

HARMONY OR COERCION? CHINA-EU TRADE DISPUTE INVOLVING INTELLECTUAL PROPERTY ENFORCEMENT

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I. INTRODUCTION

The enforcement of intellectual property rights (“IPR”) has become one of the most hotly contested issues in the global trade arena. The conventional perception sees an ostensible correlation between greater international pressure and greater domestic compliance with the international norms of IPR however, an increasing amount of empirical evidence shows that a coercive policy towards IPR protection is misconceived and ineffective in obtaining the desired results and a more workable approach is therefore required.¹ Some scholars have attempted to analyze the negative impact of a coercive policy, but have failed in providing alternative approaches.²

Although much has been written about the protection of international IPR in China, the existing literature focuses predominantly

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¹ See, e.g., Karen Halverson, *China’s WTO Accession: Economic, Legal, and Political Implications*, 27 B.C. INT’L & COMP. L. REV. 339 (2004) (stating that external pressure of WTO obligations may accelerate China’s process of legal integration).

² See, e.g., Robert C. Bird, *Defending Intellectual Property Rights in the BRIC Economies*, 43 AM. BUS. L.J. 317 (2006) (examining the ineffectiveness of U.S. trade sanctions towards BRIC countries, namely Brazil, Russia, India, and China); see also Peter K. Yu, *From Pirates to Partners* 50 AM. U. L. REV. 131 (2000).

on China-U.S. issues.³ Very little scholarship has been devoted to the significance of IPR in China-EU relations. By examining areas of compatibility between European and Chinese culture and analyzing the mistakes made during China-U.S. negotiations over IPR, this article uses the prism of China-EU trade relations to suggest ways to reconcile the minimum standards imposed by international standards and the specific conditions of particular states; and provide insight into the unresolved issues as to how and when China's WTO commitments will be implemented.

This article is divided into five substantive sections. Section II analyses the dilemmas associated with IPR enforcement in China. Section III compares the United States' approach and Chinese response to the unresolved issues of IPR enforcement and demonstrates the ineffectiveness of coercive measures. Section IV explores some of the special features of the China-EU IPR debate compared with China-U.S. IPR conflicts, demonstrating that the challenge for the EU and China is to set up a harmonious relationship in an effort to avoid the unsuccessful outcome of the China-U.S. experience. This article suggests that China's political leaders have shown a notable desire to involve China in the international rule-making process and, to this end, have expended considerable effort in fostering worldwide cooperation over IPR protection and reforming China's IPR regime. Additionally, the article further suggests that the current contentions between the EU and China are based both on the legal framework to provide operational regulations, and, probably more meaningful, on cultural adaptations. The effectiveness of this solution is due to the philosophic culture of Confucianism or "living in harmony" (*he wei gui*). Section VI assesses the China-EU IPR debate and suggests a "six-step" solution. This article focuses, amongst other things, on the need for China's government to interact with the EU and take constructive steps towards strengthening its IPR mechanism. It also identifies the need for EU policymakers to tailor IPR protection to local circumstances, and thus provide an analytical framework on which EU-China cooperation is based.

³ The past decades witnessed bilateral relations which had reflected sentimental China-U.S. ties amid strains over IPR protection in China.

II. IPR ENFORCEMENT: A PERENNIAL CONUNDRUM

A. COUNTERFEITING AND PIRACY: A STATISTICAL ILLUSTRATION

Counterfeiting, piracy,⁴ and infringements of IPR in general, are reaching epidemic proportions and have become an international phenomenon in emerging economies, taking on an international dimension with dramatic repercussions on world trade.⁵ In order to expedite the process of economic development, developing countries are apt to apply for a tolerant IPR policy, which allows their citizens to “steal” IPR without paying or paying less royalties.⁶

Patented pharmaceuticals have been seen as an appealing target for imitation through the production of pirated generic versions, either by using methods revealed in the patent itself or by chemical analysis of the final product and development of alternative synthetic routes.⁷ One official statistic shows that counterfeit drug sales are estimated to reach seventy-five billion dollars in 2010, a 92 percent increase from 2005.⁸

The software industry has been targeted as another vulnerable domain for piracy. A survey carried out by the International Data Corporation (“IDC”) research firm for the Business Software Alliance (“BSA”) suggests that one out of every three copies of personal computing software installed in 2005 was pirated.⁹ The piracy rate for commercial software was 36 percent, but that percentage has risen dramatically in parts of Asia and Eastern Europe.¹⁰

⁴ In this article, counterfeiting refers to the production of fake products without the authority of the owner of a patent or trademark of protected goods. Piracy refers to the use of the creative property of others without their permission. In general, counterfeiting means an infringement of an industrial property right while piracy means an infringement of copyright and related rights.

⁵ See Press Release, European Commission, Counterfeiting and Piracy: The Commission Proposes Criminal-law Provisions to Combat Infringements of Intellectual Property Rights, (July 12, 2005), available at <http://europa.eu/rapid/pressReleases/Action.do?reference=IP/05/906&format> (last visited Oct. 8, 2007).

⁶ FRED WARSHOFKY, *THE PATENT WARS: THE BATTLE TO OWN THE WORLD'S TECHNOLOGY* 10 (1994).

⁷ Ronald J.C. Corbett, *Protecting and Enforcing Intellectual Property Rights in Developing Countries*, 35 INT'L LAW. 1085 (2001).

⁸ Press Release, World Health Organization, Counterfeit Medicines: the Silent Epidemic, WHO News Releases 2006 (Feb. 15, 2006), available at <http://www.who.int/mediacentre/news/releases/2006/pr09/en/index.html> (last visited Oct. 8, 2007).

⁹ Candace Lombardi, Study: *Software Piracy Costs \$34 Billion*, ZDNET NEWS, May 23, 2006, http://news.znet.com/2100-3513_22-6075629.html (last visited Oct. 8, 2007).

¹⁰ *Id.*

In Europe, counterfeiting and piracy affects the proper functioning of the internal market,¹¹ resulting in the loss of an estimated one hundred thousand jobs per annum in the EU.¹² European Commission (“EC”) statistics show an increase of 800 percent in counterfeited and pirated goods intercepted by EU Customs from 1998 to 2002.¹³ In 2005, twenty-six thousand cases were dealt with, an increase of 20 percent over the 2004 figure.¹⁴ In response, the EC implemented a Green Paper¹⁵ in late 2000 aimed at combating counterfeiting and piracy in the internal market.¹⁶ The Green Paper shows that counterfeiting and piracy is estimated to account for 5 to 7 percent of world trade, representing two hundred to three hundred billion euros a year in lost revenue and the loss of an estimated two hundred thousand jobs worldwide.¹⁷

B. ENFORCEMENT AS A DECISIVE ASPECT

When it comes to the protection of IPR in China, there is serious concern in the international community about the Chinese government’s

¹¹ Memorandum From the Office on Harmonization in the Internal Mkt. to the Representatives of Cmty. Trade Marks Registered with the Office on the Possibility of Defending the Rights of the Proprietors of Cmty. Trad Marks, *available at* <http://oami.europa.eu/en/mark/aspects/piracy/note.htm> (last visited Oct. 8, 2007) [hereinafter Memorandum From Office of Harmonization].

