1995 WTO agreement. Multilateral stands for the WTO general tendency to favor multilateral relations among its members, and legalism arises from the legitimacy granted to this institution through the use of rules, principles and legal deliberation.

⁴ Nicholas R. Lardy. 2002. Integrating China into The Global Economy. Brookings Institution Press. In this book, Lardy explains how China's leadership expects to leverage the increased foreign competition inherent in its WTO commitments to accelerate its domestic economic reform program, leading to the shrinkage and transformation of inefficient unprofitable companies and hastening the development of a commercial credit culture in the banks.

⁵ For an interesting analysis on how China is seeking to become an important economic player, see Peter Nolan. 2001. China and the Global Economy: National Champions, Industrial Policy and the Big Business Revolution. Palgrave Macmillan.

parallel processes does the reformist agenda correspond and how these impact the scope and speed of reforms?

In short, this chapter will argue that although China's domestic economic agenda remains the principal force behind legal reforms, MNCs have played a direct role in both bilateral (American trade diplomacy) and multilateral arenas (GATT negotiations) in order to bring their interests at the forefront of international trade negotiations. Furthermore, two aspects will be covered. First, the role of the Chinese leadership in shaping the policy agenda and the internal debates resulting from different state institutions: the State Council and its ministries, the Standing Committee of the National People's Congress (SCNPC), the IPR Conference, provincial/local governments and administrative agencies. Second, the role of the IPR Lobby through the United States Trade Representative in pushing "forced bilateral agreements" with China over "compulsory improvements" of its intellectual property regime. Third, the increasing role of global commercial interests in the field of intellectual property reforms worldwide and their impact on multilateral trade negotiations that ultimately led to the creation of the TRIPS agreement.

I. LEGAL REFORMS IN THE EARLY 1990s: Pressures and Constraints

It should be clear that this section is not an attempt to analyze the content of reforms from a legal perspective, but rather an effort to unveil the "politics" behind these new amendments on both domestic and international spheres. Finding the politics behind such complex legal documents requires more than legal analysis, it demands a detailed observation of the "interests" behind the content, speed and timing of reforms. In order to launch our central analysis, it will be necessary to provide an overview of major draftings and amendments to intellectual property laws in the early 1990s.

Major Laws and Regulations

The Copyright Law was adopted in 1990, and officially implemented by the Standing Committee of the National People's Congress in 1991. This new legislation and its implementing regulations⁶ are considered to "set out the scope of works that can benefit of copyright protection in China"⁷ and the first one explicitly focusing on copyright issues since the establishment of the People's Republic of China in 1949. This law clearly recognizes the works of Chinese citizens, foreigners whose works have been first published within Chinese territory and foreigners whose works are protected because of agreements or

⁶ The Implementing Regulations of the 1990 Copyright Law also empowered the National Copyright Administration (NCA) to interpret the law and to handle copyright disputes. See *"Implementing Regulations of Copyright Law"* Rule 7. (Cited in Shuk Ki Ella Cheong. 1999. p.47)

⁷ Shuk Ki Ella Cheong. 1999. *"Copyright Law and Regulation in China"* in Mark A. Cohen, Elizabeth Bang and Stephanie Mitchell (eds.) in Chinese Intellectual Property Law and Practice. Boston: Kluwer Law International p.47

international treaties signed between China and a relevant country.⁸ The same document also specifies the hierarchy, jurisdiction and enforcement responsibilities of state agencies.⁹

Also at the beginning of the 1990s, the 1984 Patent Law was amended for the first time by the Standing Committee of the National People's Congress (SCNPC).¹⁰ The main purpose of this amendment was based on the further expansion of the open-door policy initiated in 1978, and the acceleration of economic, scientific and technological development. According to most commentators, these amendments also made China's Patent Law more compatible with international standards.¹¹ Additionally, the amendments provided clarifications on the role of courts in enforcing the law.¹² China also completed its legislation efforts by acceding to the Patent Cooperation Treaty in 1993.

A Trademark Law was revised in 1993 by the National People's Congress (NPC) and promulgated the same year by its Standing Committee. This newly amended law enlarged the protection area, to strengthen enforcement by simplifying the procedures of application, and to improve the proceedings of examination.¹³ Additionally, it set the tone for intellectual property protection in China in the years to come by linking reforms to other indirectly-related legislations.¹⁴

According to Palmer, the first generation of intellectual property laws provided little guidance to administrative authorities on how to proceed with resolving disputes.¹⁵ Alford adds that both Patent and Trademark Laws "failed to articulate in meaningful detail how the competent administrative authority

⁸ Idem. p.47

⁹ For example, the National Copyright Administration is named the head department to all local copyright administration departments. Additionally, the NCA is authorized to investigate all infringements occurring in China, including those involving the works of foreigners. Those violations that do not involve foreigners can be directly handled by the local Copyright Administrative Control Department (CACD). The role of the CADC is considered key in implementing copyrights at the local level, despite the fact that no clear procedures to enforce the law are specified, and that legal action against pirates is far from severe. For more analysis, see Shuk Ki Ella Cheong. 1999. p.52

¹⁰ The revisions included the expansion of the scope of patent protection, the enlargement of the protection period, the strengthening of the protection of patent rights, and the restipulation of conditions for imposing compulsory patent. For an excellent overview of amendments, see Flora Wand. 1999. "An Overview of the Development of China's Patent System" in Mark A. Cohen, Elizabeth Bang and Stephanie Mitchell (eds.) in Chinese Intellectual Property Law and Practice. Boston: Kluwer Law International. p.52

¹¹ See Nicholas R. Lardy. 2002. Integrating China into The Global Economy. Brookings Institution Press. Also Pitman B. Potter. 2001. The Chinese Legal System: Globalization and Local Legal Culture. New York: Routledge.

¹² The newly amended law created a two-grade level jurisdictional level of enforcement. The first one includes intermediate courts in provinces, autonomous regions and municipalities; and placed them under the control of central government. The second was composed of high courts at the provincial level with the authority to override decisions taken at the first grade. See Flora Wang. 1999.

¹³ In short, the terms of this legislation and its implementing legislations embraced principles such as national treatment, priority, mark independence, minimum protection, and also attempted to protect service trademarks, collective marks, certification marks, and well-known trademarks.

¹⁴ The statutory framework governing the use of trademarks in China encompasses other laws and regulations: the Temporary Regulations on Recognition and Administration of Well-Known Trademarks, the Anti-Unfair Competition Law, Customs Protection of Intellectual Property Rights Regulations, and the Criminal Law of the People's Republic of China. For further analysis, see Shuk Ki Ella Cheong. 1999. "Trademark Law and Regulation in China" in Mark A. Cohen, Elizabeth Bang and Stephanie Mitchell (eds.) in Chinese Intellectual Property Law and Practice. Boston: Kluwer Law International. p.25

¹⁵ Scott J. Palmer. "An identity Crisis: Regime Legitimacy and the Politics of Intellectual Property Rights in China." Indiana Journal of Global Legal Studies. Spring 2001. p.459

was to proceed or how any such administrative actions were to be enforced.”¹⁶ It can be concluded that the new reforms were a timid attempt to improve levels of enforcement. However, as it will be shown in the next section, the application of intellectual property laws remained limited and did not satisfy entirely intellectual property-dependent MNCs. Finally, general dissatisfaction among MNCs and the continuation of clear acts of piracy and counterfeiting in the early 1990s (including widespread exports of Chinese manufactured fake products to Southeast Asia and Latin America)¹⁷ would provoke enormous lobbying efforts and tensions between the US and China until 1996.

Behind the reforms: Delegation and Bureaucratization

Although not completely detached from direct diplomatic pressures¹⁸, the second generation of intellectual property reforms in China clearly coincides with the country’s emergence as an important player in international trade and the increasing levels of direct foreign investment from 1990.¹⁹ Under a more speculative angle, this second push for reforms can be also interpreted as a reaffirmation of China’s commitment to market liberalization after Deng’s southern tour in 1992²⁰ and a concrete response to all Western detractors and human rights activists that opposed diplomatic, let alone commercial ties with a repressive communist state in the aftermath of the Tiananmen tragedy.

First of all, the technical nature of amendments to both Trademark and Patent Laws has greatly minimized the political debate behind the walls of the National People’s Congress (NPC) and confirms the relative obedience that delegates show for the leadership’s reformist agenda. For example, the Trademark Law revisions in February 1993 were approved by 102 out of 106 members of the SCNPC.²¹ Such a low rate of dissent (below 5%) in a one-party authoritarian state can be interpreted in two possible ways. First, the absence of political opposition and the lack of open and free elections makes dissent a risky option for delegates, therefore the vote is conducted according to the principle of loyalty to the party rather than personal/electoral considerations. Second, the significance of amendments was relatively marginal in political terms, consequently delegates did not oppose it. In that sense, and despite Tanner’s argument, its “rubber stamp” nature is preserved when legal reforms do not affect the internal

¹⁶William Alford. 1995. p.76

¹⁷Patrick H. Hu. 1996. “Mickey Mouse in China: Legal and Cultural Implications in Protecting US Copyrights” Boston University International Law Journal. vol.81. no.93. As Hu puts it: “Exportation of counterfeits has particularly worried US companies because piracy also deprived them of markets outside China”; Also see Seth Faison. “Copyright Pirates Prosper in China Despite Promises.” NY Times. February 20th, 1996. A1. Faison explains: “It is the export market that most concerns international music and software companies”; From the estimated numbers of exports from China to Southeast Asia and Latin America, see IIPA’s website at <<http://www.iipa.org>>

¹⁸The next section in this chapter will demonstrate how foreign commercial interests have influenced early 1990s reforms.

¹⁹See David H. Bernstein and Diane M. Glass. 1995. “The Great Wall of China: Is it Still Standing in Wake of New Trade Agreement?” New York Law Journal. May 15th. p. S1

²⁰In early 1992, Deng Xiaoping made important speeches in favor of deepening reform, fixing the objective of establishing a market economy, and a modern enterprise system. See. “Excerpts from Speeches Given in Wuchang, Shenzhen, Zhuhai and Shanghai” Syllabus: Politics of China. The University of Mississippi. <<http://www.olemiss.edu/courses/pol324/dengxp92.htm>>

²¹Murray Scot Tanner. 1999. The Politics of Lawmaking in Post-Mao China: Institutions, Processes and Democratic Prospects. Oxford: Clarendon Press. p.86

stability and distribution of power within the state bureaucracy, excluding State-Owned Enterprises. As opposed to the first generation of reforms which were considered by many observers milestones of a new era in Chinese economic and legal development, these two newly amended laws sought primarily to emphasize administrative solutions to intellectual property violations while remaining committed to the principle of "legal system with Chinese characteristics."

However, the drafting process that led to the promulgation of the 1990 Copyright Law can be described as a "tortuous road".²² According to the former NPC Vice President Wang Hanbin, it was the "most complicated" in the PRC history and produced more than 20 revisions before its adoption by the SCNPC.²³ Apparently, one of the central debates was whether the law should be called "author's rights" (zhuzuoquan) or "copyright" (banquan). According to Shen Rengan, "author's rights" prevailed because the drafters decided to emphasize their concern with protecting authors rather than rights.²⁴ In terms of power shifting and coalition, Alford has identified three major groups. The first faction of government officials was generally disappointed with the low levels of technology transfers in China during the 1980s, and apparently hopeful that improvements in intellectual property protection would give China the necessary tools to compete internationally.²⁵ This coalition included also domestic software producers and entrepreneurs embracing Deng's opening-up policies. According to Alford's interviewees "a China aspiring to be competitive internationally had no alternative, however painful it might be in the short term."²⁶ The second group was formed by politically orthodox central government officials, personnel in educational circles and "other spheres of society heavily reliant on the unauthorized use of foreign copyrighted materials."²⁷ Clearly, this group was not inherently reformist and possibly was more attached to ideological considerations or local protectionism. Interestingly, these were also strong supporters of a Publications Law designed to reinforce state control over media. The third group adopted a very ambiguous position in regards to the new legislation. These officials seemed to support an orthodox version legal formalism as they "contended that China should commit to protect copyright more in name than in substance."²⁸ Their strategy was also highly gradualist in the sense that this middle-ground position had "the objective of buying time to adapt to the inevitability of adherence to international standards."²⁹

From an ideological stand, the passage of the 1990 Copyright Law marked the victory of the first group on paper, but also a strong influence from the third group in practice. In retrospective, there was no

²² William Alford. 1995. p.77

²³ Quoted in "Copyright as Industrial Property" *China News Analysis* no.1445 Oct 15, 1991.

²⁴ Quoted in William Alford. 1995. p. 77

²⁵ Idem. p.79

²⁶ Idem p.78

²⁷ Idem. p.78

²⁸ Idem. p.78

²⁹ Idem. p.78

doubt that a newly drafted Copyright Law was a powerful tool for China's efforts to build a market-oriented legal system. However, the new law remained imprinted by old legal formalism and failed to provide a clear framework for enforcement.

A more precise and compelling analysis on the politics of intellectual property rights in China is one based on bureaucratic politics.³⁰ Nonetheless, it must be noted that the history of bureaucratic politics behind the drafting of a copyright law in 1990 and the implementing regulations for the protection of software is quite complex due to the number of actors involved and our reliance on other researcher's interviews with Chinese officials and bureaucrats.

In fact, it is argued that the passage of a copyright law was directly linked to China's cultural bureaucracy, more precisely the CCP Propaganda Department and the administrative agencies under its supervision.³¹ It would be false to affirm that all officials within this department were singing on the same key during the internal debates, but evidence shows that they ultimately decided not to ignore one of the cultural bureaucrats' main role: "to ensure that spiritually uplifting arts thrive and that immoral works have no opportunity to be disseminated."³² Moreover, since the CCP Propaganda Department was in charge of creating "consensus" over China's economic strategy for development, supporting the drafting of a copyright law was nothing more than a legitimate cause.

However, one of the most important debates during the drafting process was centered around a turf battle among bureaucracies. The founding question of such debate was roughly articulated as follows: does computer software protection fall under copyright, patent, trademark or contract law.³³ Since protection for software and digital technologies were considered a new category of industrial innovation, reaching a consensus among drafters was difficult and engendered a rather ambiguous solution: neither area of law was totally appropriate, therefore both patent and copyright law were incorporated into the new legislation.³⁴ Later, bureaucratic frictions started when the State Council assigned the drafting of the law on computer software protection to the Ministry of Electronic Industries (MEI).³⁵ Obviously, this represented a clear victory for MEI bureaucratic staff and certainly a loss for the

³⁰ For a theoretical analysis on bureaucratic politics in the PRC, see Kenneth Lieberthal and Michael Oksenberg. 1989 Policy-Making in China: Leaders, Structures and Processes. NJ: Princeton University Press. 1989. Also, Kenneth Lieberthal and Michael Lampton. 1992. Bureaucracy, Politics and Decision-Making in Post-Mao China. Berkeley: University of California Press.

³¹ See Michel Oksenberg, Pitman B. Potter and William B. Abnett. 1996 "Advancing Intellectual Property Rights: Information Technologies and the Course of Economic Development in China." NBR Analysis. Vol.7 no.4. p.14 The authors explain that the CCP Propaganda Department and the following agencies (Ministry of Culture, Ministry of Radio and Television and the State Press and Publications Administration) tightly supervised the work of writers, artists and filmmakers.

³² Oksenberg, Potter, Abnett. 1996. p.14

³³ Idem. p.14

³⁴ Idem. p.15 In regards to the content of the law, Alford says that: "the law on copyright that the NPC finally promulgated provided an appreciably more curtailed grant of rights than suggested by its rhetoric and much of the initial commentary, both at home and abroad." Alford. 1995. p.78

³⁵ The MEI was a continuation of an interagency group created in the mid-80s to stimulate industrial growth: "The Promotion of Electronic Industries." Quoted in Oksenberg, Potter and Abnett. 1996. p.15

State Copyright Administration (SCA), the administrative agency in charge of implementing intellectual property laws.

From all the invited participants³⁶, two academics played a prominent role in the drafting process³⁷ because of their competence and experience in the field: Zheng Chengsi³⁸ from the Chinese Academy of Social Sciences (CASS) and Guo Shoukang³⁹ from People's University. In collaboration with three top bureaucrats⁴⁰, the law on computer software protection was drafted and finalized by 1991. It is reported that delegations were sent abroad to investigate foreign practices and constant exchanges were formalized with IBM representatives. In fact, it seems that "the Chinese were heavily influenced by the views of IBM, which sent several delegations to China and held seminars to assist Chinese policymakers on this issue."⁴¹

The final debate was about which administrative agency would be in charge of implementing the Copyright Law as well as the Software Computer Protection Implementing Regulations. The debate arose from a common practice in China in which the governmental agency drafting regulations is also made responsible for its implementation, and obviously, this made MEI the most likely candidate to keep this responsibility.⁴² However, there was a strong opposition to this idea within several ministries and institutes⁴³ that feared a monopoly of power under MEI would impede access to technology or lead to the adoption of such as assisting exclusively the development of the domestic software industry for which MEI was responsible.⁴⁴ For instance, detractors even went to argue that MEI would eventually tolerate infringement in those electronics factories from which it withdrawn substantial profits.⁴⁵ On the other side, the State Copyright Administration (SAC) was considered a potential candidate to take charge of implementing the newly drafted legislations, but apparently, it was seriously understaffed and therefore lacked the capacity to implement effectively. Surprisingly, once the law was enacted in 1991, the SAC was granted implementation responsibilities by the CCP Propaganda Department.