¹² *Id.*

¹³ European Commission, Memorandum on the EU Strategy to Enforce Intellectual Prop. Rights in Their Countries – Facts and Figures, Ref. MEMO/04/255 (Nov. 10, 2004), <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/04/255&format> (last visited Oct. 8, 2007).

¹⁴ Memorandum on the 2005 Customs Seizures of Counterfeit Goods – Frequently Asked Questions, Ref. MEMO/06/421 (Nov. 10, 2006), <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/421>.

¹⁵ From a European perspective, a Green Paper is a document “published by the European Commission that is intended to stimulate discussion on given topics at the European level.” European Commission, Green Paper, http://europa.eu/scadplus/glossary/green_paper_en.htm (last visited Oct. 8, 2007). A Green Paper is usually meant to invite interested bodies or individuals to participate in a consultation process and debate on the basis of the proposals they put forward. *Id.* A Green Paper “may give rise to legislative developments that are then outlined in a White Paper” which contains an official set of proposals in specific policy areas that are used as a vehicle for their development. *Id.*; *see also* European Commission, White Paper, http://europa.eu/scadplus/glossary/white_paper_en.htm (last visited Oct. 8, 2007).

¹⁶ *Commission Green Paper on Combating Counterfeiting and Piracy in the Internal Market*, at 2, COM (1998) 569 final (Oct. 15, 1998), *available at* http://europa.eu/documents/comm/green_papers/index_en.htm#1998 (last visited Oct. 8, 2007). The implementation of the EC Green Paper marked the start of a wide-ranging consultation between Member States and the institutions of the EU. The consultation has examined the economic impact of counterfeiting and piracy in the European market in order to assess the effectiveness of the relevant legislation and to propose a number of initiatives to improve the weak enforcement of IPR. *Id.*

¹⁷ *Id.* at 4.

commitment and ability to provide such protection,¹⁸ which has become the focus of ongoing trade disputes with Western nations. China's accession to the WTO in 2001 directed foreign attention towards the issue of IPR and, in particular, on whether improvements in Chinese IPR laws and WTO commitments to enforcing these laws will lead to these concerns being addressed; and if so, how and within what period of time. Although China has complied with the Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPs"), related enforcement of the TRIPs Agreement has been poor despite China's accession to the WTO.¹⁹ Theoretically, the TRIPs Agreement covers both substantive and enforcement aspects; however, the latter is essential to ensure the effective protection of IPR. Thus, resolving the enforcement problem is essential to the resolution of a broader range of IPR debates arising out of global trade—if it is resolved, these other issues of trade disputes can be re-framed as technical matters for negotiation.

C. TRIPs COMMITMENTS: RHETORIC OR REALITIES?

As the instrument establishing the standard of international IPR protection, TRIPs is the benchmark for evaluating the adequacy of China's IPR laws.²⁰ According to this benchmark, China's IPR legislation is generally consistent with international standards;²¹ however, legislation without enforcement is elusive and deceptive, as are rights without remedy. The crucial issue for China lies not in the enactment of new laws, but in the application of *existing* laws.²² In the

¹⁸ Geoffrey T. Willard, *An Examination of China's Emerging Intellectual Property Regime: Historical Underpinnings, The Current System and Prospects for the Future*, 6 IND. INT'L & COMP. L. REV. 411 (1996) (mentioning that the rampant IPR infringement in China arouses serious concern of the international community about China's commitments to enforce intellectual property laws).

¹⁹ See e.g., Warren Newberry, *Copyright Reform in China: A "Trips" Much Shorter and Less Strange Than Imagined?*, 35 CONN. L. REV. 1425, 1425 (2003) (mentioning that China's accession to the WTO has not accordingly reduced the level of counterfeiting and piracy as expected). See also, Wei Shi, *Cultural Perplexity in Intellectual Property: Is Stealing a Book an Elegant Offense?* 32 N.C.J. INT'L L. & COM. REG. 2, 31 (2006) (demonstrating that the IPR infringement will remain persistent or even become aggravated during the adaptive phase before China's WTO accession will eventually result in the removal of the various impediments to an effective IPR enforcement regime).

²⁰ See, TERENCE P. STEWART, *THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY* (1986-1992) 2249 (1993) (introducing TRIPs as the cornerstone of the global IPR infrastructure).

²¹ Newberry, *supra* note 19, at 1447.

²² See Daniel C.K. Chow, *Enforcement against Counterfeiting in the People's Republic of China*, 20 NW. J. INT'L L. & BUS. 447 (2000).

past two decades, China has notably upgraded its IPR legal regime, but an unwillingness regarding enforcement remains a significant problem.²³ Although the legislation may have been in place, rampant infringement has continued. The repeated international threats against China, in the absence of satisfactory enforcement of new IPR policies, suggest that the trend towards greater IPR protection in China is not being embraced as ardently as wished.²⁴ In order to achieve desirable enforcement, it is necessary to re-examine the existing mechanism and conceive a workable approach towards its solution.

III. COMPARATIVE ANALYSIS: CHINA-U.S. NEGOTIATIONS

As a counterpoint to the EU policy on IPR protection in China, it is instructive to compare the United States' approach and China's response, to the unresolved issues of how and when China's WTO commitments to IPR protection will be implemented. The United States is relevant because, as is well documented, the legislative program of many developing states, including China, has developed under external pressure from the United States, which threatened to impose trade sanctions on countries that fail to provide adequate IPR protection to American products.²⁵

A. AMERICA'S CONCERNS

The chronic piracy problems throughout the world and the United State's growing trade deficit have forced the U.S. government to act as harshly as before against countries which have encroached on

²³ Scott J. Palmer, *An Identity Crisis: Regime Legitimacy and the Politics of Intellectual Property Rights in China*, 8 *IND. J. GLOBAL LEGAL STUD.* 449, 450 (stating that China's IPR enforcement is more of a wish list for foreign investors than a realistic mechanism of enforceable rules to protect actual rights). Interestingly, while China's economic reforms have been remarkable, the process of IPR implementation is like "a square peg in a round hole"— although the law has been introduced and implemented, there is an inertial way of thinking among some of China's leaders to view IPR as a barrier to obtain modern technologies necessary for continued economic development.

²⁴ Susan K. Sell, *Intellectual Property Protection and Antitrust in the Developing World: Crisis, Coercion, and Choice*, 49 (2) *INT'L ORG.* 315, 329-30 (1995) (emphasizing the gap between the U.S.'s expectation and the reality in terms of China's IPR enforcement).

²⁵ U.S. Dep't of State, U.S.: China Has High Rate of Intellectual Property Infringement, April 29, 2005, <http://usinfo.state.gov/usinfo/Archive/2005/Apr/29-580129.html> (last visited Oct. 8, 2007).

American interests due to weak IPR protection.²⁶ The widening American trade deficit vis-à-vis China, which reached a record 232.5 billion U.S. dollars in 2006, is one of the largest.²⁷ As with previous U.S. efforts to secure stronger IPR protection in China, a significant aspect of the unresolved issues relates to reaching bilateral and multilateral agreements on how and when China's commitments will be implemented in accordance with WTO requirements.²⁸ Since the beginning of the 1990s, in order to achieve instant improvement of IPR enforcement, the United States has frequently leveraged a series of unilateral mechanisms—trade wars, non-renewal of Most Favored Nation (MFN) status, and opposition to entry into the WTO—to push China towards stronger protection of the U.S. IPR.²⁹

B. CHINA'S RESPONSE

Faced with United States' pressure,³⁰ China has invariably given clear and prompt responses to American concerns, demonstrating that the U.S. strategy has, in theory, been successful in securing compliance.³¹ Pirating, however, has continued and has been evidenced by the intermittent improvement and subsequent rebound, and repeated threats of renewed Section 301 action.³² The cat-and-mouse game continued

²⁶ See Stephen S. Roach, Chief Economist, Morgan Stanley, *The China Fix*, Statement Before the Senate Finance Committee Hearing on "Risks and Reforms: The Role of Currency in the U.S.-China Relationship" 1 (Mar. 28, 2007), transcript available at <http://www.senate.gov/~finance/sitepages/hearing032807testsr.pdf>.

²⁷ OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2007 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 79 (2007), available at http://www.ustr.gov/assets/Document_Library/Reports_Publications/2007/2007_NTE_Report/asset_upload_file855_10945.pdf.

²⁸ Pierre-Louis Girard, Chairperson, WTO Working Party on the Accession of China, *Summing Up By the Chairman: Meeting of the Working Party on the Accession of China* (Sept. 28, 2000), available at http://www.wto.org/english/news_e/news00_e/news00_e.htm.

²⁹ Yu, *supra* note 2, at 133.

³⁰ Section 301 of the Trade Act of 1974, as amended (19 U.S.C. § 2411), is the principal statutory authority, aiming to eliminate unfair trade practices and open foreign markets. Section 301 permits the President of the United States to investigate and impose sanctions on countries engaging in unfair trade practices that threaten the United States' economic interests. In 1988, U.S. Congress introduced the Omnibus Trade and Competitiveness Act of 1988, which amended section 301 by including two new provisions—Super 301 and Special 301. Jean Heilman Grier, U.S. DEP'T OF COMMERCE, SECTION 301 OF THE 1974 TRADE ACT 1, 4-5 (2005), <http://www.osec.doc.gov/ogc/occic/301.html>.

³¹ Sell, *supra* note 24, at 329-30, 323.

³² *Id.* The USTR placed China on the "priority watch list" in 1989 and 1990, and listed China as a "priority foreign country" in 1991. After carrying out a Section 301 investigation, the USTR threatened 1.5 billion dollars in sanctions, which China avoided by signing a landmark Memorandum of Understanding ("MOU") on IPR on January 16, 1992. While actively

and in nearly every instance, China has dragged its feet and chosen not to enforce the new policies as originally promised.³³

On the one hand, China made continuous promises that appear to presage a stronger protection;³⁴ however, on the other hand, China appears to be adopting countermeasures that undercut these commitments.³⁵ It has become more and more apparent that the United States' coercive policy towards IPR protection has been misconceived in obtaining the desired results.

In 2006, the U.S. Trade Representatives ("USTR") elevated China to the Priority Watch List again for "epidemic" infringements of IPR.³⁶ In the USTR's Special 301 Report released on April 28, 2006,³⁷ the United States complained that "China has not provided the [United States] with adequate IPR enforcement to which they are entitled and,

implementing IPR legislation, China failed to enforce IPR laws effectively. In 1994, the USTR placed China back on the "priority foreign country" list and threatened import tariffs of 100 percent on 1.1 billion dollars worth of Chinese imports. China again avoided such sanctions by signing another MOU on IPR on March 11, 1995. But the cycle of insufficient compliance continued and, in April 1996, the USTR again put China on the "priority foreign country" list and threatened 2 billion dollars in sanctions. Once again China avoided the sanctions by signing US-China IPR Enforcement accord on June 17, 1996. On April 29, 2005, the USTR elevated China to the Priority Watch List again. See CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS 96-469 E, (May 24, 1996), available at <http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-334:1>; EXCERPT FROM THE IIPA SPECIAL 301 RECOMMENDATIONS, (Feb. 24, 1997), available at <http://www.ipr.gov.cn/cn/zhuanli/meiIPzhuannlan/1997interIP301material.doc>; United States Dep't of State, *supra* note 25.

³³ Sell, *supra* note 24, at 329-30, 323.

³⁴ For a comprehensive account of China's IPR legislation, see General Introduction to China IPR System, <http://www.ipr.gov.cn/en/ip.shtml> (follow "IPR Agencies and Progress" hyperlink). Following the government's imitative introducing and implementing the major pieces of legislation, i.e., the trademark law, patent law and copyright law, that laid the foundation for a comprehensive IPR regime in the 1980s, the 1990s witnessed a further wave of significant legal reform and readjustment addressing the need to create an effective legal basis from which to engage in the world trading community and fulfil China's WTO commitment.

³⁵ MYRON A. BRILLIAN & JEREMIE WATERMAN, U.S. CHAMBER OF COMMERCE, CHINA'S WTO IMPLEMENTATION: A THREE-YEAR ASSESSMENT 2 (2004), http://www.uschamber.com/press/releases/2004/September/040922_intl_wto.pdf. For example, in order to shield emerging domestic enterprises from global competition, China has adapted proprietary technological standards that discount foreign IPR, such as IGRS (Intelligent Grouping and Resources Sharing) for connectivity, and EVD (Enhanced Versatile Disc) for recording media. There is also a trend towards mandated unique standards which is a technological alliance. See *Non-market Oriented Revolution of Standards in China*, CHINA ECON. NET, Dec. 2, 2004, http://en.ce.cn/Insight/200412/02/t20041202_2462666.shtml

³⁶ U.S. Dep't of State, *supra* note 25.

³⁷ See OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2006 SPECIAL 301 REPORT available at http://www.ustr.gov/Document_Library/Reports_Publications/2006/2006_Special_301_Review/Section_Index.html (follow "Full Version of 2006 Special 301 Report" hyperlink).

accordingly, China would remain on the Priority Watch List.”³⁸ On April 9, 2007, the United States filed two trade complaints against China at the WTO over deficiencies in China’s intellectual property laws and market access barriers to copyright-based industries.³⁹ As expected, China expressed “great regret and strong dissatisfaction” at this decision.⁴⁰ This cast a leaping blight on the already fragile relationship between these two old rivals.

C. LESSONS TO BE LEARNED

Due to a lack of mutual trust and understanding between the United States and China, the constant use of trade threats by the United States has created a stimulating effect on the creation of the protective immunity against various coercions in China.⁴¹ Due to hostility and harassment towards the United States within Chinese government and public circles, the Chinese government became more reluctant to implement necessary reforms and do any more than was necessary in meeting the particular circumstances.⁴² Clearly, the high protectionist policy towards IPR protection negatively impacted China, making Chinese leaders more defensive than receptive to strengthening their IPR enforcement mechanisms. Coercive measures as a dominant U.S. strategy have been incomplete and unsuccessful in curbing global intellectual property piracy.⁴³ The failure of this strategy is thought to be due to lack of consideration for cultural differences, and in particular the Confucian values of harmony.⁴⁴ In this respect, the United States’ strategy provides a good example of what has been tried and failed.