In the light of such a counterintuitive decision, we can conclude that MEI clearly lost out in the negotiations over the allocation of the administration of software copyrights.⁴⁶ However, one must not

³⁶The Institute of Computer Sciences of CASS, the China Patent Office, the State Copyright Administration, the Ministry of Foreign Economic Relations and Trade (the predecessor of MOFTEC), the China Council for the Promotion of International Trade, and Ministries of AeroSpace Industry, Public Security, and Petroleum. Cited in Oksenberg, Potter, Abnett. 1996. p.15

³⁷Idem. p.15

³⁸Apparently, professor Chengsi concentrated on the study of foreign software intellectual property rights protection.

³⁹Professor Shoukang was the very first academic to study intellectual property in the post-Mao era and was therefore considered an authority in the field.

⁴⁰Yang Tainxing (director of the Computer Department at MEI), Ying Ming (deputy general manager of the China Software Corporation) and Shen Rengan (director of the State Copyright Administration).

⁴¹Oksenberg, Potter, Abnett. 1996. p.15

⁴²Idem. p.15

⁴³Especially CASS and the Petroleum Industry

⁴⁴Oksenberg, Potter, Abnett. p.16

⁴⁵Idem. p.16

⁴⁶Idem p.16

forget that the SCA is not necessarily "housed within a strong and supportive bureaucracy (the State Press and Publication Administration)"⁴⁷ and is definitely constrained by decisions taken by other bureaucrats in higher ranked agencies. In sum, the most important outcome of these bureaucratic frictions was twofold: it contributed to the inherent institutional weakness of the system to administer copyrights computer protection, and reinforced the lack of adequate enforcement.

From both debates behind the drafting of the Copyright Law and the Software Computer Protection Regulations, it is possible to conclude that main differences emerged from ideological-pragmatic considerations⁴⁸ and implementing responsibilities.⁴⁹ It must be clear that these debates do not clearly illustrate a strong internal/domestic opposition to the existence of the intellectual property laws but rather highlight differences on the content, orientation and procedures of implementation. It is also fair to conclude that direct foreign intervention was almost exclusively limited to technical issues, training sessions and information forums, keeping commercial interests and aggressive diplomatic tactics at bay.

In retrospective, differences on formal procedures and the allocation of responsibilities can be attributed to normal bureaucratic reactions to structural changes inside the bureaucratic apparatus that often have direct implications on the organization of the state and the distribution of power among officials. These conflicts were certainly accentuated by the lack of a coherent tradition, let alone formal intellectual property protection in Chinese history as defined by Western law.⁵⁰ In short, these debates provide the basis for a deeper understanding of piracy and infringement practices in China, despite the existence of formal written laws. As we have seen, the implementing agency (SCA) has been weakened by its position within the bureaucracy and because of its lack of experience, personnel, and infrastructure to effectively ensure proper enforcement of the newly drafted/amended laws. The institutional presence of the SCA in all provinces and coastal regions where most factories are operating should be considered of crucial importance by Chinese central authorities if serious efforts to eradicate the problem exist. Indeed, this is not the case. As we will see in the next section, poor enforcement became an important incentive for American trade diplomacy, and more particularly MNCs to exert bilateral pressures on Beijing as soon as 1991.

Provisions related to enforcement and processes of lawmaking can be largely disputed in legal terms. However, it is politically striking to see that promulgation of intellectual property laws did not involved dissent within the top legislature, neither did it provoke significant struggle at the leadership

⁴⁷ Idem p. 16-17 Oksenberg, Potter and Abnett also remind us that: "*the State Press and Publication Administration suffers from not being a ministerial-level agency and therefore not having units below the provincial level, it is incapable to fulfill its responsibilities effectively.*"

⁴⁸ Alford. 1995. Chapter 4

⁴⁹ Oksenberg, Potter, Abnett. 1996.

⁵⁰ Alford. 1995. Chapter 2.

level. The promulgation of three major IP laws in the early 1990s did not involved the same level of dissent within the legislature compared to the Enterprise Bankruptcy Law in 1986 or the State-owned Industrial Enterprises Law in 1988,⁵¹ neither did it implied struggles at the leadership level.⁵² For this period, it can be said that losers and winners were defined in terms of gained or lost responsibilities and pragmatic-reformist versus ideological-orthodox views. Clearly, the SCA won new responsibilities but it is unclear which political actor(s) ordered it, presumably the State Council or the CCP Propaganda Department. If this is the case, we could conclude that legal formalism and an ambiguous commitment to real enforcement of intellectual property laws still dominated the reformist agenda in the early 1990s, and that given the low levels of dissent, the higher levels of leadership (Politburo, State Council) embraced this gradualist strategy.

At this point, it is necessary to extend our analysis in order to include the joint systemic evolution of intellectual property rights in international trade behind the golden walls of GATT negotiation rooms. Similarly, it is pertinent to look at some domestic developments and political shifts in foreign trade policy within the United States, a country that dominated and exported largely in sectors such as software development, pharmaceuticals, film and music during the 1980s and 1990s, and that has taken the leadership in most international forums dealing with trade and investment in the past two decades. The next section will concentrate on these two aspects.

II. THE ISSUE OF ENFORCEMENT AND AMERICAN UNILATERALISM

As China became an important player in international trade in the 1990s, intellectual property rights also became a prominent issue in GATT negotiations with the help of American, European and Japanese interests. While TRIPS was being negotiated behind closed doors, the strong opposition of high-income developing countries to the imposition of a binding multilateral agreement on their domestic legal systems and industries contributed to create a sense of frustration on the part of American intellectual property-based industries that were losing astronomical amounts of money.⁵³ As soon as 1989, corporate frustration was translated into Congressional pressure at the domestic level and the use of section 301 by the United States Trade Representative (USTR) became the current practice to force infringers of intellectual property rights in the world to provide appropriate protection.

⁵¹ Murray Scot Tanner. 1999. Chapters 7 and 8.

⁵² See Chapter on the top 20. Kenneth Liebrthal. 1995.

⁵³ Michael P. Ryan. 1995. P.80. As Ryan explains: "*The IIPA, Pharmaceutical Research and Manufacturers of America (PhRMA), Software Publishers Association (SPA) and the International Anti counterfeiting Coalition submit detailed assessments of intellectual property policies and practices around the world and their recommendations for the USTR Special 301 announcement.*"

As this section will demonstrate, China was not exception to the rule and the USTR, urged by American business executives,⁵⁴ identified it as a “priority foreign country” according to Special 301 in 1991. This marked the beginning of American unilateralism in China and opened the door to a cycle of trade sanctions threats and last minute agreements.⁵⁵ In order to understand the “politics behind” American aggressive trade diplomacy, it is important to explore its domestic process of trade policy formulation and the role played by powerful lobbies in Congress, as well as the evolving role of the USTR in conducting diplomatic pressure at the international level, and particularly in its relations with China.⁵⁶ It is a widely accepted fact that the US have played a central role in pushing for intellectual property protection in China during the 1990s. However, it is less clear why the USTR adopted an aggressive strategy in the 1990s and what were the incentives that motivated American trade policy-makers to give it such a prominence while negotiations at the GATT for a multilateral agreement covering intellectual property rights were almost concluded.

According to our central argument, the second phase of reforms to China’s intellectual property regime began at the end of the 1980s with the use of a “priority foreign country” clause by the United States Trade Representative (USTR) under section 301 and continued until the 1996 US-China Accord for the protection of intellectual rights. The uniqueness of this second phase of reforms lies on the increasing interventionist role that the IPR lobby (an American government-business coalition) played in pushing for further protection of intellectual property rights protection through multilateral and bilateral means.⁵⁷ In the case of China, USTR pressures did not lead directly to the drafting of new intellectual property laws, but attempted to address a generalized problem of lack of enforcement.⁵⁸ As will be demonstrated in this section, China’s domestic legalism became highly constrained by external economic interests and domestic political objectives. Reformist efforts were placed under constant American aggressive trade diplomacy tactics placing enormous pressure on China’s agenda to join the World Trade Organization (WTO).

Our analysis will be centered around the role played by three main actors at different stages of the process that leads to the formulation and application of American unilateral trade diplomacy: section 301, the USTR, and the IPR lobby. These three actors differ in nature but reinforce each other in the

⁵⁴Daniel Southerland. “US Businesses Urge Trade Sanctions to Stop Piracy of Software in China.” Washington Post. April 11, 1989.

⁵⁵Peter K. Yu. 2002 “*The Second Coming of Intellectual Property Rights in China.*” Occasional Papers in Intellectual Property from Benjamin N. Cardozo School of Law Yeshiva University. Number 11.

⁵⁶Paul C.B. Liu. 1994. “US Industry’s Influence on Intellectual Property Negotiations and Special 301 Actions.” UCLA Pacific Basin Law Journal. Volume 13. As Liu comments: “The influence of US industries and industrial organizations is evident in recent legislative actions. Although Congress still accommodates different, and sometimes conflicting interests in a given issue, industries have gained enough government recognition, if not sufficient protection, for their special interests.” p.67

⁵⁷Michael P. Ryan. 1998.

⁵⁸Warren H. Maruyama. “US-China IPR Negotiations: Trade, Intellectual Property and the Rule of Law in a Global Economy.” In Mark A. Cohen, Elizabeth Bang and Stephanie Mitchell (eds.) Chinese Intellectual Property Law and Practice. Boston: Kluwer Law International. 1999 p.179

process. Broadly, we can make three general statements about the role of each actor First, section 301 is the legal foundation that empowers, legitimizes and defines responsibilities in the process of foreign trade policy formation. Second, the USTR is the agency that acts as negotiators and protectors of American foreign interests abroad, and is heavily influenced by lobbyists through Congress and directly by detailed annual reports and policy recommendations. Finally, the IPR lobby represents a multiplicity of corporate interests generally advocates of free-trade and committed to multilateralism but also willing to make use of American diplomatic muscle to ensure that their interests abroad are respected.

A powerful domestic tool: Section 301

Section 301 finds its roots in the Trade Act of 1974 and gives mandatory and discretionary provisions as well as specific timetables for action to the USTR.⁵⁹ Its main goal is to investigate and impose sanctions on countries whose trade practices are considered unfair or unreasonable to American commercial interests. Perhaps a key implication of Section 301 is that “it reaches beyond the General Agreements on Tariffs and Trade (GATT)” and gives the USTR the power to unilaterally penalize those countries that threaten, restrict or burden American trade.⁶⁰ It is a sort of complementary diplomatic tool to the multilateralism pruned by the World Trade Organization (WTO). Although it was designed to strengthen the President’s authority to impose sanctions unilaterally and therefore more flexibility in resolving trade disputes, continuous amendments have constantly redefined the balance of power between Congress and the President and the most recent one has transferred “final decision-making authority in section 301 cases from the President to the USTR.”⁶¹ Among the three types of action under the section 301 umbrella⁶², “special 301” is the one that requires the USTR to identify countries that show low levels of intellectual property protection. The infringers are named “priority foreign countries” and ought to be investigated and sanctioned if necessary.

Whose interests does the USTR represent? The Power of Lobbying and American Trade Diplomacy

The Office of the United States Trade Representative (USTR) is the key government agency charged with pursuing American trade policy on the international scene. Despite its important role in conducting foreign trade diplomacy, it has often been described by observers as a small-size organization

⁵⁹ A. Lynne Puckett and William L. Reynolds. 1996. “Rules, Sanctions and Enforcement under Section 301: At Odds with the WTO?” *American Journal of International Law*. Volume 90. Issue 4. October. pp. 675-689.

⁶⁰ Puckett and Reynolds. 1996. p.675

⁶¹ Idem. P.677 In regards to the most recent amendment (the Omnibus Trade and Competitiveness Act of 1988), Puckett and Reynolds explain: “The legislative history of the transfer of authority makes plain that Congress sought to limit the role of the President.”

⁶² The original “section 301” deals with unfair practices, “special 301” tackles the issue of intellectual property protection and “super 301” entails a mandatory annual identification of countries practicing unfair trade policy with the US.

lacking the research-capacity and basic knowledge in intellectual property rights required to build a solid negotiating agenda.⁶³ Therefore, it has relied extensively on information produced by interest groups such as business associations and coalitions in the software, pharmaceutical and entertainment industries.⁶⁴ In fact, industry representatives serve as advisors to the USTR and have direct input in American negotiation strategies.

The high level of permeability of the USTR to business interests, and particularly to the IPR lobby agenda through its "priority foreign country" designation is a fundamental organizational element that explains the origin of the "international forces" as defined in our theoretical framework. As the USTR relies on the IPR lobby to define its foreign trade policy agenda, it is fair to conclude that interest groups actually shape the scope and content of the USTR strategy from the agenda-setting to the implementation process.⁶⁵

Compared to other government agencies, the office of the USTR is quite small in term of staff (200 employees), and the tenure of top players inside the organization is relatively short. Also, according to an interview, the USTR lacks country-specific expertise and its lead negotiators are relatively unencumbered by a deep sense of organizational culture.⁶⁶ Because the USTR lacks a country-specific in-house investigation team, it often relies upon submissions from interested parties with legitimate grievances in analyzing a country's performance, shaping specific negotiating platforms, and in deciding to take action against a target country.⁶⁷ As one former negotiator put it "informing, explaining become persuading."⁶⁸

As Dean Garten, the former Under Secretary of Commerce for International Trade, explains, "Business have become more important to the American government than they used to be. The executive branch depends almost entirely on business for technical information regarding trade negotiations. In all emerging markets, America's political and economic goals depend largely on the direct investments in factories or other hard assets that only business can deliver."⁶⁹ In regards to the USTR aggressive trade diplomacy, he notices that: "The business community was able to drive a good deal of foreign policy

⁶³Michael P. Ryan. 1995. p.80

⁶⁴Although the list of "influencing organizations, associations and coalitions" is rather long, we can mention the more important ones: *International Intellectual Property Alliance (IIPA)*, the *Business Software Alliance (BSA)*, the *International Anti counterfeiting Coalition (ICC)*, the *Pharmaceutical Manufacturer's Association (PMA)*, the *International Trademark Association (ITA)*, *Microsoft Corporation*, the *Interactive Digital Software Association (IDSA)*, the *Motion Picture of America (MPA)*, the *Recording Industry Association of America (RIAA)* and the *Association of American Publishers (AAP)*.

⁶⁵Andrew Mertha. 2001. "Pirates, Politics, and Trade Policy: Structuring the Negotiations and Enforcing the Outcomes of the Sino-US Intellectual Property Dialogue, 1991-1999" PhD Dissertation. University of Michigan.

⁶⁶E-mail Interview with USTR representative. February 2003.

⁶⁷Idem

⁶⁸Cited in Andrew Mertha. "What Does China Trade and Why? Transnational Deterrence and US Trade Policy Agenda Formation." Research paper. University of Michigan. Interview in Washington DC. December 1998. p.5

⁶⁹Jeffrey E. Garten. "Business and Foreign Policy." Foreign Affairs. May-June 1997. pp.67-69

because of unique features of American society: corporate leaders, lawyers, and investment bankers were able to move in and out of the highest levels of government.⁷⁰

The use of American trade law through special 301 was definitely a successful strategy on the part of IPR lobbyists because they were able to institute constraints on the conduct of domestic trade policy and influence at the same time the diplomatic agenda of the USTR while enhancing their bargaining position at the international level, especially against those countries reluctant with the developed world agenda on intellectual property rights.⁷¹

Aggressive Trade Diplomacy and the Role of the IPR Lobby

The role of international actors has been central to China's process of institution-building and enforcement mechanisms from 1989 to 1996. By employing a strategy of constant investigations, aggressive bilateral negotiations, and threats to impose trade sanctions, the office of the United States Trade Representative (USTR) forced China to depart a period of legal formalism, and to enter a period of hybrid enforcement in which state agencies still lack coordination and competency,⁷² and foreign powers intervene in the training of judges and legal popular education. The USTR's unilateral strategy was facilitated two reinforcing and very effective tools: one legal (the provision "special 301" under section 301) and the other political (IPR Lobby: a group of software, pharmaceutical and entertainment industries).

Whereas many analysis tend to define the IPR Lobby as a single actor sharing the same economic and strategic considerations, it is important to explore the real behavior and possible "sub-alliances" within the IPR Lobby during the intensive US-China negotiating period that started in the early 1990s. Two main groups and strategies can be identified. The first group was formed of globally ambitious multinationals (MNCs) and intellectual property-based companies in the software and pharmaceutical industry. As previously described in chapter 3, these MNCs generally favored a multilateral strategy and were deeply involved in the GATT's Advisory Committee on Trade Policy and Negotiations (ACTPN) during the Uruguay Round.⁷³ Another powerful lobbying initiative was an Intellectual Property Committee (IPC)⁷⁴ that had the mandate to influence policy positions at Congress in Washington and at the World Intellectual Property Organization (WIPO) in Geneva.⁷⁵

⁷⁰Jeffrey E. Garten. 1997. p.69

⁷¹Particularly Brazil and India.

⁷²This point is made by Oksenberg, Potter and Abnett. 1996.

⁷³Michael P. Ryan . 1995. p.68

⁷⁴The original thirteen members of the IPC were *Pfizer, IBM, Merck, General Electric, DuPont, Warner Communications, Hewlett-Packard, Bristol-Meyers, FMC Corporation, General Motors, Johnson & Johnson, Monsanto and Rockwell International.*

⁷⁵Michael P. Ryan. 1995. p.69

The second group of MNCs decided to take a rather bilateral and more aggressive approach in dealing with IPR violations, and gave preference to the USTR as the main institutional body responsible to defend their commercial interests. In order to better articulate their grievances and provide technical support, they formed a coalition of associations mainly drawn from the entertainment industry and created the International Intellectual Property Alliance (IIPA).⁷⁶ From the very beginning, it was clear that the IIPA's strategy did not favor the multilateral approach taken by software manufacturers and pharmaceuticals. One of their main publications was a country-by-country report⁷⁷ that quantified the losses caused to American industries by piracy in films, music, computer software and books in NICs⁷⁸ and LDCs.⁷⁹ Another publication known as the White Paper⁸⁰, aimed to provide specific and well-documented trade policy advice concerning intellectual property rights violations. In the early 1990s, the White Paper generally suggested the USTR to adopt a more aggressive attitude towards infringers by threatening them of trade sanctions in case of non-agreement. Over the years, the annual reports prepared by the IIPA have become more sophisticated as a result of a symbiotic network of corporate-trade representatives gathering up-to-date informations domestically and abroad.

During the period of intensive bilateral negotiations between the US and China (1991-1996), entertainment industries were particularly active both in Congress and at the USTR office so that their interests would be respected and that effective trade diplomacy would be undertaken by the American government against infringers.⁸¹ Because of their geographical location in American territory (California and New York) and the importance of these states in electoral terms, the Clinton Administration was under constant pressure to put forward their demands.⁸²

When the logic of the short-term invades political circles: Combative/Reactive Diplomacy

In part due to the Tiananmen events of 1989, the incredible range of human rights violations that followed, and the lack of a clear, credible and committed leadership to improve IPR protection, the USTR was ready to initiate an investigation on China's intellectual property rights practices in May 1991, and willing to impose trade sanctions if necessary. These sanctions included a possible rise on tariffs of US\$1.5 billion of Chinese textiles, footwear, clothing, leather, electronics, and

⁷⁶The IIPA includes the American Association of Publishers (AAP), the Motion Picture Association of America (MPAA), the Recording Industry Association of America (RIAA), the American Film Marketing Association (AFMA), the National Music Publishers' Association (NMPA), and the Information Technology Council (ITC).

⁷⁷Otherwise called "Piracy of US Copyrighted Works in Ten Selected Countries" Cited in Michael P. Ryan. 1995. p.72

⁷⁸Taiwan, South Korea, India, Thailand, Brazil, China

⁷⁹Paraguay, Honduras and Ukraine

⁸⁰Otherwise called "US Government Trade Policy: Views of the Copyright Industry" Cited in Michael P. Ryan. 1995. p.72

⁸¹Philip A. Mundo. 1999. National Politics in A Global Economy: The Domestic Sources of US Trade Policy Georgetown: Georgetown University Press.; Martha L. Gibson. 2000. Conflict Amid Consensus in American Policy. Georgetown: Georgetown University Press.

⁸²William P. Alford. 1995. p.115

pharmaceuticals.⁸³ In response, the Chinese government through its trade ministry, MOFTEC, quickly threatened US exporters of aircraft, cotton, corn, steel, and chemicals of a similar amount of sanctions.⁸⁴ Finally, in January 1992, American and Chinese negotiators reached a first Memorandum of Understanding (MOU)⁸⁵ in which China agreed to accept international standards of patent protection for pharmaceuticals and chemicals. Short after, the 1992 MOU became a catalyst that favored further implementation of a market-oriented intellectual property regime in the mainland⁸⁶ and the establishment of tribunals for disputes involving nationals and foreigners.⁸⁷

Despite the establishment of special courts, the counterfeiting and piracy practices continued after the 1992 MOU and American businesses struck back by pressuring the USTR to bring up the issue of enforcement for the second time with its counterpart in China, MOFTEC.⁸⁸ In 1994, the entertainment business industries were deeply concerned about the significant losses resulting from lack of enforcement in China.⁸⁹ As intellectual property reforms in the 1980s demonstrated, the mere establishment of institutions and promulgation of laws could not suffice to effectively protect intellectual property rights. At this stage, the clarification of procedures of enforcement and responsibilities of administrative agencies as regulating bodies became a priority for foreign stakeholders, especially those with the necessary organization, political contacts and financial resources.

In 1994, infringements of patents, copyright piracy and trademark counterfeiting were estimated at approximately US\$1 billion by the USTR's National Trade Estimate Report.⁹⁰ More important for the IIPA lobby, the report concluded that US\$850 million involved copyright piracy.⁹¹ In regards to market access restrictions, entertainment industries were preoccupied by the increasing export rates of counterfeited and pirated goods produced in China to other continents such as Southeast Asia and Latin America.⁹² Copyright-intensive industries' claims were later supported by then-USTR Ambassador

⁸³Sheryl Wu Dunn. "Nonstate Plants in China at Risk in US Talks." *NY Times* January 14th, 1992. A9

⁸⁴David Holley. "Warns of Trade War with US Over Patents, Copyrights, Beijing Warns" *LA Times*. January 8th, 1992. E6

⁸⁵"Memorandum of Understanding Between the People's Republic of China and the United States of America on the Protection of Intellectual Property" January 17th, 1992.

⁸⁶In 1992, China amended its Trademark Law, its Patent Law, promulgated new regulations and laws and signed the Patent Cooperation Treaty. The same year, China also adopted a new Unfair Competition Law in order to protect trade secrets and acceded to the Berne and Geneva Conventions. Finally, the higher and intermediate courts in Beijing took the initiative to establish tribunals for intellectual property disputes involving nationals and foreigners.

⁸⁷A very well-known case handled by the Intermediate People's Court of Beijing is the one opposing Beijing Paris Delifrance Bakery Co. To the Beijing Sun City Department Store. The accusation was directed against Beijing Sun for infringing Delifrance Bakery's Trademark. The court concluded that the defendant had infringed the registered trademark originally owned by Delifrance, and Beijing Sun was condemned to pay infringement/court costs to Delifrance and ordered to stop its trademark violations. Cited in *The Building of the Legal System in China* 2001. New Star Publishers. Beijing. p.45

⁸⁸Patrick H. Hu. 1996. "Mickey Mouse in China: Legal and Cultural Implications in Protecting US Copyrights." *Boston University International Law Journal*, vol.14. pp.83-84.

⁸⁹Marcus Brauchli. "Fake CDs are a Growth Industry in China." *Wall Street Journal*. February 11th, 1994. B1

⁹⁰USTR. 1995 *National Trade Estimate Report on Foreign Trade Barriers*. Found in USTR's website <www.ustr.org>

⁹¹Idem

⁹²Seth Faison. "Copyrights Pirates Proper in China Despite Promises." *NY Times*. February 20th, 1996. Gregory S. Fender. 1996. "Enforcement of Intellectual Property Rights in China: You Can Lead a Horse to Water, but You Can't Make it Drink." *Virginia State Journal of International Law*. vol.37. pp.223-242

Mickey Kantor when he declared that "enforcement of intellectual property laws in China was sporadic at best and virtually nonexistent for copyrighted works."⁹³

As a result, the Clinton administration indicated the possibility to impose trade sanctions on Chinese exports if the situation on IPR violations was not improved before December 31st.⁹⁴ In January 1995, after the deadline was expired, the USTR announced a comprehensive list of Chinese imports worth US\$2.8 billion to be sanctioned,⁹⁵ and despite many criticisms coming from academia⁹⁶, the USTR remained firm in its position. Praised by the local media,⁹⁷ the Chinese government threatened to freeze all joint-ventures with three major American automakers (a direct attack on one of Clinton's top trade priorities), and to impose 100% tariffs on US-made compact discs, cigarettes, and alcoholic beverages.⁹⁸ Simultaneously, as a sign of good faith, Beijing organized major raids in the southern province of Guangdong, closing more than a dozen factories and bringing charges against software retailers at the Beijing's intellectual property court.⁹⁹ The closure of the Shenfei factory in Shenzhen was especially appreciated by American businesses because it was considered "the most important maker of bootleg music and videos in China."¹⁰⁰

After an intensive period of threats and heated bilateral negotiations, both countries reached a new Memorandum of Understanding (MOU) in which China agreed to further extend its legislative and institutional framework to ensure effective intellectual property protection.¹⁰¹ The 1995 Agreement comprised two main documents.¹⁰² First, a letter from Wu Yi, Chinese Minister of Foreign Trade and Economic Cooperation (MOFTEC), to USTR Ambassador Mickey Kantor. Second, the Action Plan for Effective Protection and Enforcement of Intellectual Property Rights, also referred to in the literature as the "Action Plan". This agreement clearly confirms that no quotas, license requirements, or other restrictions will be imposed on the importation of audiovisual and published products from the US.¹⁰³ Second, and most important, the agreement included a "market access" clause allowing US individuals and entities to establish joint ventures with nationals in the audiovisual sector, and also providing

⁹³Gregory S. Fender. 1996. p.242

⁹⁴To allow time for negotiations that year, the Clinton administration extended the period to six months. "US Delay on China Move." NY Times. May 2nd, 1994. D2

⁹⁵Martha H. Hamilton. "US to Hit China with Stiff Tariffs." Washington Post. February 5th, 1995. A1

⁹⁶William P. Alford, professor of Law at Stanford University was particularly critical of the USTR strategy in China.

⁹⁷According to Martha H. Hamilton, the Xinhua News Agency declared that China needed to take retaliatory measures in order to protect its national sovereignty and national dignity.

⁹⁸Martha Hamilton. Washington Post. February 5th, 1995

⁹⁹Michael P. Ryan. 1995. p.83

¹⁰⁰Martha H. Hamilton and Steven Mufson. "Clinton Hails Accord with China on Trade: Piracy Enforcement Provision Called Tough." Washington Post. February 27th, 1995. A1

¹⁰¹Seth Faison. "US and China Sign Accord to End Piracy of Software, Music Recordings and Film" NY Times. February 27, 1995. A1.

¹⁰²To find the original versions of both documents, see Pitman B. Potter. Seminar on Trade and Investment in the People's Republic of China. Curse Pack for LAW 337. Faculty of Law: University of British Columbia. 1995.

¹⁰³See "Action Plan for Effective Protection and Enforcement of Intellectual Property Rights." February 26th, 1995.

immediate access to major cities such as Shanghai and Guangzhou, and promising to extend the list to thirteen cities by the year 2000.¹⁰⁴

Perhaps the more innovative and significant outcome of the 1995 Action Plan was the improvement of intellectual property rights protection through court procedures and the creation of interagency task forces at all levels of government. Consequently, a new enforcement structure was introduced: the State Council Working Conference on Intellectual Property Rights (also known as "Working Conference"¹⁰⁵). In short, the IPR Working Conference was made responsible for the central organization, coordination, protection, and enforcement of intellectual property laws at all levels of government and throughout the country.¹⁰⁶ Moreover, the Working Conference was given the mandate to contribute to rise standards of transparency by making public and publish all laws, provisions, regulations, decrees and interpretations regarding the implementation of intellectual property rights.¹⁰⁷

In the United States, the media welcomed the "1995 Action Plan" qualifying it of "the single most comprehensive and detailed enforcement agreement the US had ever concluded."¹⁰⁸ One commentator added that "never had a bilateral agreement done so much to build national institutions in China."¹⁰⁹ Even president Clinton played the rhetorical game by declaring: "This is a strong agreement for American companies and American workers."¹¹⁰ However, the cycle of combative/reactive US-China trade diplomacy started again at the end of 1995 when the "Action Plan" appeared inadequate to ensure intellectual property rights protection in China.¹¹¹ In a testimony before the Senate Subcommittee on East Asian and Pacific Affairs, USTR Ambassador Charlene Barshefsky stated that despite great efforts to establish intellectual property courts and fight pirates, China's implementation of the "1995 Action Plan" fell short of the minimal requirements of the agreement.¹¹² Once again, the Clinton administration threatened of trade sanctions against Chinese products by announcing US\$2 billion worth of sanctions on textiles, electronics, and bicycles. In response, China advanced retaliatory measures against agricultural products, telecommunications and audiovisual equipment.¹¹³

¹⁰⁴Idem

¹⁰⁵Michel Oksenberg, Pitman Potter and William B. Abnett. 1996. P.19. As Oksenberg, Potter and Abnett explain: "*The IPR Working Conference is composed of representatives of the State Science and Technology Commission, the Ministry of Foreign Trade and Economic Cooperation, the Ministry of Culture, the Ministry of Broadcast, Film and Television, the Ministry of Justice, the Ministry of Public Security, the Customs Bureau, the State Administration for Industry and Commerce, the national patent, trademark and copyright offices, and other relevant agencies. The IPR Working Conference was placed in the State Science and Technology Commission under the leadership of State Council Song Jian.*"

¹⁰⁶Peter K. Yu. 2002. "*The Second Coming of Intellectual Property Rights in China.*"

¹⁰⁷Oksenberg, Potter and Abnett. 1996. p.20

¹⁰⁸Helen Cooper and Kathy Chen. "*China Averts Trade War with the US, Promising a Campaign Against Piracy.*" Wall Street Journal. February 27th, 1995.

¹⁰⁹Michael P. Ryan. 1998. p.85

¹¹⁰Cited in Martha H. Hamilton and Steven Mufson. "*Clinton Hails Accord with China on Trade: Piracy Enforcement Provision Called Tough.*" Washington Post. February 27th, 1995. A1

¹¹¹Paul Blustein. "*US Warns China to Step Up Efforts Against Piracy.*" Washington Post. November 30, 1995. B13

¹¹²Cited in Paul Blustein. November 30, 1995. B13

¹¹³Helen Cooper and Kathy Chen. "*US and China Announce Tariff Targets as Both Nations Step Up Trade Rhetoric.*" Wall

In June 1996, both countries reached an Accord in which China confirmed its commitment to fight counterfeiting and piracy practices by taking immediate and radical measures at the local level.¹¹⁴ Fifteen CD factories were shut down and more than 5000 mini-theaters closed, and China expanded market access to American music and movie companies to produce and sell their products inside the country.¹¹⁵ The reaction of the USTR was quite positive as Ambassador Charlene Barshefsky declared that massive raids in China's southern provinces demonstrated a clear commitment on the part of Chinese local authorities to put into place an operational enforcement system.¹¹⁶ The 1996 Action Plan was also well received by corporate stakeholders.

As many commentators have argued, the 1996 Agreement "mainly reaffirmed China's commitment to protect intellectual property rights and confirmed the market access arrangements concluded under the 1995 Action Plan."¹¹⁷ Not to mention that the trade sanctions announced by both countries would have deeply hurt important industries such as agriculture, aerospace, automobile, and textiles.¹¹⁸ A less widespread analysis states that the Clinton administration obtained political gains from such aggressive strategy: "When the US-China relations were strained in 1996, the Clinton administration wanted to appear tough on China, and copyright piracy was an obvious lever to pull."¹¹⁹

In order to further clarify the complex net of ambiguous and changing relations during the second phase of China's intellectual property protection, a close analysis of each actor introduced throughout this chapter will be conducted. The objective is to verify whether there have been changes in roles compared to the first phase and how these changes have evolved within our initial theoretical framework. It is also important to keep in mind that, during this period, the TRIPS agreement was finally signed by WTO member-states and negotiators, and that a shift towards a rules-based trade system officially began in 1995. We should also take into consideration that this period was strategically important for China's international image as it was preparing to join the WTO and therefore, complying with international standards would give it more credibility in the eyes of its trade partners.¹²⁰

Street Journal, May 16th, 1996. A3.

¹¹⁴Helen Cooper and Kathy Chen. "US and China Reach an Agreement, Averting Trade Sanctions by Both Sides." Wall Street Journal, June 18th, 1996. A2.

¹¹⁵Seth Faison. "US, China Agree on Pact to Fight Piracy." NY Times, June 18th, 1996. A1

¹¹⁶Office of the USTR. Statement by Ambassador Charlene Barshefsky, June 17, 1996. Found at USTR's website: <www.ustr.org/releases/1996/06/9653.html>

¹¹⁷Peter K. Yu. 2002. "The Second Coming of Intellectual Property Rights in China." p.15

¹¹⁸Helen Cooper and Kathy Chen. "US and China Reach an Agreement, Averting Trade Sanctions by Both Sides." Wall Street Journal, June 18th, 1996. A2. Also see Evelyn Iritani. "Boeing Likely Loser if US-China Talks Fail." LA Times, February 24th, 1995. D1.