³⁸ *Id.*

³⁹ See Press Release, Office of the U.S. Trade Representative, United States Files WTO Cases Against China Over Deficiencies in China’s Intellectual Property Rights Laws and Market Access Barriers to Copyright-Based Industries, (Apr. 9, 2007) available at http://www.ustr.gov/Document_Library/Press_Releases/2007/April/United_States_Files_WTO_Cases_Against_China_Over_Deficiencies_in_Chinas_Intellectual_Property_Rights_Laws_Market_Access_Barr.html.

⁴⁰ *US Gets Tough on Chinese Piracy*, GUARDIAN, Apr. 10, 2007, available at <http://film.guardian.co.uk/print/0,,329773029-3156,00.html>.

⁴¹ Wei Cai, *Zhengduan Zhong De Hezuo: Zhongmei Zhishi Chanquan Boyi [Seeking Cooperation in the Confrontation: The Sino-U.S. Game of Intellectual Property]*, WTO JINGJI DAOKAN [CHINA WTO TRIBUNE] (2005) (highlighting the strategies for understanding the mentality of the United States and winning the “game” of the IPR disputes) (translation by author).

⁴² Yu, *supra* note 2, at 134.

⁴³ Bird, *supra* note 2, at 334-35.

⁴⁴ See WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILISATION* 19-22 (1995) (explaining that cultural differences

IV. CHINA-EU IPR DEBATE: WHY THE EU IS DIFFERENT FROM THE UNITED STATES.

In a manner similar to their U.S. partners, EU companies have encountered significant infringement problems caused by the lack of adequate IPR protection in China.⁴⁵ To protect their economic interests, some EU companies have lobbied EU institutions to initiate trade sanctions; however, the dominant trend has been towards strengthening bilateral cooperation regarding IPR protection.⁴⁶

A. PROFILE OF CHINA-EU TRADE RELATIONS AND IPR: A HISTORICAL LENS

China-European relations are long standing.⁴⁷ Cultural traits from China have been embraced by Europeans for more than two thousand years.⁴⁸ The old “Silk Road” provided a vital link between China and Europe and the millennium has seen a greater consolidation of this relationship.⁴⁹ Specifically regarding IPR, the EU has engaged in a series of negotiations with China over the development and enforcement of Chinese IPR laws.⁵⁰ At the eighth China-EU summit in Beijing in September 2005,⁵¹ leaders from both sides⁵² recognized the importance

may have posed as a major barrier for the U.S. to achieve its goal in pushing China towards stronger IPR system).

⁴⁵ See Lombardi, *supra* note 9; European Commission, *supra* note 13; Memorandum From Office of Harmonization, *supra* note 11.

⁴⁶ As the EU Ambassador to China, Mr. Serge Abou, figuratively and vividly commented on March 7, 2007 in a press conference in Shanghai, “the trade conflict between the EU and China is inappreciable, as a small tree in a dense forest, and a strengthened cooperation is the mainstream.” See Oumeng Zhuhua Dashi: Moca Juefei Zhongou Maoyi Zhuliu [*The EU Ambassador to China: Conflict is By No Means Mainstream of EU-China Trade*], XINHUA NEWS NET, Mar. 7, 2007 (translation by author).

⁴⁷ Paul Frederick Gressey, *Chinese Traits in European Civilization: A Study in Diffusion*, 10 AM. SOC. REV. 595, 595 (1945).

⁴⁸ *Id.*

⁴⁹ Council of the European Union, Joint Statement, 7th EU-China Summit (Dec. 8, 2004), available at http://ec.europa.eu/external_relations/china/summit/index.htm (follow “Joint Statement 7th EU-China Summit” hyperlink) [hereinafter 7th EU-China Joint Statement] (stating that both the EU and China “stressed the importance of achieving the Millennium Development Goals and attached considerable importance to enhancing bilateral and multilateral co-operation”).

⁵⁰ See Ministry of Commerce of People’s Republic of China, *China, EU Nod to Talks on Trade Rules*, <http://english.mofcom.gov.cn/aarticle/newsrelease/commonnews/200706/20070604780905.html>.

⁵¹ Council of the European Union, Joint Statement, 8th EU-China Summit (Sept. 5, 2005), available at http://ec.europa.eu/external_relations/china/summit_0905/index.htm [hereinafter 8th EU-China Joint Statement].

of implementing and enforcing intellectual property laws, while safeguarding the interests of consumers and creating a positive business environment for continued economic growth and individual prosperity protection.⁵³ The agreement reached at the ninth China-EU summit in Helsinki in 2006 reflected the intensification of the strategic cooperation with an extremely positive momentum between the EU and China.⁵⁴ Most recently, at the tenth China-EU summit, consensus was reached to establish by the end of March 2008 a High Level Economic and Trade Dialogue between the European Commission and the State Council of China which will discuss strategies in a broad area of bilateral trade including the protection of IPR.⁵⁵

1. THE EU'S PRAGMATIC APPROACH TO CHINA: UNDERSTANDING BEFORE TRUST

The EU has been one of the most outspoken supporters of China's WTO membership as an integral part of China's integration into the international economy.⁵⁶ Contrary to the United States which opposed a fast entry to China, the EU supported a quick accession from the mid 90s on.⁵⁷ China's entry into the WTO significantly improved market access for European companies and fostered the European business competitiveness. As the former European Commissioner, Pascal Lamy, has noted, upon China's accession to the WTO, "the costs of [EU] exporting will be reduced and the incentives of investing in China will be strongly enhanced by a more attractive and predictable

⁵² In this summit, "Premier Wen Jiabao of the State Council of China attended the meeting on behalf of the People's Republic of China. The EU was represented by the President of the European Council, Prime Minister Tony Blair of the UK, President of the European Commission, Mr. José Manuel Barroso, and Secretary General of the Council of the EU and High Representative for the EU Common Foreign and Security Policy, Mr. Javier Solana." *Id.*

⁵³ Joint Statement, *supra* note 51, art. 15.

⁵⁴ See Council of the European Union, Joint Statement, 9th EU-China Summit (Sept. 9, 2006), available at http://ec.europa.eu/external_relations/china/summit/index.htm [hereinafter 9th EU-China Joint Statement]

⁵⁵ Council of the European Union, Joint Statement, 10th EU-China Summit (Nov. 28, 2007), available at http://ec.europa.eu/external_relations/china/summit_1107/index.htm [hereinafter 10th EU-China Joint Statement]

⁵⁶ See *Building a Comprehensive Partnership with China*, COM (1998) 181 final (Mar. 25, 1998), available at http://ec.europa.eu/external_relations/china/com_98/index.htm.