¹¹⁹Editorial. "Surprise! A Deal with China." Wall Street Journal, June 18th, 1996. A22.

¹²⁰Margaret M. Pearson. 2000. "China's Track Record in the Global Economy." China Business Review, January-February. Pearson points out that: "Direct pressure was not the only impetus for many of China's policy changes; liberalization also took place with an eye toward China's bid for eventual WTO membership. Chinese leaders recognized that they not only had to 'talk the talk' by promising changes at the negotiating table, they had to 'walk the walk' by introducing concrete policy shifts."

III. READING BETWEEN THE LINES: THE END OF AMERICAN UNILATERALISM

The second phase of intellectual property reforms in China has been of greater complexity than the period of domestic legal formalism initiated in 1978, and strongly influenced by foreign commercial interests, especially MNCs. In a first attempt to further reform its intellectual property regime, the Chinese leadership and bureaucracy worked together to draft, promulgate and amend key legislations at the beginning of the 1990s.¹²¹ However, since these reforms lacked the necessary institutional foundations to ensure effective enforcement, their scope of protection remained ambiguous and their application unsatisfactory. Moreover, as China became an important player in international trade and its commercial relations with the US increased, a group of US-based software, pharmaceutical and entertainment industries (IPR lobby) realized the enormous losses that widespread piracy was causing to their potential economic benefits in China, and therefore decided to take action.¹²² It is important to note that these groups were not totally homogenous as often depicted in the literature. They certainly agreed on the necessity to ensure intellectual property rights protection worldwide, but differed on the strategy to achieve their ultimate goal.

The first front, more pragmatic and less threatened in the short-run by counterfeiting and piracy, started a multilateral strategy during the 1980s and pushed hard to include intellectual property rights in the Uruguay Round.¹²³ The second front, more vulnerable to piracy in the short-run because of the relatively low costs that piracy implied for infringers, decided rather to act domestically and shape the content of American trade policy by lobbying intensely both the Congress and the office of the USTR.¹²⁴ In regards to the role played by the IPR lobby as a whole, the literature often implies a certain correlation between MNCs inputs or interests and foreign trade policy formulation and application in the US.¹²⁵ Undoubtedly, the influence of MNCs and IPR trade associations (through their contacts in Congress and their role as providers of updated information to the USTR) is undeniable and has been largely demonstrated in this chapter. However, we strongly contest the idea that this correlation was mechanically applied to China by the USTR without any other "particular" considerations. To put it differently, it is possible that the IPR lobby was genuinely preoccupied by the lack of enforcement worldwide, but evidence suggest (both in their internal documents and their interventions in Congress) that "commercial" considerations were paramount and did not take into account factors like the feasibility or applicability of imposing US standards to an emerging legal system in China.

¹²¹See Alford. 1995; and Oksenberg, Potter, and Abnett. 1996

¹²²Michael P. Ryan. 1998.

¹²³Duncan Matthews. 2002. Globalizing Intellectual Property Rights. London: Routledge

¹²⁴Idem.

¹²⁵Bayard and Elliot. 1994. Mundo. 1999. Duncan Matthews. 2002.

Therefore, the question of market access emerges into our analysis as a political and economic incentive for these firms to put pressure on the USTR so that aggressive trade diplomacy could be applied to China. On one side, these MNCs saw a great potential in China because of its large number of consumers. On the other side, we also think that these corporations were somewhat distrustful of the willingness of Chinese officials to put forward "effective reforms" and favored a more aggressive approach bilaterally while working hard to obtain a binding agreement multilaterally at the same time. It is also important to keep in mind that the main short-term objective for MNCs in supporting USTR's unilateral pressures was to fight copyrights violations. Interestingly, this type of violations only affect the producer (MNCs) and much less the consumer (Chinese citizens and tourists).¹²⁶ Certainly, patent and trademark violations were still a central issue during bilateral and multilateral negotiations, but perhaps less urgent, taking into account that the misuse of patents and trademarks implies labor-intensive methods of production and generally require the possession of advanced technologies in order to obtain high quality and safe copies.¹²⁷

Furthermore, some basic economic indicators suggest that market access was certainly among the top priorities/objectives that MNCs had in mind while pushing for intellectual property enforcement in China. In the 1990s, the increasing cosmopolitanism in coastal areas and the size of its population makes China a very attractive market for industries selling internationally, and especially those selling products or services targeting emerging middle classes.¹²⁸ Especially in eastern and central regions where the GDP per capita is relatively high compared to the national average,¹²⁹ middle classes and entrepreneurs whose demand for luxury and conspicuous consumption goods is relatively inelastic¹³⁰ are naturally more open to the introduction of American pop culture and software novelties.¹³¹ Compared to their national counterparts, habitants of coastal regions also possess a higher purchasing power,¹³² therefore are more prone to buy "original" products. Finally, if we take into account the relatively small amount of players

¹²⁶ Taking into consideration the relatively low cost of technology used to reproduce illegal software and audiovisual equipment, copyrights are much more vulnerable to piracy than patents and trademarks because the cost/time factors are significantly low compared, to say manufacture a fake Gucci bag or develop a similar product to treat HIV.

¹²⁷ Duncan Matthews. 2002. Globalizing Intellectual Property Rights. London: Routledge

¹²⁸ Since 1998, Far Eastern Economic Review publishes a serie on China's Elite. Nury Vittachi. "Consumer wars rage" Far Eastern Economic Review. December 19th, 2002. pp.51-56. Vittachi says: "China's elite aren't completely divorced from the rest of the world. Like many others, their consumerist fantasies see them with Rolex on their wrist, and a German car in their garage."

¹²⁹ "Per Capita GDP Per Province" China Statistics Yearbook 2001. For example, in coastal regions, we find GDP per capita above (US\$3000-5000) the national average (US\$900). In central and western regions, the GDP per capita are similar or way below the national average (US\$300-900). For further analysis on the meaning and implications of regional disparity in China, see Chi Hun Kwan. 2002. "Redressing China's Regional Disparity Problem: Labor and Capital Mobility Hold the Key." China in Transition. Research Institute of Economy Trade and Industry. Tokyo, Japan.

¹³⁰ In microeconomics, demand for an x good is said to be relatively inelastic when relatively large changes in prices cause relatively small changes on demand. In other words, quantity is not very responsive to price.

¹³¹ "Good Things From Outside" Far Eastern Economic Review October 18th, 2001. "Which products are well-heeled Chinese citizens most likely to buy from overseas sources? The surveys indicate that telecommunications items, consumer electronics, insurance and cars." Surprisingly, we find three intellectual property-based industries in the top four of foreign goods consumed by mainlanders.

¹³² "Per Capita GDP Per Province" China Statistics Yearbook 2001.

in the Chinese market during the early 1990s and even before its accession to the WTO, it becomes more attractive for American MNCs to enter when competition is low. Therefore, there is no doubt that beyond legal concerns, commercial interests were key motives for MNCs to deploy their diplomatic armies, both domestically and internationally.

Second, although it has been showed that intellectual property rights protection occupied a relatively high importance in the Chinese reformist agenda during the 1990s, the organization and division of responsibilities within the state apparatus clearly highlights the inherent ambiguity of the top leadership's commitment.¹³³ The ambiguous position of Chinese leaders can be resumed as follows: none of them openly opposed legal reforms, but clearly no leader ever mentioned his desire to fight politically for adequate enforcement of intellectual property reforms, let alone make it a top priority in the reformist agenda. Instead, key reforms were delegated to five leaders that, ironically, are not members of the Standing Committee of the Politburo, "where the highest issues are resolved."¹³⁴ Despite their impressive professional record and their prominent position within the Chinese bureaucratic apparatus, these leaders lacked the political stature to make of intellectual property protection a top priority. They were certainly very knowledgeable and made great contributions to China's second phase of reforms, but their initiatives were highly restrained by bureaucratic organization and internal hierarchies. As we have seen, the agency in charge of copyright enforcement (SCA), was greatly restricted by the CCP Propaganda Department.¹³⁵ Similarly, MOFTEC's sphere of influence and policy making capacity was limited by a dozen of government agencies inside the IPR Working Conference.¹³⁶ The fact that intellectual property reforms did not become a top priority in the Politburo's agenda undoubtedly created a sense of fluidity and relaxation in bureaucratic circles rather than contributing to the establishment of a reliable and effective system of enforcement. Despite concrete action to remedy internal structural problems of China's legal system, the second period has confirmed that legal formalism was still dominant in China and that the system itself lacked the bureaucratic capacity and national scope to properly implement the law.

In that sense, the distrust of MNCs towards Chinese authorities can be easily supported and perhaps justified by the lack of human, political and financial capacity accorded to the IPR Working Conference and its implementing agencies.¹³⁷ As widely recognized, these institutional limitations posed

¹³³Oksenberg, Potter, Abnett. 1996.

¹³⁴Idem p.18 "In the IPR area, five leaders play crucial roles. State Councilor Song Jian is director of the State Science and Technology Commission (SSTC), whose portfolio includes the China Patent Office. Song is an internationally renowned scientist and experienced science administrator. Ren Jianxin is head of the Supreme Court and oversees the entire political-legal system that includes the Ministry of Public Security, the Procuracy, the Ministry of Justice, the Ministry of Civil Affairs, and the court system. Vice Premier Li Lanqing, who represents the foreign trade bureaucracies in high-level deliberations, is responsible for the Trademark Office and is deputy director of the IPR Working Conference. Finally, Ding Guang'en and Li Tieying, because of the roles in the CCP Propaganda Department, represent the State Press and Publications Administration, and hence the SCA."

¹³⁵Oksenberg, Potter and Abnett. 1996.

¹³⁶Idem.

¹³⁷Idem.

serious obstacles to implementation, especially in regions where the full application of intellectual property laws is not a political or economic incentive for local officials. There is no doubt that MOFTEC played an important role in negotiating with USTR officials, but given the complex and heavy bureaucratic structure in which MOFTEC evolved, it became extremely difficult for its bureaucrats to exercise any leadership, let alone to coordinate and implement enforcement.

In regards to the IPR lobby, we can conclude that it obtained a double victory. On one side, copyright-based industries succeeded in shaping the USTR agenda and secured important concessions from central government officials, more particularly in terms of “concrete” actions to ensure enforcement of existing IP laws. In a sense, it can be said that implementation efforts were a foreign-driven departure from pure domestic legal formalism. On the other, due to intensive pressures in GATT negotiation rooms,¹³⁸ the TRIPS agreement finally became a binding component of the World Trade Organization (WTO) and marked the beginning of a multilateral approach to solve trade conflicts among member-states, putting end at the same time to an old trade system based on consensus and diplomatic efforts.¹³⁹ This was certainly a crucial political gain for MNCs because China’s accession to the WTO was considered by many highly profitable and constructive in the long run.

By extending our analytical framework to the international scene, it is important to take into account, not only the consensus that existed among developed countries on the importance to include intellectual property rights in the GATT agenda, but also the role played by MNCs in creating the consensus in the 1980s. Although China was already a player for international trade and important market for MNCs in the early 1990s, the emergence of intellectual property rights in multilateral trade talks clearly influenced the IPR lobby strategy and Chinese officials responses in two ways.

First, MNCs realized that as long as the trade system would not respond to their needs or interests (this was the case before TRIPS), they seemed obliged to use all available means to push and protect their rights, even if their strategy would conflict with the emergent spirit of multilateralism. At the same time, MNCs understood that multilateralism, especially if combined with the a rules-based system, could be potentially very effective in forcing its members to provide adequate protection of intellectual property rights. As a matter of fact, it is widely recognized that aggressive unilateralism produced ambiguous and counterproductive results¹⁴⁰ and was certainly not the most productive neither more

¹³⁸ G.E. Evans. 1994. “Intellectual Property as a Trade Issue: the Making of the Agreement on Trade-Related Aspects of Intellectual Property Rights” *World Competition*. vol.18 no.2. pp.137-180

¹³⁹ Gilbert R. Winham. 1992. *The Evolution of International Trade Agreements*. Toronto: University of Toronto Press. Winham explains that: “The GATT is (was) an international agreement, and the participants in GATT are ‘contracting parties’ and not ‘members’ of an organization. The GATT operates on the basis of consensus (that is, all nations possess a veto) both in multilateral negotiations and in meetings of GATT committees and working parties.” p. 65

¹⁴⁰ Critiques to US aggressive trade diplomacy/unilateralism are found in William P. Alford. 1995. Warren H. Maruyama. 1999. Peter K. Yu. 2002. and Jagdish Bhagwati and Hugh T. Patrick (eds.) 1990. *Aggressive Unilateralism: America’s 301 Trade Policy and the World Trading System*. Ann Arbor: University of Michigan Press. For an American perspective on how US (aggressive) trade policy was formed, see Philip A. Mundo. 1999. *National Politics in a Global Economy: the Domestic Sources*

effective way to deal with piracy in NICs. In regards to China, a rules-based multilateral system promised to be the ultimate remedy to a cycle of endless negotiations, numerous trade sanctions and enormous financial resources directed into lobbying efforts that only produced mitigated results. Consequently, as evidence shows, American commitment to multilateralism was well in place while aggressive trade diplomacy was being applied in China by the USTR.

So far, we have seen that great improvements in intellectual property enforcement were experienced in China during the early 1990s, and not surprisingly, short after USTR aggressive diplomatic strategy. Nonetheless, it should be clear that not all laws were at the center of the combative/reactive trade diplomacy practiced by both MOFTEC and the USTR. As the MNCs strategy confirms, copyrights were a very delicate and explosive issue that required, according to Motion Picture Association president Jack Valenti, "immediate attention."¹⁴¹ In fact, this was the main focus of all negotiations. As previously mentioned, the Patent and Trademark components of the IPR lobby decided to take the multilateral path and contributed to generate a sort of global corporate consensus in favor of TRIPS inside the GATT negotiation rooms. As shown in the first section of this chapter, the Chinese state (Standing Committee of the Politburo, IPR Working Conferences, MOFTEC, administrative agencies) contributed substantially to the evolution of China's intellectual property regime through the drafting of a Copyright law and the amendment of both trademark and patent laws. This phase also confirmed that IP issues became increasingly embedded in the Chinese bureaucracy.

Furthermore, evidence indicates that enforcement was rather accompanied by strong diplomatic pressures through the USTR, under the leadership of the MNCs. As this chapter has demonstrated, corporate actors have been astute negotiators and strategists through the formation of domestic coalitions with global ambitions using American trade law for short term objectives and concluding strategic partnerships with European and Japanese interests to push for a rules-based multilateral system that includes intellectual property protection as a trade issue.

The immediate losers of China's intellectual property reforms have been local officials, owners of large factories in the piracy business and ironically enough, some administrative agencies in charge of enforcement. Owners of large factories generally disapproved Beijing efforts to put forward enforcement by conducting massive raids and anticounterfeiting campaigns. In many cases, they were well protected by local officials¹⁴² Moreover, since the inflicted penalties and levels of enforcement remained relatively of US Trade Policy. Georgetown: Georgetown University Press.; Thomas O. Bayard and Kimberly Ann Elliott. 1994. Reciprocity and Retaliation in US Trade Policy. Washington DC: Institute for International Economic.

¹⁴¹ Motion Picture Association of America. "Valenti Praises China in war Against Piracy but Urges Further Action to stem Growing Problem" Press Release. November 29, 1995. "Testifying before the Senate Subcommittee on East Asian and Pacific Affairs, President Jack Valenti told Members of the US Senate that immediate action should be taken by the Chinese government against illegal CD/VCD/CD-ROM manufacturers."

¹⁴² Seth Faison. "Copyright Pirates Prosper in China Despite Promises" NY Times. February 20th, 1996. "Although a few compact disk factories were finally suspended by Chinese government officials last year, no one has been prosecuted, nor has a business license been revoked. In fact, it is increasingly evident that pirates are protected by powerful forces - military, secret

low, owners and distributors seemed to gain from the inherent flaws associated with each law, and were tempted to pursue their illicit activities. Despite the fact that factory owners were financially affected by central government-sponsored raids, especially in southern coastal regions, these entrepreneurs still benefited from the lack of state presence and central policy application in many localities.¹⁴³ Not to mention that the problem of enforcement was aggravated by the unwillingness of the populace to buy original copies at international prices.¹⁴⁴ Part of the problem in implementation has been the little room for maneuver and lack of resources granted to the SCA after the promulgation of the Copyright Law and the Software Computer Protection Legislation. Placed under the authority of the CCP Propaganda Department, an important bureaucracy responsible of the central government public relations, the SCA has remained very ineffective and its presence in southern and central regions is still limited.¹⁴⁵

It must be clear, however, that neither MNCs nor the USTR were directly involved in the drafting, implementation or enforcement of intellectual property laws in China during the 1990s. During the period of aggressive trade diplomacy, IBM was quite involved in providing 'technical' advice on how to proceed with enforcement to central, provincial and local officials.¹⁴⁶ The State Council, the five leaders in charge of drafting and the IPR Working Conference provided valuable insights and contributed substantially to the content and form of newly drafted and amended laws.¹⁴⁷ Yet the Standing Committee of the Politburo never took intellectual property reforms under its arm as they did with SOEs reforms or WTO accession.¹⁴⁸ It is possible then to suggest that intellectual property rights were only a component of the liberalization package and no particular attention was attributed to it among the top leaders. The processes of drafting and implementation were seriously diluted inside the Chinese bureaucratic apparatus and automatically approved by the top legislature.

From, it is possible to say that the second phase of IP reforms in China has been reinforced by a global corporate consensus seeking the entrenchment of their economic rights within the WTO legal architecture. This consensus was orchestrated at different institutional levels, taking advantage of the permeability offered by organizations such as the USTR and the GATT, as well as their economic leverage as job-creators at home and abroad. Another important element to consider is the strong free-trade agenda in place during the Clinton era and the marginalization of human rights issues between

police, organized crime - which the central government has failed, or simply declined, to rein in."

¹⁴³ Steve Lohr. "Pirates are Circling the Good Ship Windows 95" *NY Times*, August 24, 1995. "Microsoft, working with police in several countries, filed suit against the Shenzhen Reflective Materials Institute in China's Guangdong province, which was illegally churning out Microsoft Holograms. Papers seized in a police raid on the factory, the counterfeiters were prosecuted by the Chinese government, but their punishment was a mere US\$5000 fine." p.3

¹⁴⁴ It must be noticed that similar behaviors are observed in other developing countries. For example, why would a low-middle-income households buy the latest Madonna's album (US\$13-17 retail price in North America), when his/her weekly income is about US\$120?

¹⁴⁵ Oksenberg, Potter, and Abnett. 1996.

¹⁴⁶ Idem

¹⁴⁷ Idem

¹⁴⁸ Joseph Fewsmith. 2001. *Elite Politics in Contemporary China*. ME Sharpe

the US and China. On the other side, it must be noted that the emergence of intellectual property rights in international trade negotiations has become particularly crucial in the case of China, a globally ambitious rising economy trying to gain a seat inside the WTO. With the approval of TRIPS, China had no choice than to show signs of compliance before its accession.

CONCLUSION

This chapter has unveiled a key element of our initial puzzle and has further supported our central argument. First, we have found that despite the continuous efforts made by MNCs to defend their economic rights in different battlegrounds, the initiators of reforms are based in Beijing, more particularly within its bureaucratic apparatus and share a reformist-pragmatic ideology while pushing for China's global integration in different economic forums. Second, we have seen that the MNCs, essentially corporate actors representing a variety of private interests, but well connected with traditional political circles, have used American trade law, the USTR and their international contacts to push for intellectual property protection in NICs and LDCs. This battle was divided in two fronts. The first has been bilateral, short-term, involved mainly copyright-based industries and favored bilateral (unilateral) means to ensure enforcement. The second group preferred multilateralism, had a long-term perspective and involved a larger number of intellectual property-based industries.

In short, we conclude that better levels of enforcement and concrete actions on the part of Chinese authorities were greatly influenced by American aggressive trade diplomacy as the three agreements between the two countries testified, as well as Chinese responses. It must be clear, however, that the promulgation of legal reforms are the result of a widespread commitment at both the leadership and bureaucratic levels to market liberalization and global economic integration. The victory of reformists has clearly helped in China's efforts to improve its intellectual property regime.

CHAPTER V

Third Phase of Reforms

CHINA EMBRACES INTERNATIONAL LEGALISM: WTO AND TRIPS

The development of China's intellectual property regime in the early 1990s focused primarily on the implementation of laws respective of international treaties and standards, and the creation of more effective administrative institutions at the provincial and local levels. In our previous chapter, we have concluded that China's efforts to enforce the law was greatly affected by American retaliatory unilateralism through the USTR, and constrained by its desire to join the World Trade Organization (WTO). We have also observed the emergence of a new and powerful variable: the adoption of a multilateral agreement on intellectual property rights within the WTO legal framework: the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). This newly adopted document would come to represent "a complex balance between conflicting national perspectives and international interests with respect to the protection of intellectual property rights"¹ and to "guarantee high levels of substantive protection to foreigners."²

In comparison with the second period of reforms in which aggressive trade diplomacy and US unilateralism were the framework used by the most active of intellectual property-based industries to push for improvements in IPR protection, the third phase of amendments in China's intellectual property regime can be termed as overly technical and essentially minor if compared to the early 1980s and 1990s reforms.³ In short, these amendments did not provoke any ideological struggles at the leadership level that could have threatened their promulgation at the National People's Congress (NPC). In addition, a period of intensive combative/reactive bilateral relations was to come to an end officially in 1997.⁴ This

¹ Michael J. Trebilcock and Robert Howse. 1995. *The Regulation of International Trade*. London: Routledge. p.264

² Christopher Arup. 2000. *The New World Trade Organization Agreements: Globalizing Law Through Services and Intellectual Property*. Cambridge: Cambridge University Press. p.177.

³ Scott J. Palmer. 2001. "An Identity Crisis: Regime Legitimacy and the Politics of Intellectual Property Rights in China" *Indiana Journal of Global Studies*. Spring.

⁴ Peter K. Yu. 2001. "From Pirates to Partners: protecting Intellectual Property in China in the Twenty-first Century" *American University Law Review*. vol.50. Professor Yu explains that: "After exchanging views on the international situation and China-US relations in a bilateral summit, the two presidents issued a joint statement, proclaiming that a sound and stable relationship between the United States and China serves the fundamental interests of both American and Chinese people and is important in fulfilling their common responsibility to work for peace and prosperity in the 21st century." p.15

third and last phase evolved within a rules-based multilateral trade regime in which intellectual property rights became a nontraditional trade issue subject to compliance. Finally, this phase illustrates the nature and framework in which China establishes diplomatic and trade relations in a complex and increasingly heterogeneous international system where commercial-driven interests tend to overshadow domestic political processes and where economic policy "imperatives" tend to exclude normative debates on democracy and social needs. Furthermore, this phase can be considered an affirmation of China's role as a major economic player and a new member-state of the WTO.

Particularly in the year preceding China's accession to the WTO, legislative activity accelerated in the National People's Congress (NPC) with the objective to conform with TRIPS minimum requirements and deadlines.⁵ After a long and consuming process of bilateral negotiations with its largest trade partners (United States, European Union and Japan), as well as with other 34 world economies⁶, China agreed to make the necessary concessions to join the current multilateral trade regime and its efforts were finally recompensed at the Doha Ministerial Conference in November 2001 where member-states of the WTO approved China's accession.⁷

This latest phase in the evolution of China's intellectual property regime can be considered a new departure towards a legalistic approach based on multilateralism. By accessing the WTO framework, China embraces a trade system that specifies rights and obligations attached to membership and emphasizes principles of nondiscrimination, reciprocity, enforceable commitments, transparency and safety values. Consequently, it would be mistaken to conclude that China's efforts to reform its intellectual property regime has been solely the result of a national economic policy⁸ supported by a reformist leadership and technocrats or even the global ambitions of knowledge-based MNCs and creative industries in the US.⁹ The integration of China into a multilateral trade system governed by the "rule of law" is part of a so-called "global consensus"¹⁰ that affects not only Newly Industrialized

⁵ Nan Xianghong. *Interview*. <www.sinopolis.com/Archives/TOPSTORY/ts_011107_04.htm> According to Li Shun De, Vice-director of the IPR Centre at the Chinese Academy of Social Sciences (CASS), "more than 2000 laws and regulations have been reformed through the State Council. Of these, 830 have been abolished and 325 modified. Similarly, the Ministry of Foreign Trade and Economic Cooperation (MOFTEC) revised 1413 laws and regulations at the beginning of 2001, including 6 laws, 163 administrative legal regulations, 887 departmental regulations, 191 bilateral trade agreements and 72 bilateral investment protection agreements. Finally, the National People's Congress (NPC) has modified 140 laws and abolished 570 laws and regulations."

⁶ These countries include: Argentina, Australia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Czechoslovakia, Ecuador, Guatemala, Hungary, Iceland, India, Indonesia, Kirghizstan, Latvia, Malaysia, Mexico, New Zealand, Norway, Pakistan, Peru, Philippines, Poland, Singapore, Slovakia, South Korea, Sri Lanka, Switzerland, Thailand, Turkey, Uruguay, Venezuela.

⁷ Joseph Kahn. 2001. "World Trade Organization Admits China, Amid Doubts" *New York Times*. November 11. Page A1

⁸ Joseph Fewsmith. "China and the WTO: The Politics Behind the Agreement." *NBR Analysis*. December 1999. Vol.10. no.5

⁹ Peter K. Yu. 2002. *World Trade, Intellectual Property and Global Elites*. Boston: Kluwer Law International.

¹⁰ Duncan Matthews. 2002. "Trade-Related Aspects of Intellectual Property Rights: Will the Uruguay Round Consensus Hold?" *Centre for the Study of Globalization and Regionalization. 5th Annual Conference. University of Warwick March*. Matthews explains that: "...developing countries made little contribution during the formulation of the TRIPS agreement, save for adopting an early negotiating strategy stating a preference for WIPO over GATT as the most appropriate forum for discussing intellectual property rights." p.21

Countries (NICs), but also underdeveloped countries in all continents. This shift is also confirmed by the formal inclusion of intellectual property rights as component of the WTO framework.

This chapter will seek to confirm our initial thesis within the particular context of multilateral legalism. Our central argument goes as follows: *The evolution of China's intellectual property regime in this third period has been (1) reinforced by the inclusion of intellectual property rights in the rules-based multilateral WTO legal framework; (2) conducted mainly by a new elite of top bureaucrats willing to embrace the integrationist agenda of a reformist-pragmatic leadership, and (3) more than ever constricted by the norms, rules, principles and internal functioning of the post-GATT world trade system.* Second, it will attempt to clarify the following puzzle: *why did China accept to continue the development of its intellectual property regime within the highly legalistic and binding WTO framework?* Furthermore, in a more general perspective, this chapter will also argue that *the politics behind China's intellectual property reforms are rooted in the aggregation of economic interests in the international sphere that indirectly intervene in the agenda-setting of trade-related ministries, national legislative bodies and administrative agencies through supranational institutions in charge to regulate international trade, and largely insulated from public scrutiny.* A set of questions will guide our discussion: *Which domestic/international forces are pushing for intellectual property reforms in China in the late 1990s? Which institutions/mechanisms do they use to achieve their interests? Which forces behave as mediators, enablers or architects of reforms?*

I. TOWARDS COMPLIANCE: LATE 1990s REFORMS

The latest amendments to China's intellectual property laws have not involved significant debate in political circles. As Fewsmith has observed, the multi-arena debates have rather concentrated on the conditions and impact of China's accession to the WTO and its often tumultuous relationship with the US.¹¹ Nonetheless, it is fair to say that intellectual property protection has been treated as "just another" component of domestic legal reforms and a formal requirement to enter the WTO. Evidence shows that political debate has remained minimal around the issue of intellectual property reforms since 1997 and has rather attracted the attention of legal scholars and specialists of international trade and intellectual property.¹²

¹¹ Joseph Fewsmith. 1999. "China and the WTO: The Politics Behind the Agreement." Fewsmith explains: "Chinese leaders in favor of China's greater integration into the world economy were thrown on the defensive in April 1999 by the US rejection of China's unprecedentedly forthcoming offer for joining the World Trade Organization (WTO) and by the bombing of Chinese embassy in Belgrade in May. The events of April and May raised the WTO issue from the already difficult arena of bureaucratic politics to the often brutal realm of elite politics. Although Premier Zhu Rongji bore the brunt of public criticism, President Jiang Zemin similarly came under attack by nationalistic opposition leaders for "selling out the country" and being soft on the United States."

¹² For a useful economic analysis, see Nicholas R. Lardy. 2002. *Integrating China into the Global Economy*. Washington DC: Brookings Institution.; For political-legal analysis, see Peter K. Yu. 2001. "From Pirates to Partners" Charles Baum. 2001.

In political terms, this might pose a problem since our final objective is to explain why a certain political outcome arose and which are the forces behind those changes instead of simply *describing* the legal implications of reforms. In the pre-WTO era, low levels of dissent inside the top legislature (NPC), lack of substantial debate at the leadership level and insignificant yet regular turf struggles within China's bureaucracy should not be surprising.

First, because the National People's Congress (NPC) and its Standing Committee remain spheres in which lawmaking processes are undertaken and debated but their political role is still limited compared to the State Council, its subordinate committees, ministries and bureaus.¹³ The top Chinese legislature gladly fulfills its role of rubber stamp, at least in the field of IPR legislation, and seems to become the stage of political struggle only when legal reforms affect crucial domestic interests like previously observed by Tanner.¹⁴ In that sense, the NPC and its Standing Committee do not offer a powerful counterbalance to the executive power, and therefore the Standing Committee of the Politburo, the State Council and its ministries tend to remain largely unchecked on a day-to-day basis. The problem of an independent judiciary also exacerbates the lack of checks and balances within the system and consequently, amendments and implementing regulations are often intended to provide more precise instructions to lower levels¹⁵ rather than creating constructive debates.

Second, the Zhu Rongji-Jiang Zemin tandem was particularly effective in pushing for the completion of WTO negotiations and have, although indirectly,¹⁶ supported intellectual property reforms and compliance with TRIPS leaving most of the drafting and enforcement to certain ministries¹⁷ and agencies¹⁸ under the leadership of the State Council. Third, despite the bureaucratic struggles between provincial and central branches, no major or politically significant struggle has been reported. Internal struggles seem to vary depending on which issue is at stake, which ministries are involved and when. It is important to notice that in the last phase, MOFTEC has become a relatively powerful ministry as China's chief representative in the WTO negotiations.¹⁹ More important, it has been a key driving force in promoting Zhu Rongji's trade liberalization agenda.²⁰ Leaving enforcement to China's specialized agencies and taking advantage from its position within the bureaucracy (under the authority of the State

Duncan Matthews. 2002.

¹³ Murray Scot Tanner. 1999. p.120

¹⁴ Idem p.120

¹⁵ Idem p.129

¹⁶ Most of the times, these two leaders made speeches or comments in favor of intellectual property protection, but have never tackled this particular issue with the same attention that SOEs reforms or WTO negotiations.

¹⁷ For example, MOFTEC

¹⁸ For example, the State Intellectual Property Office,

¹⁹ Heike Holbig and Robert Ash. (eds.)2002. Accession to the World Trade Organization: National and International Perspectives. 2002. London: Routledge. p.24

²⁰ Idem. p.25

Council), MOFTEC has not confronted any real obstacle in pushing for the top leadership's reformist agenda while at the same time broadening its agenda in support of China's long-run national interests.

The implications behind China's WTO accession has been widely debated in the current literature. Yet no analysis has clearly attempted to explore the "interlocking force of domestic and international forces."²¹ It is undeniable that MNCs were important stakeholders in the process of negotiations that led China to become a member-state of the WTO. Yet the sector-specific nature of IPR issues comes to eclipse the politics behind reforms. Given the secondary role that intellectual property rights protection played in the political arena, we can conclude that the latest amendments were just another issue in the WTO legal package. For the purpose of our central argument, the third generation of reforms is worth analyzing because of the many insights it provides regarding China's willingness to integrate the global economy under legalist and multilateral terms. It is also an indication that the dominance of ideology in China's policy-making has been expelled and replaced by a post-Deng approach based on pragmatism, technocracy and free-trade economics.

China's efforts to reform its intellectual property regime in order to comply with the TRIPS agreement should be considered significant for two reasons. First, they surpass China's previous multilateral commitments by embracing a legal framework that requires respect of predefined and legally entrenched international standards and enforcement procedures. Clearly, this was not the case during the two previous periods. Second, the importance of this period arises from the fact that these amendments are tied, for the first time in the post-Mao era, to international binding agreements rather than domestic initiatives or unilateral pressures from powerful trade partners, and are conditional to China's accession to the World Trade Organization (WTO). It is important to note that in the post-WTO era, the reformist agenda at the leadership level and the balance of power inside the bureaucratic apparatus will be largely shaped and constrained by so-called imperatives of trade: reciprocity, nondiscrimination, binding and enforceable commitments and transparency.

A. Intellectual Property Reforms in the pre-WTO era

China's intellectual property regime has been slowly built since 1978 and domestic legal formalism has generally prevailed in both its drafting and application. However, the latest amendments to China's major laws (copyright, patent, trademark) are rather technical and focus mainly on enforcement procedures.