⁵⁷ Oliver Lembcke, China's Economic Integration in the WTO: A Test for the Political Integration of the European Union? (paper presented at 2001 Harvard China Review 4th Annual Conference), available at http://www.harvardchina.org/conference/conf2001/conference_Summary/plenary/Lembcke.doc.

business environment.”⁵⁸ “The EU, for example, proposed a ‘transitional membership status’ for China” and also rejected “the American position that China should enter the WTO with the status of a developed country . . . and instead opted for a more case-by-case ‘sectorial’ approach.”⁵⁹

Over the past decade or so, China-EU bilateral trade has undergone radical growth, due, in part, to the increasing economic interdependence of the two parties.⁶⁰ As far as the EU is concerned, China’s exponential economic growth represents tremendous economic opportunities despite the so-called “China threat” or “China collapse” theory.⁶¹ As Chinese scholar Zhengde Huo has noted, “while some European commentators support the theory of ‘China threat’ or ‘China collapse,’⁶² many Europeans see this theory as an American perception.”⁶³ Instead, Europeans tend to believe that the momentum of China’s growth is irresistible.⁶⁴ During China’s difficult process of transition, the exchange of experience and information between the EU and China helped facilitate China’s efforts towards reform, while increasing a European understanding of the modern Chinese economy.⁶⁵ As far as China is concerned, the EU’s model with its tolerance, diversity, and sustainable development embodied in its integration is more suitable for the future world than the U.S. model.⁶⁶ The EU’s rational attitude and flexible approach has provided a cornerstone for further bilateral cooperation. As Javier Solana, Chief of the EU Foreign

⁵⁸ Pascal Lamy, European Comm’r for Trade, Speech to the China Europe International Business School (Dec. 3, 2001), available at http://www.delchn.cec.eu.int/en/eu_china_wto/wto1.htm.

⁵⁹ See Lembcke, *supra* note 57.

⁶⁰ *Id.*

⁶¹ See Xiaobiao Liu, *From Concocting ‘Theory of Threat to Dishing up ‘Theory of Collapse*, PEOPLE’S DAILY, June 11, 2002, at 3, available at http://english.peopledaily.com.cn/200206/14/eng20020614_97837.shtml.

⁶² See, e.g., MURRAY WEIDENBAUM & SAMUEL HUGHES, *THE BAMBOO NETWORK: HOW EXPATRIATE CHINESE ENTREPRENEURS ARE CREATING A NEW ECONOMIC SUPERPOWER IN ASIA 185-95* (1996) (explaining “China threat”); GORDON G. CHANG, *THE COMING COLLAPSE OF CHINA* (2001) (explaining “China collapse”).

⁶³ For many Europeans, China’s “non-rise” could pose a greater threat to global affairs, as sustainable and smooth economic development would be beneficial to Europe. See Huo Zhengde, *On China-EU Strategic Relationship*, INT’L STUDIES, Mar. 2002, at 1. See also European Policy Centre, *EU-China Relations*, <http://www.epc.eu/en/er.asp?TYP=ER&LV=293&see=y&t=2&PG=ER/EN/detail&l=&AI=526>.

⁶⁴ See Huo, *supra* note 63, at 1.

⁶⁵ See generally *Communication of the Commission: A Long Term Policy for China-Europe Relations*, COM (1995) 279 final (July 5, 1995).

⁶⁶ Huo, *supra* note 63, at 1.

Affairs and Security, has commented, China and the EU, as two rising forces, are becoming “strategic partners” and “have the potential to become the most active factor in the international relations.”⁶⁷

2. CULTURAL COMPATIBILITY: MYTH OR REALITY?

The advantages that the EU possesses over the United States when it comes to dealing with IPR issues in China are numerous. First, the significant difference between the U.S. and EU attitudes towards China reflects their respective philosophies towards international relations—between realism and liberalism.⁶⁸ A realism approach asserts that nation states are the unitary actors and dominant players in world affairs and all policies are driven by the national interest of these participants;⁶⁹ while liberalism sees the primary actors on the international stage as individuals and their relations with the state and extra-national organizations.⁷⁰ This concept advocates liberty and equality in general.⁷¹ According to realism, if great powers want to survive, they should act aggressively towards each other and take advantage of every chance they obtain to amass as much power as they can.⁷² However, based on the realist approach to foreign relations,⁷³ Europeans tend to believe that “democracy and free trade secure peace between nations, and that cooperation ultimately enhances freedom.”⁷⁴

With regard to international IPR, the U.S. policy seems to have been driven, or at least influenced, by various political considerations. For example, the White House has responded ardently to mounting anti-China sentiments in Congress⁷⁵ concerning the bilateral trade deficits

⁶⁷ *EU and China, Strategic Partners with Global Objectives: Interview*, PEOPLE’S DAILY ONLINE, http://english.peopledaily.com.cn/200403/17/eng20040317_137780.shtml.

⁶⁸ Vincent G. Sabathier, *Europe and China*, ADASTRA ONLINE, http://www.space.com/adastra/china_europe_0505.html (last visited on Oct. 14, 2007).

⁶⁹ See Gideon Rose, *Neoclassical Realism and Theories of Foreign Policy*, 51 *WORLD POLITICS* 144 (1998).

⁷⁰ *Id.*

⁷¹ SERGE-CHRISTOPHE KOLM, *DISTRIBUTIVE JUSTICE: A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY* 440 (Robert Goodin & Philip Pettit eds., 1995).

⁷² See JOHN J. MEARSHEIMER, *TRAGEDY OF GREAT POWER POLITICS* 11–12, 35 (2001).

⁷³ *Id.*

⁷⁴ Sabathier, *supra* note 68.

⁷⁵ Jonathan Weisman, *China’s Demands Anger Congress, May Hurt Bid*, WASH. POST, July 6, 2005, at D01, available at http://www.washingtonpost.com/wp-dyn/content/article/2005/07/05/AR2005070501617_pf.html.

with China by lobbying for various economic sanctions.⁷⁶ As has been mentioned above, the recent WTO complaints against China are the latest move by the Bush administration, under growing pressure from Congress, to cut the trade deficit with China.⁷⁷ These trade deficits continuously influence U.S. trade relations with China and China remains the biggest country with which the United States runs a bilateral trade deficit.⁷⁸ While the total trade volume in 2006 has reached three hundred and forty-three billion dollars, the deficit with China topped two hundred and thirty-two billion dollars.⁷⁹ With regard to China-EU relations, although bilateral trade is also marked by a sizeable EU trade deficit, the EU attributes the deficit to the obstacles in market access in China, and tends to believe that, if China were to further open its market, the EU's bilateral deficit with China would shrink.⁸⁰

Second, unlike U.S.-China relations, the EU and China have maintained harmonious relations on both a political and an economic level. This is largely due to the historical compatibilities and cultural adaptability between Europe and China. The EU and China enjoy a long history and rich heritage, making outstanding contributions to human civilizations.⁸¹ Cultural accumulation has equipped Europe and China with historical maturation to better deal with complexity, uncertainty, and the art of compromise.⁸² As has been noted by David Gosset, while "Eurasia" carries and cherishes ancient memories, America, which evolved into a super-power only two centuries after its independence, is indulging in the "American spirit" and "departing culturally from its European decent."⁸³ Although Europe and China have gradually developed civilizations, as Gosset remarks, "having in common long

⁷⁶ For an account of the US bilateral trade deficit with China, see US-CHINA TRADE IN CONTEXT, US-CHINA BUSINESS COUNCIL, <http://www.uschina.org/public/documents/2006/06/us-china-trade-context.pdf> (stating that "focusing on the bilateral trade deficit with China misses a bigger story and could lead to poor policy choices").

⁷⁷ Parija B. Kavilanz, *U.S. Files Piracy Complaint Against China*, CNNMONEY.COM, Apr. 10 2007, http://money.cnn.com/2007/04/10/news/international/china_piracy/index.htm.

⁷⁸ See U.S. Dep't of State, Study Documents Negative Impact of U.S. Trade Deficit with China, <http://usinfo.state.gov/ei/Archive/2005/Jan/12-31762.html> (last visited Nov. 6, 2007).