Laws and Regulations

As described in chapter 4, the field of copyright has been a contentious issue opposing American and Chinese trade diplomacy armies in the early 1990s. In 2000, the National People's Congress (NPC)

²¹Expression used by Holbig and Ash. 2002

approved new amendments²² to the Copyright Law and revisions took effect immediately after its publication in October 2001. Additionally, the State Council promulgated a new Computer Software Protection Act²³ in which it specifies several new rights of computer software including leasing, transmitting, disseminating and translation rights for authors. The more recent amendments to the Patent Law took effect on July 2001 after a period of revision at the National People's Congress (NPC) in 2000. In general, the amendments focused more on improving the effectiveness of application and enforcement procedures, and also the simplification of administrative procedures of application.²⁴ Finally, the National People's Congress (NPC) ratified the amended Trademark Law on October 2001. In essence, the new amendments covered only items required to comply with the TRIPS Agreement.²⁵ The new Implementing Regulations of the Trademark Law came into force on September 2002.

Additionally, the State Intellectual Property Office (SIPO) officially replaced China's Patent Office in 1998. The office of SIPO conducts research on IPR protection and coordinates the work of other administrative agencies²⁶ carrying powers of investigation, raiding, confiscation and destruction of infringing goods. Five main departments conduct the different operations in which SIPO is involved: the General Affairs Office, the Legal Affairs Department, the International Cooperation Department, the Coordination and Administration Department and the Planning and Development Department. From these, the Legal Affairs and International Cooperation Departments have been particularly active in

²²The amendments contain (1) revisions and additional provisions to bring the law in closer conformity to TRIPS and the Berne Convention, (2) enhances copyright and enforcement, (3) and enlarges the scope of remedies in case of violation. It is also the first time that the PRC Copyright Law addresses Internet-related issues. Some practical examples of changes include a special power granted to courts to order confiscation of illegal gains and pirated copies, and a provision that places the burden of proof on the accused to prove it has obtained a legitimate license. Moreover, in an effort to build the new copyright regime according to the "rule of law", the new amended law encourages arbitration as an alternative to direct litigation among parties, and includes a reference to China's law as a basis for fulfillment of parties' obligations. A legal analysis can be found at Baker & MacKenzie - Intellectual Property Group. PRC - Copyright Law Implementing Regulations Issued. September 2002. Hong Kong.

²³The Act extends the protection period and explains that software registration is no longer a prerequisite for initiating litigations proceedings. For example, an individual software developer may keep his copyrights for life, and it will continue 50 years after his death. See Wang & Wang. New Computer Software Protection Act. <www.wangandwang.com/news4.htm#76>

²⁴For a complete legal analysis, see Vivien Chan. 2002. "New IPR Laws in the PRC to Accord with WTO Accession." China International Economic and Trade Arbitration Commission and Shenzhen Arbitration Commission. China-Appointed Attesting Officer. March. Also see Jiwen Chen. 2001. "The Amended PRC Patent Law" China Business Review. July-August.

²⁵The key areas of amendment are: (1) registration, (2) well-known trademarks, (3) counterfeiting, (4) enforcement, (5) judicial review, and (6) contestability and cancellations. Perhaps the most important feature tackling directly international complaints is the provision that enlarges and defines protection for famous marks. First, the amended Law determines what is "a famous mark" by using the following criteria: degree of recognition by the relevant public, length of time the trademark has been in use, geographical area and duration of promotional activities, and recording of protection as a famous mark with local AICs. Second, it tackles the issue of enforcement by providing clear guidelines on application, statutory damages and compensation, as well as confiscation and transfer of criminal cases to judicial authorities. In addition, there are now provisions punishing government officials who abuse their authority when enforcing the Trademark Law. See Vivien Chan. 2002. "New IPR Laws in the PRC to Accord with WTO Accession." China International Economic and Trade Arbitration Commission and Shenzhen Arbitration Commission. China-Appointed Attesting Officer. March. See also: CCPIT Patent and Trademark Office Law Office: <www.ccpit-patent.com.cn/News/2002090601.htm>

²⁶These agencies include: Administration for Industry and Commerce (AIC), Technical Supervisory Bureau (TSB), Public Security Bureau (PSB), Customs, Courts, the Patent Office and the Trademark Office.

providing advice and cooperating with international regulatory bodies such as the World Intellectual Property Organization (WIPO).²⁷

B. International Legalism: Framework and Institutions

The third generation of intellectual property reforms in China has been more than ever tied to the current rules-based multilateral trade system. Compared to a period relatively closed from foreign influence (domestic legal formalism) and a more tortuous in which foreign commercial interests strongly influenced improvements to enforcement (aggressive trade diplomacy), the third period of reforms coincides with the assertion of multilateral binding agreements to regulate trade at the international level. For analytical purposes, a brief overview of the WTO and its agreement on intellectual property rights protection (TRIPS) will follow.

A rules-based multilateral institution: the World Trade Organization (WTO)

The legal corpus of the World Trade Organization includes three important agreements: the General Agreement on Tariffs and Trade (GATT) covering goods, the General Agreement on Trade in Services (GATS) covering services, and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) covering Intellectual Property.²⁸

In principle, the WTO is built upon a neoliberal ideology²⁹ aiming a substantial opening of the international trade system by the reduction of tariffs and non-tariff barriers for goods and services, and the prevention of antidumping and anti-subsidy measurements for protectionist policies, and ultimately to open up markets. As opposed to the old GATT system, it demands its member-states to comply to all the WTO rules in a package mode and establishes a Dispute Settlement Body (DSB) which is given the power to adjudicate commercial disputes among member-states.³⁰ The DSB serves as a regulatory and enforcement body providing greater stability and predictability to international trade relations.

The establishment of such body (DSB) is particular significant because it tends to “depoliticize” trade issues by emphasizing the use of the rule of law in solving trade conflicts. In practical terms, the

²⁷For more details, see SIPO's website at <<http://www.sipo.cn.com>>

²⁸See WTO's website <<http://www.wto.org>>

²⁹Christopher Arup. 2000. The New World Trade Organization Agreements: Globalizing Law Through Services and Intellectual Property. Oxford: Oxford University Press. p.9 Arup puts it in the following terms: “*The WTO agreements can be linked to a neoliberal agenda of regulatory reform. The objective is not just to ease conflicts between foreign and local legalities but to promote efficient regulation around the world. This agenda extends beyond free-trade in the sense of breaking down barriers at the border. Its program for reform behind the border seeks to achieve two more ambiguous goals. It aims to ensure that markets are accessible to foreign, commercial suppliers while at the same time they are secure for their investments. There are different ways of characterizing this package of reforms. They can be seen as a blend between access and security, liberalization and control, free and fair trade, or deregulation and re-regulation.*”

³⁰Gilbert R. Winham. 1992. The Evolution of International Trade Agreements Toronto: Toronto University Press. p.65. Professor Winham explains that in fact, the GATT was considered a regime (not an international organization). Also, the participants in the GATT were ‘contracting parties’ and not ‘member-states’ like in the WTO. The GATT operated on the basis of consensus (all nations possess a veto) rather than a neutral dispute settlement mechanism whose rulings are binding.

existence of such regulatory body is expected to diminish the number of unilateral trade sanctions and favors a more rational-legal approach to solve trade disputes.

A legally binding agreement: Trade-Related Aspects of Intellectual Property Rights (TRIPS)

In international law literature, the TRIPS Agreement is often referred to as one of the three pillars of the WTO, binding on all its member-states,³¹ a “behind the border” agreement,³² and a key negotiation issue previous to China’s WTO accession in 2001.³³ In essence, the agreement addresses the applicability of basic GATT principles and those of relevant international intellectual property agreements, the provision of adequate intellectual property rights, the provision of effective enforcement measures for those rights, multilateral dispute settlement, and transitional arrangements.³⁴ It contains seven sections³⁵ and aims to establish uniform standards of protection across all developed and developing countries.³⁶ In terms of organization, the TRIPS Agreement includes a regulatory body (“the TRIPS Council”) that is responsible for monitoring the operation of the agreement and assesses how member-states comply with their obligations.³⁷

II. BEHIND THE SUPPORT FOR MULTILATERAL LEGALISM

Surprisingly, following the creation of a multilateral rules-based trade regime in 1995 and previous to China’s WTO accession in 2001, the official stance of the IPR lobby changed. Not only had this coalition supported China’s accession to the WTO, but it has also changed its tone regarding current intellectual property rights violations by applying less pressure on the USTR to practice unilateral tactics based on section 301 of US trade law. Today, the IPR lobby remains highly organized, heavily financed, increasingly specialized and strongly influent in both American soil and international spheres.³⁸ The main

³¹Christopher Arup. 2000. p.178

³²Idem p.8

³³Nicholas Lardy. 2002. p.100

³⁴ This definition is provided in the WTO’s website: <www.wto.org/english/docs_e/legal_e/ursum_e.htm#nAgreement>

³⁵Michael J. Trebilock and Robert Howse. *The Regulation of International Trade*. New York: Routledge. 1995. Trebilock and Howse affirm that TRIPS includes: “(1) a statement of general principles and of the interaction of the Agreement with the Paris and Berne Conventions; (2) substantive norms with respect to the protection of various forms of intellectual property; (3) obligations with respect to the domestic enforcement of intellectual property rights; (4) obligations with respect to the facilitation in domestic legal systems of the acquisition and maintenance of intellectual property rights; (5) dispute settlement; (6) transitional arrangements; and (7) a WTO-based institutional framework for TRIPS.” p. 264

³⁶Idem. 1995. p.273. The authors make an interesting suggestion: “...in fact, it allows for a balance to be struck between countries’ legitimate interests in limiting intellectual property rights for consumer welfare and economic and social development reasons, and the interests of their trading partners in sustaining adequate incentives for innovation.”

³⁷According to the WTO’s website, the TRIPS Council is a consultative forum for member-states that coordinates technical cooperation in intellectual property rights issues. It also conducts a general review of each member-state every five years. See <<http://www.wto.org>>

³⁸For example, the Business Software Alliance (BSA), which members are world’s leading software developers, (Adobe, Apple, Autodesk, Bentley Systems, Borland, CNC Software/Mastercam, FileMaker, Macromedia, Microsoft, Symantec, and Unigraphics Solutions) sponsors global summits, meets with legislators and government officials and provides technical

IPR Lobby associations continue to provide detailed and updated information to the USTR, presumably still influencing its internal deliberations and processes of agenda-setting. However, the implementation of TRIPS and multilateralism have transformed it into a less belligerent player. In the next section, an attempt to grasp the motivations or incentives behind a sudden peaceful multilateral attitude on the part of intellectual property-based MNCs will be explored.

The good old IPR lobby

Ever since the 1996 Action Plan, studies have often demonstrated that losses due to piracy and counterfeiting in China have continued to affect software developers and entertainment companies. According to IIPA's last annual report on piracy submitted to the USTR, American intellectual property-based corporations still suffer from illegal reproduction of software, retail piracy and trademark counterfeiting around the world. Clearly, the situation has not improved significantly if we compare it to the early 1990s. In fact, estimated trade losses in 51 of 64 countries analyzed amounted to over US\$8.3 billion in 2001 and global losses to the copyright industries are estimated at US\$21 billion³⁹.

Surprisingly, most of these powerful MNCs (mostly copyright-dependent) unanimously supported the Clinton administration during the bilateral negotiations it conducted with China previously to its accession to the World Trade Organization (WTO). On a different front, patent-dependent industries such as Pfizer and IBM expressed their satisfaction with the entrenchment of intellectual property rights as a central part of the global economic structure and joined the so-called China Lobby, a business coalition supporting the grant of PNTR status to China in the wake of WTO accession. As Edmund J. Pratt, CEO of Pfizer, claims: "The fight to protect patents, copyrights, trade secrets, and trademarks is essential not only to businesses but to individual inventors and nations and their economies."⁴⁰ Despite high levels of piracy and in the light of such counterintuitive outcomes, it is important to question the motivations or incentives that brought these longtime supporters of American

cooperation to ensure enforcement abroad. For more information, see website <<http://www.bsa.org>> In addition, the Computer Systems Policy Project (CSPP) and the Recording Industry Association of America (RIAA) assert that "the role of government, if needed at all, should be limited to enforcing compliance with voluntarily developed functional specifications reflecting consensus among affected interests. Technology and record companies agree to engage in constructive dialogue and look common ground in policy debates" CSPP's members are Dell, Intel, Hewlett-Packard, Motorola, NCR, IBM, EMC, Unisys. RIAA's members include BMG, EMI, Sony Music Entertainment, Universal Music Group and Warner Music Group. See websites: <www.cssp.org> and <<http://www.riaa.org>> Finally, the International Intellectual Property Alliance (IIPA) continues to submit comprehensive annual reports on detailed piracy rates around the world and estimated losses to the USTR, is engaged in "an ongoing effort to bring China and Taiwan's laws and enforcement regimes up to TRIPS levels of protection as required by the WTO." See <<http://www.iipa.org>>

³⁹ Found in IIPA's website at <http://www.iipa.com/pdf/2002_Jul11_Asia_LOSSES.pdf>. In the same report, the IIPA estimates that copyright piracy in the Asia Pacific region oscillate around US\$4.2 billion from which China represents 50% of total. More precisely, this figure consists of US\$160 millions in losses to the motion picture industry, US\$48 millions to piracy of sound recordings and musical compositions, US\$1.2 billion in losses due to piracy of business software, US\$455 millions in losses to the entertainment software industry, and US\$130 millions due to boom piracy.

⁴⁰ Edmund J. Pratt. 1995. "Intellectual Property" Speech at the US Council for International Business (USCIB). Washington DC.

unilateralism to embrace multilateralism under the umbrella of TRIPS. It is also important to assess the role of the USTR in this post-unilateral era with China.

First, it is evident that China's accession was broadly supported by key players inside the IPR lobby. In a letter written in support of China's WTO accession, IPR lobby associations executives⁴¹ not only recognized their active participation through the USTR-led aggressive diplomatic agenda in the early 1990s that culminated on the signature of three bilateral agreements, but also provided the rationale behind their unanimous public support. According to the letter, the inclusion of China in the WTO is the best instrument to ensure continuing improvement of intellectual property protection, and multilateral enforcement offers a promising method of ensuring continued progress in China's intellectual property environment, already reflected in Chinese authorities continuous efforts to reduce the flow and export of pirated goods.⁴² Interestingly, they also made reference to their long-term economic interests and market-access concerns: "We support China PNTR because the US copyright sector, so critical to America's economic strength, will not cede to our global competitors the massive opportunities the US have won at the negotiating table, and the enormous opportunities that China offers in the long-run for national creative industries."⁴³

At this point, it is clear that the IPR lobby support for unilateralism was replaced by a more attractive package under the banner of multilateral legalism. Second, they obviously perceive the WTO as an effective mechanism for intellectual property protection because it constraints member-states to comply through binding agreements (TRIPS). This can certainly be considered a great improvement with the GATT framework based on consensus (i.e. lack of efficiency when dealing with developing countries whose positions on intellectual property issues are often at odds with those of developed countries.) and a more legitimate tool based on a neutral concept like the rule of law and independent dispute settlement processes. Third and last, the IPR Lobby admits that its economic interests, at least at short and medium term, can be preserved inside the legalistic framework of the WTO.

The IPR's lobby official support of China's WTO accession comes to confirm that that its main motivations were not based on a genuine attempt to contribute to China's economic or legal development, but rather on obtaining market access provisions and guarantees. Although TRIPS is not meant "to guarantee the success of any intellectual property in the sense of market access and the level of sales and other custom which it attract"⁴⁴, the WTO framework opens the Chinese market to goods and

⁴¹ Official document found on the Web at: www.iipa.com/rbi/2000_CHINA_PNTR.PDF. IIPA. An Open Letter in Support of China PNTR From America's Creative Industries. February 23, 2000. The signatures of this letter include the Business Software Alliance (BSA), the Recording Industry Association of America (RIAA), the Association of American Publishers (AAP), the Software and Information Industry Association (SIIA), the Interactive Digital Software Association (IDSA), the National Music Publishers' Association (NMPA), the International Intellectual Property Alliance (IIPA), and the Motion Picture Association of America (MPAA).

⁴² Idem

⁴³ Idem

⁴⁴ Arup. 2000. p.74

services in which telecommunications and audiovisuals occupy a central place.⁴⁵ Moreover, because problems of enforcement remain in China, an annual monitoring exercise under the supervision of the TRIPS Council would be expected to become a more efficient tool than continuous trade sanctions threats and last-minute compromises. To complement with the spirit of international legalism, MNCs have also conducted some interesting experiments on Chinese soil. For example, Warner and MGM have launched pilot projects to diminish counterfeiting practices by adapting to Chinese market standards⁴⁶ in cooperation with local authorities.⁴⁷

In terms of the evolution of US-China diplomatic relations in an era of international legalism, we can draw the following conclusions. First, the fact that Congress is no longer required to vote on China's trade status (PNTR) every year brings more stability and predictability to their trade relationship, regardless of which political forces hold the balance of power in the US. Second, both countries will be able to use a neutral Dispute Settlement Body (DSB) to solve possible disputes regarding intellectual property protection rather than relying on unilateral threats or trade sanctions. Third, China's accession to a trade regime of multilateral rules signifies that the US-based MNCs will no longer have to go alone with their grievances because other member-states (such as the European Union and Japan) also have a strong interest in ensuring China's compliance with its WTO commitments, including those on intellectual property protection. Given the IPR lobby support to international legalism and their less belligerent discourse, a fundamental question remains: why did China favored international legalism?