⁷⁹ See US-China Business Counsel, US-China Trade Statistics, www.uschina.org/statistics/tradetable.html (last visited Nov. 6, 2007).

⁸⁰ Wei Wang, *EU-China Trade to Benefit Both*, CHINA DAILY, Oct. 9, 2004, available at http://www.chinadaily.com.cn/english/doc/2004-10/09/content_380770.htm.

⁸¹ *Id.*

⁸² See David Gosset, *A Symphony of Civilizations*, ASIA TIMES ONLINE, Aug. 12, 2006, <http://www.atimes.com/atimes/China/HH12Ad02.html>.

⁸³ *Id.*

maturations over millennia, the two old worlds have developed affinities and, despite all the exotic representations, the two edges of Eurasia are closer than they seem.”⁸⁴ While European and Chinese values may be different, the objective of communication and cooperation between Europe and China is to try to understand each other better.⁸⁵

As Christopher De Vroey, the IPR Director at DG Trade of the European Commission, stated during an interview with the authors, the difference between EU and U.S. foreign policy is that the EU “aims to maintain a rational and flexible approach in achieving its long-term strategic goals in terms of intellectual property protection, understanding that counterfeiting and piracy are common problems in developing countries.”⁸⁶ The mutual awareness of fundamental cultural and historical commonalities has deepened the links between the two edges of Eurasia and has “a moderating effect on Washington’s imperial hubris.”⁸⁷ This cultural adoption has resulted in a better understanding between Europe and China which has been essential for both sides in understanding what the two ancient civilizations can achieve together.⁸⁸ As the EU trade Commissioner Peter Mandelson recently acknowledged, the EU “ha[s] accepted that IPR is a complex issue and that China’s commercial culture and legal system need time to absorb change.”⁸⁹ The perceived “gentleness” of the European style and the “courtliness” of the Chinese style are mutually compatible and have provided an excellent ethical foundation for a constructive bilateral relationship.

Third, an institutional foundation has been established to implement the envisioned “strategic partnership,” although substantial work is still required. By May 2006, there were approximately forty cooperation projects with a total amount of two hundred and seventy million euros operating by various European institutions in China.⁹⁰ The establishment of the European Chamber of Commerce in China (“EUCCC”), the EU-China Business Dialogue, and the newly established EU-Intellectual Property Dialogue is a promising institutional

⁸⁴ *Id.*

⁸⁵ See European Policy Centre, *supra* note 63.

⁸⁶ Interview with Christopher De Vroey, IPR Director at DG Trade, European Comm’n, in Brussels, Belgium (May 28, 2003).

⁸⁷ Gosset, *supra* note 82.

⁸⁸ *Id.*

⁸⁹ Peter Mandelson, Protecting IPR in China, Speech at Trade Fairs Seminar - Beijing (Nov. 26, 2007), available at http://www.delchn.cec.eu.int/?item=news_view&nid=105.

⁹⁰ Delegation of the European Commission, EU-China Co-operation Projects, http://www.delchn.cec.eu.int/en/Co-operation/General_Information.htm.

arrangement.⁹¹ In contrast, the United States has been using Section 301 assiduously in fighting piracy without paying much attention to the economic adaptation and indigenous tradition.⁹² Almost all of the U.S.-China bilateral agreements concerning IPR protection were outcomes of a coercive U.S. policy aimed at imposing sanctions upon China, while largely neglecting capacity building and the enhancement for the sustainability.

3. WHAT THE EU CAN OFFER CHINA

Whilst China has failed to implement satisfactory political reform, Chinese economic integration into the world trading system is perceived by the West as beneficial when it yields dramatic economic prosperity. Further economic integration is necessary and the EU is best suited to guide China on this. China is undergoing a dramatic socio-political transition and the eventual outcome of this transition will have considerable implications for China-EU relations. In this sense, it is in Europe's interest to understand and assist China towards economic and political reform. China can draw extensively on Europe's rich experience in political institutional building, democratic governance, social welfare reforms, as well as regional integration.⁹³

In addition, China has embarked on its ambitious plan for legal reform.⁹⁴ Of critical importance is the need for European assistance in

⁹¹ The European Union Chamber of Commerce in China is a corporate and autonomous private sector body, which represents the views of the business community of the Member States of the EU in China and endeavours to improve access of European business to the Chinese market. See, European Union Chamber of Commerce in China, <http://www.europeanchamber.com.cn/home/index.php>. The EU-China Business Dialogue and the EU-Intellectual Property Dialogue were launched in 1998 and 2003 respectively with aim of fostering mutual understanding and cooperation between the two parties. See European Commission, An Overview of Sectoral Dialogues between China and the European Commission, http://ec.europa.eu/external_relations/china/intro/sect.htm#Textile_trade_dialogue (EU-China Business Dialogue); see also EUROPEAN COMMISSION, EU-CHINA DIALOGUE ON INTELLECTUAL PROPERTY, available at http://ec.europa.eu/external_relations/china/intro/ipr_291003.pdf.

⁹² In the area of world trade and intellectual property, many developing countries adopted high level standards of IPR through coercive approaches, such as Section 301, imposed by developed countries, such as the United States. See Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L. 839, 847-48 (2003).

⁹³ See Wei-Wei Zhang, *China's Political Transition: Trends and Prospects*, EURASIA BULL., Oct.-Nov. 2003, at 11 (Chinese economic reform may better be described as "great economic reform with lesser political reform").

⁹⁴ Since the late 1970s when China's "open door" policy was carried out, China's ambitious program of legal reform has enabled law to gain in unprecedented importance in Chinese society

the enactment of implementing regulations, administrative rules, and a refinement of laws, particularly in difficult areas such as the balance between unfair competition and intellectual property. The regulation can be abstracted and developed from the existing frameworks of national legislation and experience from the EU on a comparative basis. In concrete terms, as will be discussed below, the authors suggest that a differentiated IPR policy should be applied to fit in different circumstances arising from the regional disparities and industrial divergence. Here, China can benefit from the EU's experience in implementing the EU Directive on Enforcement of IPR. Since this directive was formally adopted on April 29, 2004, two days before the enlargement of the EU to twenty-five member states, the ten new member states had no influence on the directive.⁹⁵ However, this directive is a "one-law-fits-all" provision,⁹⁶ which means that although the member states have flexibility in implementing this directive in their own way and at their own pace, all member states, including the new members as developing states, will eventually have to transpose the directive into their respective national laws. In this context, reconciling the old and the new member states coming from both the developed and developing worlds is an enormous challenge for the EU, and its successful harmonization of this policy will provide valuable guidance for China in dealing with its own differentiation of IPR standards.

B. MATRIX OF CONCERNS WITHIN CHINA-EU INTEGRATIONS

Notwithstanding that the EU and China share common values and enjoy good and cooperative relations, there are still institutional obstacles between the two. These concerns need to be addressed as this

and shaped China's legal landscape profoundly. For a detailed introduction and interpretation of China's legal reform, see Mingde Li, *The Intellectual Property System in the Modern Chinese Social Development*, available at www.iolaw.org.cn.