China: The victory of reformists

To start, it is important to understand how American demands were being channeled inside the complex net of lawmaking both at the State Council and the National People's Congress. Normally, the first step taken by Chinese authorities (following the transmission of USTR demands to China) was an "interagency process" among government agencies.⁴⁸ This interagency bargaining included all the administrative units involved in a particular issue and its main purpose was to draft the parameters of the Chinese "win-set".⁴⁹ The lead negotiating agency, the Ministry of Foreign Trade and Economic Cooperation (MOFTEC), required that each of the participating Chinese administrative agencies provide

⁴⁵Nicholas Lardy. 2002. p.65

⁴⁶Eric M.Griffin. "Stop relying on Uncle Sam!- a Proactive Approach to Copyright Protection in the PRC." University Texas Law Journal. Available at <www.utexas.edu/law/journals/ti>As Griffin correctly points out, "the US industries have realized that the Chinese student whose monthly salary is US\$50 is not likely to pay US\$35 for an American law book; unless US suppliers provide cheaper alternatives, the student will be forced to turn to the pirates for the products."

⁴⁷Don Groves. "Warner Bros., MGM Dips into China's Video Market." Daily Variety. Feb 21, 1997. p.1 For example, Warner and MGM announced a home video licensing deal in 1997 with the Ministry of Culture. The mandarin-dubbed products have been made available on VCD at prices oscillating around US\$6 wholesale and US\$7 retail (pirated copies usually cost US\$4). In cooperation with the Ministry of Culture and the National Post Office, these audiovisual materials have been distributed exclusively throughout the country's 60000 libraries

⁴⁸Andrew Mertha. 1998 What Does China Trade and Why? Transnational Deterrence and US Trade Policy Agenda Formation. Research Paper. University of Michigan. December 1998

⁴⁹Idem.

a maximum of potential concessions. This list was eventually submitted to the State Council for approval before negotiations begin. At this stage, the leadership could and actually did intervene to break impasses in critical junctures during negotiations. Intercession by the top leadership during the negotiations was therefore essential to move. This meant that, despite the growing influence of the NPC in lawmaking, the top leadership remained an essential force in the drafting, implementation and enforcement of intellectual property reforms in the late 1990s. This, of course, had an influence on how foreign demands for further reform were handled and prioritized.⁵⁰

It is important to notice the central role played by the State Council in furthering intellectual property reforms since 1997. Not only the comprehensive revision of laws and regulations was a sign of "good will" on the part of China's leadership, but it also meant that despite the conservative positions taken by the Chair of the Standing Committee of the NPC, Li Peng, in issues related to foreign influence⁵¹, the State Council dominated the lawmaking process in this particular period. If not unanimously, the State Council strongly supported all the latest amendments on IPR laws. On the other side, although NPC delegates were eager to debate the content and the "feasibility" of the new amendments, they did not go as far as to reject the proposed amendments to the office of the State Council. At this point, it remains unclear whether NPC delegates fully supported the pre-WTO amendments, but the lack of political debate shows that they did not oppose it in any substantial way, at least not publicly. One thing remains sure, the third period of reforms in intellectual property has not been directly threatened by any conservative backlash within the bureaucracy or a sudden coalition of orthodox forces at the leadership level. Undoubtedly, this lack of consensus can be explained by the emergence of a highly educated technocratic elite insulated from public scrutiny that speaks the language of power outside China and adopts a socialist rhetoric at home.

As we have seen throughout this chapter, the second phase of Sino-American trade relations in the field of intellectual property rights has shifted towards a more conciliatory, cooperative approach. This strategic switch was allowed by the existence of an institutional framework (WTO) regulating international trade based on rational legalism. The period is also intimately linked to China's final lap before its entry into the WTO, the politics behind the agreement,⁵² as well as some external structural influences such as the Asian financial crisis, a reformist leadership in Beijing, and a cooperative leadership in Washington.

We have also learned that this particular transition was conducted differently on both sides of the Pacific ocean. On the American side, the IPR Lobby adopted a less aggressive approach, perhaps due to the overwhelmingly dominance of the US-China Business Council in the office of the USTR after 1997,

⁵⁰Idem.

⁵¹See Joseph Fewsmith. 1999. "China and the WTO: The Politics Behind the Agreement" NBR Analysis.

⁵²Fewsmith. 1999.

and the controversial debates monopolized by pro-democracy, human rights, and labor movements against China's accession to the World Trade Organization (WTO). Consequently, the IPR Lobby remained at the periphery of all those heated debates and decided to trust the well-functioning of the current multilateral trade regime. This shift in strategy leads us to two conclusions. First, the approach that the IPR Lobby adopted at the beginning of the 1990s was more focused on ensuring enforcement of IP laws in China. Second, the IPR Lobby has assessed the current situation of IPR protection in China and has resolved that an aggressive approach is no longer required, and could be potentially counterproductive if the stage of enforcement is to be fully completed.

On the Chinese side, the leadership has been caught between two complementary but conflictual policies: further economic development and global integration on one side,⁵³ and the continuation of State-owned Enterprises (SOEs) reforms on the other. The concessions made by China in this last period of IPR reforms can easily be attributed to a proactive and pro-reform leadership, but also to Jiang Zemin's desire to leave his mark in Chinese history by making China an official recognized member-state in the WTO. Undoubtedly, the third generation of leaders have gone beyond pure instrumental formalist approaches to law for policy purposes as argued by Pitman Potter, and have integrated domestic policy making and legal reforms into a framework of international regulatory structures. The political compromise can be termed as follows: "obligations and further foreign influence exchange of global integration and continuous prosperity."

Some observers have pointed out the structural risks associated with this rules-based, multilateral, market-oriented system, based on discipline and enforcement of international standards. Maruyama argues that because TRIPS contains generous transition provisions for "developing countries" and "transitional economies", there is always a risk that WTO membership would weaken China's current IPR regime by allowing it to back away from current bilateral IPR agreements.⁵⁴ This vision, however, does not take into account the compatibility between the leadership commitment to respect the rules of the current international trade regime, and the inclusion of economic interests in the agenda-setting process.

US-China bilateral relations

Although the role played by the United States in pushing for the latest legal developments in IPR protection in China is not well documented due to the technical nature of these particular amendments, it is necessary to establish a bridge between the first phase of reforms analyzed in chapter 3 based on domestic legal formalism and the emergence of a global consensus towards a multilateral and highly legalistic trade regime. It has been argued that the US shift to multilateral legalism in IPR protection can

⁵³ Idem.

⁵⁴ Warren H. Maruyama. "US-China IPR Negotiations: Trade, Intellectual Property, and the Rule of Law in a Global economy." *American Journal of International Law*.

be explained by its ineffective, misguided and self-deluding policy towards China.⁵⁵ In an era of rapid globalization, the net of domestic in the US is strongly based on a coalition of political and economic forces coordinating trade policy. This coalition of forces can be considered the driving engine of US hegemony in the twentieth century. As one commentator points out: "The politics behind the creation of intellectual property protection in China are complex, but have served the interests of the United States by securing the legal groundwork for the meaningful protection of American intellectual property in China, while also transforming the Chinese intellectual property landscape into familiar territory."⁵⁶

The period of détente started in 1997 after the governments of the United States and the People's Republic of China signed a joint statement inspired from the "constructive strategic partnership" model. More specifically, the goal of this joint statement was to develop an action plan that would cultivate a more stable and harmonious relationship between the two countries and to promote a self-sustainable intellectual property regime in China.⁵⁷ In a sense, this joint statement of "good will" marks the turning point in Sino-American relations in general, and the diminution of confrontation, unilateral sanctions and the use of section 301. In the last 1990s, both countries preferred to focus on their mutual interests rather than their fundamental disagreements, and intelligently used multilateralism to create stability and more predictability to their relationship.

Although MNCs have contributed to the content of TRIPS, we can conclude that rules-based multilateralism found great reception in both countries because its compatibility with their respective foreign policy. On one side, China's willingness to pursue its integration accompanied with efforts at the bureaucratic level to counterbalance the hegemonic tendencies of the US. On the other, the desire of American top officials to support a system that provides guidelines to a somewhat unpredictable emerging economic power, and more specifically to leave intellectual property protection within the jurisdiction of a neutral body (DSB).

As we can see, the international trade structure has greatly influenced both countries bilateral relations and provided commercially-driven MNCs the minimum rules-based structure to protect their

⁵⁵Peter K. Yu "From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-first Century." American University Law Review. Vol. 50 For an interesting discussion on the various differences between China in the West and the failure of the US, see Peter K. Yu "Piracy, Prejudice and Perspectives: An Attempt to use Shakespeare to Reconfigure the US-China Intellectual Property Debate." Boston University International Law Journal. Spring 2001.

⁵⁶Alford, William P. To Steal a Book is an Elegant Offense: Intellectual Property Laws in Chinese Civilization p.118-119

⁵⁷ Joint United States-China Statement, October 29, 1997. "The United States and China have areas of both agreement and disagreement, they have a significant common interest and a firm common will to seize opportunities and meet challenges cooperatively, with candor and a determination to achieve concrete progress. The United States and China have major differences on the question of human rights. At the same time, they also have great potential for cooperation in maintaining global and regional peace and stability; promoting world economic growth; preventing the proliferation of weapons or mass destruction; advancing Asia-Pacific regional cooperation; combating narcotics trafficking, international organized crime and terrorism; strengthening bilateral exchanges and cooperation in economic development, trade, law, environmental protection, energy, science and technology, and education and culture; as well as engaging in military exchanges." Source:

<http://www.usconsulate.org.hk/uscn/jiang97/1029f.htm>

interests and ensure market access to a country with tremendous economic potential and huge consumer market.

CONCLUSION

In this last chapter, we have concentrated our analysis on the legal discipline that the current rules-based multilateral trade regime has imposed on China's lawmaking process, more particularly in regards to the protection of intellectual property rights. We have also seen that these amendments not only been highly technical in nature, but engendered limited political debates at the leadership levels because the main focus of attention was China's WTO accession. In that sense, the third period of reforms is less pertinent in political terms. However, it marks the beginning of a new era of legal reforms deeply linked to the organization and architecture of the international trade regime. In political terms, the strong pressures that international legalism exerts on lawmakers and policy makers at the domestic level could easily change the balance of power within the Chinese system or alter political realignments at the top. With tremendous economic and social challenges domestically, it will be interesting to follow the evolution of such systemic barriers in the future.

Among the most important findings figure the inherent "depoliticization" of trade issues in the domestic and international scenes. On one side, we have seen that lawmaking and trade negotiations are conducted from within the Chinese bureaucracy, and the leaders and conservative members of the CCP had little influence behind the closed doors of power. In a sense, we can say that the Chinese political system is slowly adopting some values inherent to the global trade architecture: the technocratization of lawmaking and policymaking processes. Also, we can observe that the shift towards multilateralism has been accompanied by a "neutralization" of politics through the Dispute Settlement Body and the TRIPS Council.

CHAPTER VI

Conclusion

THE POLITICS OF INTELLECTUAL PROPERTY RIGHTS IN CHINA: TECHNOCRATIZATION OF POWER, CORPORATE COALITIONS AND MULTILATERAL LEGALISM

Throughout this essay, we have attempted to explore the “*bien-fondé*” of our initial argument and further nuance the role played by the variables identified in chapter two. At this point, we can resolve that the rapid evolution of China’s intellectual property regime in post-Mao China was affected by three main forces.

First, the process was reinforced by the growing importance of IPR protection in international trade, as illustrated by high levels of political activism among intellectual property-dependent multinationals and technologically-advanced countries. Second, at the domestic level, its evolution was facilitated by a pragmatic agenda in the early years of reforms, followed by a continuous bureaucratization and depoliticization of IPR issues. In the wake of China’s WTO accession, it can be observed that a new elite of highly educated technocrats speaking the language of market economics began to dominate the process of intellectual property reforms. Lastly and perhaps more explicitly during the 1990s, China’s intellectual property reforms have been shaped by the norms, rules, principles and internal functioning of an emerging world trade system built around multilateral legalism.

A striking point identified in all three phases of reforms was the role of multinationals. Against all predictions, MNCs resulted powerful political actors with high levels of organization, influence and almost unlimited financial resources. As a result, these *theoretically apolitical* actors achieved to shape trade diplomacy priorities domestically, and by setting the pace of intellectual property reforms abroad in order to protect their commercial-driven interests. In the third phase, it is particularly worrisome to see how corporations have instrumentally used the rule of law as a tool to protect their economic rights under the banner of a rules-based multilateral

framework. Unfortunately, in the present context of rapid globalization and fragile multilateralism, the political activism of corporate sectors is often poorly covered/defined by multidisciplinary studies. In the case of intellectual property rights, coalition formation around a common goal (protection of economic rights) at different forums (office of the USTR, GATT negotiations rooms, WTO framework) has so far produced incredible results, despite the fact that the feasibility and effectiveness of multilateral legalism is still to be determined. The astonishing success of corporate actors proves that organization, financial resources and like-minded actors often produce the most rapid and effective changes in policy-making.

Another intriguing point concerns the nature of the current Chinese political system. As we have observed, especially in chapters four and five, the processes of trade negotiations, legal-building and policy coordination have increasingly fall under the responsibility of law specialists and highly educated technocrats insulated from ideological fights. In a post-WTO era, their political role domestically and the links they establish with their counterparts in industrialized countries could be considered a premonition that a move towards democracy in China will probably not emerge from the top leadership or civil society, but rather from a technocratic elite that embraces neoliberal values and becomes increasingly preoccupied about defending their *right* to obtain the fruits of global economic integration.

Finally, it is more than clear that by integrating the global economy, China has accepted to play the rules of the game. As widely analyzed in this essay, the many preconditions to join the World Trade Organization (WTO) have surprisingly created a gradual transfer of political power toward technocratic elites, confirming our initial observation that the Chinese political system is no longer a monolithic, unitary force, but rather a disaggregated apparatus in which interests cannot be considered simply dictated by the top leadership anymore. This is not to say that the top communist officials are not engines of change (at least in principle), but that the “unchecked elites” within the governmental apparatus seem to gain more and more power as China faces governance challenges and obeys economic imperatives.

BIBLIOGRAPHY

Books and articles

- Alford, William P. 1995. To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization. Stanford: Stanford University Press.
- Alford, William P. 1998. "Making the World Safe for What? Intellectual Property Rights, Human Rights, and Foreign Economic Policy in the Post-European Cold War World" in Mark A. Cohen, A. Elizabeth Bang and Stephanie J. Mitchell. Chinese Intellectual Property Law and Practice. Boston: Kluwer Law International. pp.147-165
- Arup, Christopher. 2000. The New World Organization Agreements: Globalizing Law Through Services and Intellectual Property. Cambridge: Cambridge University Press.
- Baum, Charles. 2001. "Trade Sanctions and the Rule of Law: Lessons from China" Stanford Journal of East Asian Affairs. Spring. vol.1. no.50
- Bayard, Thomas O. And Kimberly Ann Elliott. 1994. Reciprocity and Retaliation in US Trade Policy. Washington DC: Institute for International Economics
- Bernstein, David H. and Diane M. Glass. 1995. "The Great Wall of China; Is it Still Standing in Wake of New Trade Agreement?" New York Law Journal. May 15th. p. S1
- Bhagwati Jagdish. 1997. "Globalization, Sovereignty and Democracy" in Axel Hadenius (ed.) Democracy's Victory and Crisis. Cambridge: Cambridge University Press. pp.263-296
- Baghwati, Jagdish and Hugh T. Patrick. 1990. Aggressive Unilateralism: America's Trade Policy and the World Trading System. Ann Arbor: The University of Michigan Press.
- Braithwaite, J. and P. Drahos. 2000. Global Business Regulation. Cambridge: Cambridge University Press.
- Chan, Vivien. 2002. "New IPR Laws in the PRC to Accord with WTO Accession." China International Economic and Trade Arbitration Commission and Shenzhen Arbitration Commission. China-Appointed Attesting Officer. March.
- Chen, Jiwen. 2001. "The Amended PRC Patent Law" China Business Review. July-August.
- Cheong, Shuk Ki Ella. 1999. "Copyright Law and Regulation in China" in Mark A. Cohen, Elizabeth Bang and Stephanie Mitchell (eds.) in Chinese Intellectual Property Law and Practice. Boston: Kluwer Law International pp.25-47
- Drahos, P. 1995. "Global Property Rights in Information: The Story of TRIPS at the GATT" Prometheus. vol.13 no.1 pp.6-19
- Dicks, Anthony. 1995. "Compartmentalized Law and Judicial Restraint: An Inductive View of Some Jurisdictional Barriers of Reform." In Stanley Lubman (ed.) China's Legal Reforms. pp.99-103