⁹⁵ The particularity concerning the implementation of the directive in the ten new Member States is reflected by the fact that the directive was adopted just two days before enlargement was initiated. On May 1, 2004 the EU undertook new wave enlargement, bringing the total number of Member States from fifteen to twenty five. See European Parliament, *The Enlargement of the European Union*, http://www.europa.eu/enlargement/default_en.htm.

⁹⁶ Each Member State is obliged to implement the directive in a manner which fulfils the requirements of clarity and to transpose the provisions of the directive into national provisions in order to provide uniform enforcement across the EU. See Case 239/85, *Comm'n v. Belgium*, 1986 E.C.R. 3645 (stipulating that "[e]ach Member State must implement Directives in a manner which fully meets the requirement of legal certainty and must consequently transpose their terms into national law as binding provisions. A Member State cannot fulfil its obligations under a directive by means of a mere circular which may be amended by the administration at will").

will provide an essential context within which future bilateral negotiations can proceed.

1. EU INTEGRATION AND ITS IMPACT UPON CHINA

The integration of the EU is a driving force for the growth of China-EU bilateral trade, and has started to bear fruit. The most significant example is the arrival of the euro which represents a considerable challenge to the U.S. dollar and has eased China's dependence on the dollar in foreign trade settlements, as well as offered China more flexibility in utilitarian considerations of trade policy.⁹⁷

However, the legal reality of the EU in respect to trade has, to some extent, counteracted the advantages of the integration. As a unique institutional design, duality is one of the most crucial aspects of the EU. The most fundamental dilemma in the process of reforming EU institutions is the underlying tension between fragmentation on the one hand, as each state strives to protect its individual interests and highly competitive economies, and the cohesion of common policies on the other hand.⁹⁸ Some commentators state that duality is "a matter of democracy," since the diversity of the EU should be recognized and respected, and reflected in all the constitutional and institutional arrangements that maintain equality and impartiality among member states.⁹⁹ Opponents of this position argue that, as the EU grows, the diversity of interests and the opportunity for limited, issue-based policy-alliances increase exponentially.¹⁰⁰ It is apparent that no consensus has been reached.

The authority to regulate foreign trade and intellectual property for the EU is two-fold: imports are administered at the EU level;¹⁰¹ "whereas exports have . . . remained within the responsibility of each

⁹⁷ See *China Intend to Buy More Euro to Reduce its Dependence on the US Dollar*, CHINA NEWS DIGEST, <http://www.cnd.org/HXWZ/CM02/cm0201b.gb.html>.

⁹⁸ See PAUL CRAID & GRAINNE DE BURCA, *EU LAW: TEXT, CASES, AND MATERIALS* 54-65 (3d ed. 2003).

⁹⁹ See generally *id.* at 167-73.

¹⁰⁰ See Giovanni Grevi, *The Europe We Need*, (European Policy Ctr., Working Paper WP/21/GG/gg/F.199/10.04.03, 2003), available at www.epin.org/pdf/GreviEPC.doc.

¹⁰¹ Prior to the EU Summit in Nice in December, 2000, the regulation of the flow of goods fell in the sole competence of the EU. Case 1/75, Opinion of the Court Given Pursuant to Article 228 of the EEC Treaty of 11 November 1975, E.C.R. I-1355 (discussing the legal situation concerning the flow of goods); Case 1/94, Opinion Pursuant to Article 228(6) of the EC Treaty, E.C.R. I-5267 (discussing the complex situation regarding the "shared responsibilities" in the area of services).

member state.¹⁰² In terms of imports, member states adopt integrated EU criteria on imports while maintaining national policies to foster their exports and monitor their internal markets.¹⁰³ As a new creation in the international arena, the EU bears with it the duality of both traditional sovereignty and regional integration, which prescribes the incoherence in its foreign policy and hinders the effectiveness of both the EU and its trading partners.¹⁰⁴

While China was seeking to establish itself as a coherent foreign player, the EU's foreign policy agenda did not necessarily follow those of its member states¹⁰⁵—each member state has its own history with China, and some member states accommodate competing economic interests.¹⁰⁶ There are areas in which the EU was not yet a coherent actor in its foreign policy, which made it difficult for the EU to formulate a common position and arrive at a common policy towards China.¹⁰⁷ As a consequence, China is faced with the dilemma of balancing its policies towards the EU and the individual member states.¹⁰⁸ The question remains as to how far this concern could be addressed and this situation could be altered by changing the rules in foreign trade of the EU.¹⁰⁹

The legal reality of the EU, particularly in respect to IPR, is also different from that which European officials may have envisioned.¹¹⁰ Since the Common Market in many legal respects is still a combination of national markets *per se*, there are multiple layers of commercial and political involvement and several judicial structures,¹¹¹ which may pose obstacles to the bilateral trade relations.

With regard to IPR in the EU, problems are also accentuated by the cumbrous nature of the duality.¹¹² Compared to the United States and

¹⁰² Lembcke, *supra* note 57.

¹⁰³ See Huo, *supra* note 63, at 1-17.

¹⁰⁴ For a full account of the “layered” institutional structure and its limitations, see Deirdre M. Curtin & Ige F. Dekker, *The EU as a ‘Layered’ International Organization: Institutional Unity in Disguise*, in *THE EVOLUTION OF EU LAW* (P.P. Craig & Grainne De Burca eds., 1999).

¹⁰⁵ See European Policy Centre, *supra* note 63.

¹⁰⁶ David Gosset, *A Making of a China-EU World*, ASIA TIMES ONLINE, July 20, 2005, <http://www.atimes.com/atimes/China/GG20Ad02.html> (last visited Oct. 14, 2007).

¹⁰⁷ See European Policy Centre, *supra* note 63.

¹⁰⁸ *Id.*

¹⁰⁹ Lembcke, *supra* note 57 (stating that the “Treaty of Nice has lead [sic] to a number of changes to article 133 of the EC Treaty that concerned the harmonization of norms” in the area of trade and as well as intellectual property rights).

¹¹⁰ Thomas Hays, *Paranova v. Merck and Co-Branding of Pharmaceuticals in the European Economic Area*, 94 TRADEMARK REP. 821, 821 (2004).

¹¹¹ *Id.*

¹¹² *Id.*

Japan, the protection of IPR in the EU is complex, costly, and fragmented;¹¹³ and the parameters of national competencies and coordination of the different member states by the EU is cumbersome, resulting in unnecessary and sometimes counterproductive effects.¹¹⁴ In the patent area, for instance, while one-third of all patents issued in Europe are American in origin, only 15 percent of U.S.-issued patents come from Europe, simply because the dual European system is over-complex, expensive, and only partially effective.¹¹⁵

EU duality also has important implications for China's WTO membership, "the central challenge being the conversion of the achieved agreements in practical policies."¹¹⁶ While the bilateral relationship between China and the EU has improved in general terms, it is still uncertain "whether member states will be able to agree on a common position if and when disputes between the EU and China arise."¹¹⁷ From this perspective, the integration of China into the global trading system will prompt questions as to the state of the EU's own integration and their own unusual status within the WTO.¹¹⁸

2. CHINA'S INTEGRATION AND ITS IMPACT ON THE EU

China's integration into the world economy was strengthened by China's accession to the WTO and China's participation in international organizations reflects its increased global commitments. By obtaining membership, China is directly obliged to comply with the principles and rules prescribed by the WTO.¹¹⁹ In addition to formal compliance with the general provisions, China is required to adapt to international trade

¹¹³ See *IPR in Europe's Safe Keeping*, INNOV. & TECH. TRANSFER (European Comm'n Innovation Programme, Brussels, Belg.), Oct. 1999 at 11-12.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Lembcke, *supra* note 57.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ On December 11 2001, China became the 143rd member of the World Trade Organization. China's WTO obligations are set forth in China's Protocol of Accession which contains the terms of membership that China affirms its adherence to the WTO agreements, and an accompanying Report of the Working Party and Goods and Services Schedules. Protocol on the Accession of The People's Republic of China, WT/L/432 (Nov. 23, 2001), available at http://www.wto.org/english/thewto_e/acc_e/protocols_acc_membership_e.htm (follow "China Package" hyperlink).

norms, including IPR standards.¹²⁰ Since the promotion of China's integration in the multilateral trading system is part of the EU trade strategy,¹²¹ China's embracing of the WTO also reflects its aspirations of strengthening China-EU trade relations.