- Enyart, J.R.. 1990. "A GATT Intellectual Property Code." Les Nouvelles. June. pp.53-56
- Evans, G.E. 1994. "Intellectual Property as a Trade Issue: the Making of the Agreement on Trade-Related Aspects of Intellectual Property Rights." World Competition. vol.2. no.2 pp.137-180
- Fender, Gregory S. 1996. "Enforcement of Intellectual Property Rights in China: You Can Lead a Horse to Water, but You Can't Make it Drink." Virginia State Journal of International Law. vol.37. pp.223-242
- Griffin, Eric M. "Stop relying on Uncle Sam!- a Proactive Approach to Copyright Protection in the PRC." University Texas Law Journal. Available at <www.utexas.edu/law/journals/ti>
- Fewsmith, Joseph. 1994. Dilemmas of Reform in China: Political Conflict and Economic Debate. ME Sharpe
- Fewsmith, Joseph. 1999. "China and the WTO: The Politics Behind the Agreement." NBR Analysis. December. vol.10. no.5
- Fewsmith, Joseph. 2001. Elite Politics in Contemporary China. ME Sharpe.
- Garten, Jeffrey E. 1997. "Business and Foreign Policy." Foreign Affairs. May-June. pp.67-69
- Gibson, Martha L. 2000. Conflict Amid Consensus in American Trade Policy. Washington DC: Georgetown University Press.
- Hamrin, Carol Lee and Suisheng Zhao (eds.) 1995. Decision-Making in Deng's China: Perspectives from Insiders. ME Sharpe.
- Harding, Harry. 1987. China's Second Revolution: Reform after Mao. Washington DC: Brookings Institution.
- Hoekman, Bernard. 2002. "The WTO: Functions and Principles." In Bernard Hoekman, Aaditya Mattoo and Philip English. Development, Trade and the WTO: A Handbook. World Bank. Washington DC. pp.41-49
- Holbig, Heike and Robert Ash. (eds.)2002. Accession to the World Trade Organization: National and International Perspectives. London: Routledge.
- Howse, Robert. 2002. "From Politics to Technocracy - and Back Again: The Fate of the Multilateral Trading Regime." (Symposium: The Boundaries of the WTO) American Journal of International Law. vol. 96 no.1 pp.94-117.
- Hsia Tao-tai. 1984. "China's New Patent Law and Other Recent Legal Developments." Report prepared for the Special Subcommittee on US Trade with China of the Committee on Energy and Commerce of the US House of Representatives. Washington DC: Government Printing Office. July.
- Hu, Patrick H. 1996. "Mickey Mouse in China: Legal and Cultural Implications in Protecting US Copyrights" Boston University International Law Journal. vol.81. no.93

- Kapstein, Ethan. 2000. "*Winners and Losers in the Global Economy*" International Organization. Vol.54. Spring. pp.359-384
- Kay, David. 1985. "*The Patent Law of the People's Republic of China in Perspective*" UCLA Law Review. vol.33. no.1
- Keller, Perry. 1994. "*Sources of Order in Chinese Law.*" American Journal of Comparative Law. vol.42. pp.711-734
- Lardy, Nicholas. 1998. China's Unfinished Economic Revolution. Washington DC: Brookings Institution Press.
- Lawrence, Robert Z. 1999. International Trade Policy in the 1990s. Occasional paper: John F. Kennedy School of Government. Harvard University.
- Lee, H.C.H. and J.M. Brazzil. 2000. "*The Sino-American WTO Agreement: Sectoral Summary*" China Law and Practice. January. pp.30-34.
- Lieberthal, Kenneth and Michel Oksenberg. 1988. Policy-Making in China. NJ: Princeton University Press
- Lieberthal, Kenneth. 1995. Governing China: From Revolution Through Reform. NY: WW Norton & Company.
- Lieberthal, Kenneth and David Lampton (eds.) 1992. Bureaucracy, Politics and Decision Making in Post Mao China. Berkeley: University of California Press.
- Liu, Paul C.B. 1994. "*US Industry's Influence on Intellectual Property Negotiations and Special 301 Actions.*" UCLA Pacific Basin Law Journal. vol. 13.
- Lubman, Stanley B. 1996. China's Legal Reforms. Oxford: Oxford University Press.
- Lubman, Stanley. 1996. "*Introduction: The Future of Chinese Law.*" In Stanley Lubman (ed.) China's Legal Reforms. Oxford: Oxford University Press. pp.1-21
- Lubman, Stanley. 2000. "*Bird in a Cage: Chinese Law Reforms After Twenty Years.*" Northwestern Journal of International Law and Business. vol.20. no. 4 pp.383-394
- MacFarquar, Roderick. (ed.) 1997. The Politics of China: The Eras of Mao and Deng. Cambridge: Cambridge University Press.
- Mann, Charles C. 2000. "The Heavenly Jukebox" The Atlantic Online. September. Online version <<http://www.theatlantic.com/issues/2000/09/mann.htm>>
- Maruyama, Warren H. 1999 "*US-China IPR Negotiations: Trade, Intellectual Property, and the Rule of Law in a Global Economy.*" In Mark Cohen, Elizabeth Bang and Stephanie Mitchell (eds.) Chinese Intellectual Property Law and Practice. Boston: Kluwer Law International. pp.165-213.
- Matthews, Duncan. 2002. "*Trade-Related Aspects of Intellectual Property Rights: Will the Uruguay Round Consensus Hold?*" Centre for the Study of Globalization and Regionalization. 5th Annual Conference. University of Warwick March.

- Matthews, Duncan. 2002. Globalizing Intellectual Property Rights. London: Routledge.
- Mertha, Andrew. 1998. "*What Does China Trade and Why? Transnational Deterrence and US Trade Policy Agenda Formation.*" Research paper. University of Michigan. December.
- Mertha, Andrew. 2001. "*Pirates, Politics, and Trade Policy: Structuring the Negotiations and Enforcing the Outcomes of the Sino-US Intellectual Property Dialogue, 1991-1999*" PhD Dissertation. University of Michigan.
- Mundo, Philip A. 1999. National Politics in A Global Economy: The Domestic Sources of US Trade Policy. Washington DC: Georgetown University Press.
- Nolan, Peter. 2001. China and the Global Economy: National Champions, Industrial Policy and the Big Business Revolution. Palgrave Macmillan.
- Newby, Kim. 1995. "*The Effectiveness of Special 301 in Creating Long Term Copyright Protection for US Companies Overseas.*" Syracuse Journal of International Law and Commerce. vol. 29. no.33.
- Oksenberg, Michel; Pitman B. Potter and William B. Abnett. 1996. "*Advancing Intellectual Property Rights: Information Technology and the Course of Economic Development in China*" NBR Analysis. vol.7 no.4
- Palmer, Scott J. 2001. "*An identity Crisis: Regime Legitimacy and the Politics of Intellectual Property Rights in China.*" Indiana Journal of Global Legal Studies. Spring.
- Pearson, Margaret M. 2000. "*China's Track Record in the Global Economy.*" China Business Review. January-February.
- Peerenboom, Randall. 2002. "*Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China.*" Michigan Journal of International Law. pp.472-536
- Potter, Pitman B. 1994. "*Riding the Tiger: Legitimacy and Legal Culture in Post-Mao China.*" The China Quarterly. vol. 3
- Potter, Pitman B. (ed.) 1994. Domestic Law Reforms in Post-Mao China. ME Sharpe.
- Potter, Pitman B. 1995 Seminar on Trade and Investment in the People's Republic of China. Course Pack for LAW 337. Faculty of Law: University of British Columbia.
- Potter, Pitman B. and Michel Oksenberg. 1999. "*A Patchwork of IPR Protections.*" China Business Review. no.28. January- February.
- Potter, Pitman B. 2001. "*The WTO: Legal Implications*" China Quarterly. September. no.167.
- Potter, Pitman B. 2001. The Chinese Legal System: Globalization and Local Legal Culture. London: Routledge.
- Puckett, A. Lynne and William L. Reynolds. 1996. "*Rules, Sanctions and Enforcement Under Section 301: At Odds with the WTO?*" American Journal of International Law. October. vol.90. no.4. pp.675-689.

- Rawski, Thomas G. 2000. "China's Move to Market: How Far? What Next?" In Ted Galen Carpenter and James A. Dorn (eds.) China's Future: Constructive Partner or Emerging Threat? Cato Institute. pp.317-39
- Rosen, Daniel H. 1999. Behind the Open Door: Foreign Enterprises in the Chinese Marketplace. Washington DC: Institute for International Economics.
- Ryan, Michael P. and Justine Bednarik. 1995. "Drugs, Books and Videos: US-Korea Trade Dispute over Intellectual Property Rights" Georgetown Cases in International Business Strategy. Georgetown University: Institute for the Study of Diplomacy.
- Ryan, Michael P. 1998. Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property Rights. Washington DC: Brookings Institution Press.
- Schlesinger, Michael N. 1995. "A Sleeping Giant Awakens: The Development of Intellectual Property Law in China." Journal of Chinese Law. vol.9. no.1. Spring. pp.93-140
- Shirk, Susan. 1993. The Political Logic of Economic Reform in China. Berkeley: University of California Press.
- Sell, S.K.. 1995. *The Origins of a Trade-Based Approach to Intellectual Property Protection: The Role of Industry Associations.* " Science Communication. vol.17. no.2 pp.163-185
- Strange, Susan. 1998. Mad Money: When Markets Outgrow Governments. Ann Arbor: The University of Michigan Press.
- Stewart, T.P. (ed.) 1993. The GATT Uruguay Round: A Negotiating History (1986-1992). Netherlands: Kluwer Law and Taxation Publishers.
- Tanner, Murray Scot. 1999. The Politics of Lawmaking in Post-Mao China: Institutions, Processes and Democratic Prospects. Clarendon Press.
- Trebilock, Michael J. and Robert Howse. 1995. The Regulation of International Trade. London: Routledge.
- Wang, Flora. 1999. "An Overview of the Development of China's Patent System." In Mark A. Cohen, A. Elizabeth Bang and Stephanie J. Mitchell. Chinese Intellectual Property Law and Practice. Kluwer Law International. Boston. pp.3-25
- Wang Jiafu. 1981. "Shilun zhuanlifa de zhiding" Faxue Yanjiu ("An examination of the Formulation of the Patent Law." Research on Legal Studies) vol.16 no.5 pp.27-32 (Quoted in William P. Alford. 1995. p.68)
- Weissman, Robert. 1996. "A Long, Strange TRIPs: The Pharmaceutical Industry Drive to Harmonize Global Intellectual Property Rules, and the Remaining WTO Legal Alternatives Available in Third World Countries." University of Pennsylvania Journal of International Economic Law. vol. 17. no.4 pp.1069-1125

- Winham, Gilbert R. 1994. The Evolution of International Trade Agreements. Toronto: University of Toronto Press.
- Xianghong, Nan. 2001. Legal Reforms in China before WTO accession. Interview with Li Shun De, Vice-director of the IPR Center at the Chinese Academy of Social Sciences.
<http://www.sinopolis.com/Archives/TOPSTORY/ts_011107_04.htm>
- Yang Guohua and Cheng Jin. 2001. "The Process of China's Accession to the WTO." Journal of International Economic Law. pp.297-328.
- Yu, Peter K. 2002. The Second Coming of Intellectual Property in China. Occasional Papers in Intellectual Property from Benjamin N. Cardozo School of Law Yeshiva University. Number 11.
- Yu, Peter K. 2001. "From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century" American University Law Review. vol.50
- Zheng Chengsi. 1987. "The Chinese Legal System: An Overview." In Zheng Chengsi and Michael D. Pendleton. Chinese Intellectual Property and Technology Transfer Law. London: Sweet & Maxwell

Official documents

- International Intellectual Property Association (IIPA). An Open Letter in Support of China PNTR from America's Creative Industries. February 23th, 2000.
<http://www.iipa.com/rbi/2000_CHINA_PNTR.PDF.IIPA.>
- "Joint US-China Statement" October 29th, 1997. Found online at:
<<http://www.usconsulate.org.hk/uscn/jiang97/1029.htm>>
- Motion Picture Association of America (MPAA). "Valenti Praises China in war Against Piracy but Urges Further Action to stem Growing Problem" Press Release. November 29, 1995.
- The Building of the Legal System in China. 2001. Beijing: New Star Publishers.
- USTR. National Trade Estimate Report on Foreign Trade Barriers - 1995. <<http://www.ustr.org>>
- USTR. Statement by Ambassador Charlene Barshefsky. June 17, 1996.
<<http://www.ustr.org/releases/1996/06/9653.html>>

Newspapers

- Paul Blustein. "US Warns China to Step Up Efforts Against Piracy." Washington Post. November 30th, B13.

Marcus Brauchli. *"Fake CDs are a Growth Industry in China."* Wall Street Journal. February 11th, 1994. B1.

Helen Cooper and Kathy Chen. *"US and China Reach an Agreement, Averting Trade Sanctions by Both Sides."* Wall Street Journal. June 18th, 1996. A2.

Helen Cooper and Kathy Chen. *"China Averts Trade War with the US, Promising a Campaign Against Piracy."* Wall Street Journal. February 27th, 1995.

Helen Cooper and Kathy Chen. *"US and China Announce Tariff Targets as Both Nations Step Up Trade Rhetoric."* Wall Street Journal. May 16th, 1996. A3.

Seth Faison. *"US, China Agree on Pact to Fight Piracy."* NY Times. June 18th, 1996. A1.

Seth Faison. *"Copyright Pirates Prosper in China Despite Promises."* NY Times. February 20th, 1996.

Seth Faison. *"US and China Sign Accord to End Piracy of Software, Music Recordings and Film"* NY Times. February 27, 1995. A1.

Martha H. Hamilton. *"US to Hit China with Stiff Tariffs."* Washington Post. February 5th, 1995. A1.

Martha H. Hamilton and Steven Mufson. *"Clinton Hails Accord with China on Trade: Piracy Enforcement Provision Called Tough."* Washington Post. February 27th, 1995. A1.

David Holley. *"Warns of Trade War with US Over Patents, Copyrights, Beijing Warns"* LA Times. January 8th, 1992. E6.

Evelyn Iritari. *"Boeing Likely Loser if US-China Talks Fail."* LA Times. February 24th, 1995. D1.

Joseph Kahn. *"World Trade Organization Admits China, Amid Doubts"* New York Times. November 11, 2001. Page A1.

Huang Kunyi. *"Principles Underlying China's Draft Patent Law"* People's Daily. December 4th, 1983.

Steve Lohr. *"Pirates are Circling the Good Ship Windows 95"* NY Times. August 24, 1995.

Daniel Southerland. *"US Businesses Urge Trade Sanctions to Stop Piracy of Software in China."* Washington Post. April 11, 1989.

Nury Vittachi. *"Consumer wars rage"* Far Eastern Economic Review. December 19th, 2002.

Sheryl Wu Dunn. *"Nonstate Plants in China at Risk in US Talks."* NY Times January 14th, 1992. A9.

"Asia 2002 Yearbook." Far Eastern Economic Review. p.10.

"Good Things From Outside" Far Eastern Economic Review October 18th, 2001.

"Per Capita GDP Per Province" China Statistics Yearbook 2001

Editorial. *"Surprise! A Deal with China."* Wall Street Journal. June 18th, 1996. A22.

"US Delay on China Move." NY Times. May 2nd, 1994. D2.

"Copyright as Industrial Property" China News Analysis no.1445 Oct 15, 1991.

"Number of Applications Grow 17% Since 1984 Patent Law" People's Daily. April 10th, 1989.

"China Sets Up National Association of Patent Agencies." Xinhua News. December 29, 1988.

"Making the Right Moves" China Trade Reports July 25th, 1987. pp.5-7.

"Kohl Visits China's Patent Office" Xinhua News. July 13th, 1987.

"Japan to Help China Train Engineers for Patent Info Retrieval." Jiji Press. August 8th, 1986.

"China Issues First Patent Certificates." Xinhua News. January 1st, 1986.

"China Receives More than 14000 Patent Applications" Xinhua News. February 16th, 1986.

"Huang Hua Meets Leader of the World Intellectual Property Organization" Xinhua News. November 23th, 1985.

"PRC and France to Cooperate in Patents" Xinhua News. April 10th, 1984.

"China Forms Patent Service Network." Xinhua News. March 14, 1984.

"NPC Standing Committee Meeting Hears Drafts of Laws" Xinhua News. December 1st, 1983.

"Several Law Seminars to be Established in China" Xinhua News. November 23, 1983.

"An Analysis of Six NPC Special Committees." Xinhua News. June 7, 1983.

"Ren Zhonglin explains China's Draft Trademark Law." Xinhua News. August 19, 1982.

"China Drafts Patent Law" Xinhua News. October 20, 1982.

"Jurist Zhang Youyu on Deletion of Four Bigs" Xinhua News. September 7, 1980.

"People's Daily Calls for the Introduction of the Patent System in China." People's Daily. July 15, 1980.

"It is Absolutely Necessary to Establish a Patent System." (Excepts from an article by Xia Shuhua)
People's Daily. July 15, 1980.