The expansion of the Chinese market in the manufacturing, telecommunications, transportation, energy, and environmental sectors is immensely attractive to an EU member state that depends on foreign trade and has surplus capital and advanced technologies.¹²² Since China's WTO accession, China-EU trade relations are no longer the conventional relations characterized by exchanging market for capital and technologies.¹²³ Rather, the EU is expected to attach greater importance to China's role in maintaining the stability of and giving an impetus to the global economy.¹²⁴ To this end, the EU is required to develop a strong and sustainable trading relationship with China by harmonizing a common WTO policy—in other words, a common China policy.

3. SAME HIERARCHY, DIFFERENT DIMENSION

While the EU and China have much in common within the process of China-EU negotiations, each has its own special needs. China is keen to raise its profile in the EU and to benefit from a strong relationship.¹²⁵ Simultaneously, the EU encourages the integration of China in the world economy and, at the same time, the EU is concerned with making the enforcement of IPR a key criterion—creating the means

¹²⁰ In accordance with the TRIPs Agreement, China is obliged to comply with internationally accepted provisions for protecting intellectual property rights. *Id.* at Part I(2)(a)2.

¹²¹ EUROPEAN COMMISSION, THEMATIC EVALUATION OF THE EC SUPPORT TO GOOD GOVERNANCE, (Mar. 2006), available at http://ec.europa.eu/comm/europeaid/evaluation/reports/2006/884_vol2.pdf.

¹²² Huo, *supra* note 63, at 5-6.

¹²³ *Id.*

¹²⁴ See Javier Solana, EU High Rep. for the Common Foreign & Sec. Policy, Speech at the China Europe Int'l Bus. School: Driving Forwards the China-EU Strategic Partnership (Sept. 6, 2005) available at www.delchn.cec.eu.int/en/whatsnew/pren060905.htm.

¹²⁵ See People's Republic of China Foreign Ministry, Zhonguo yu Oumeng Changqi Wending de Jianshexing Huoban Guanxi [Towards a Long-term Reliable and Constructive Strategic Partnership between China and the EU] (Nov. 7, 2000), available at <http://www.fmprc.gov.cn/chn/ziliao/wjs/2159/t8999.htm> (stating that China is committed to building and consolidating its credibility as a strategic partner of the EU) (translation by author).

to remedy the deficiencies of the existing IPR enforcement mechanisms.¹²⁶

On the one hand, China has a higher level of expectation towards EU investment in China. For example, “EU companies have invested considerably in China as actual FDI is around US\$4.2 billion on average in the last five years, bringing stocks of EU FDI to over US\$35 billion.”¹²⁷ While substantial, compared with its annual outward investment of three hundred billion dollars, this was only 1.4 percent of its total investment, indicating a great investment potential in China.¹²⁸ On the other hand, the EU is not totally satisfied with *status quo* and expects a great deal from China.¹²⁹ Most notably, certain Chinese IPR policies are not fully compliant with international practices.¹³⁰ For example, in recent years an increasing number of European high-tech companies signed deals for joint ventures with their Chinese trade partners and provided Chinese manufacturers with license terms that are different from the standard international terms;¹³¹ however, Chinese standards’ groups in the high-tech area have a policy requiring mandatory patent pool participation or unreasonable disclosure,¹³² thus forming unfair competitions. As a hidden rule, many Chinese officials have prohibited domestic Chinese companies from negotiating royalties by using the key technology in so-called “essential patents” that ensure interoperability of products such as TVs, telecom equipment, and CDs.¹³³

Many European entrepreneurs have a complicated attitude towards their business in China. The common sentiment is that, to some

¹²⁶ SEE EUROPEAN UNION CHAMBER OF COMMERCE IN CHINA, EUROPEAN BUSINESS IN CHINA POSITION PAPER (2004).

¹²⁷ *Nations Hail Sino-European Trade*, PEOPLE’S DAILY, Dec. 15, 2004, available at http://english.peopledaily.com.cn/200412/15/eng20041215_167397.html.

¹²⁸ *Id.*

¹²⁹ See European Commission, *supra* note 13 (mentioning that progress of enforcement is significant, but still insufficient).

¹³⁰ *Id.*

¹³¹ For example, since 2000, Qualcomm, the leading network operator that controls the technology of CDMA, signed a series of deals to provide some Chinese manufacturers with license terms that are more favorable than its standard rates. See Press Release, Qualcomm Inc., Qualcomm Signs CDMA Intellectual Property Agreement with China Unicom (Feb. 1, 2000) available at <http://www.qualcomm.com/press/releases/2000/press347.html>.

¹³² James M. Zimmerman, Partner & Chief Rep., Squires, Sander & Dempsey, L.L.P., Prepared Statement: Exerpts of AmCham-China and AmCham-Shanghai’s Draft 2005 White Paper Concerning Intellectual Property Rights Issues 76 (May 16, 2005), available at <http://www.cecc.gov/pages/roundtables/051605/Zimmerman.php?mode=print>.

¹³³ Emma Barraclough, *US and EU Pile Pressure on China*, MIP WEEK (Hong Kong), Sept. 12, 2005, available at <http://www.eurochamber.com.cn/show/details.php?id=583> (last visited Nov. 8, 2007).

extent, they are more or less reluctant to do business in China because they are not confident enough about the protection of their interests under the current legal and judicial environment;¹³⁴ however, most industries cannot afford to ignore the Chinese market with its enormous potential. The lure of the huge profit margins and low labour costs is so hard to resist that many would rather take the risk.¹³⁵ According to a survey by the EUCCC, despite the problems associated with IPR protection, 90 percent of the European companies polled said that they were “optimistic” or “cautiously optimistic” about their overall business prospects in China;¹³⁶ 64 percent of participants noted that they expected to be profitable in China.¹³⁷

C. IMPLICATIONS OF EU ACTION PLAN TOWARDS CHINA

Traditionally, while the EU has introduced legislation harmonizing the substance of intellectual property law throughout the member states,¹³⁸ significant differences remain between certain member states regarding the tools available for enforcing IPR.¹³⁹ For example, the protection of commercial confidentiality in the United Kingdom is strong while in the rest of the EU such protection is comparatively limited.¹⁴⁰ There are also differences regarding the availability of court injunctions on the sale of counterfeit products, the calculation of damages awarded to the IPR holders in relation to infringements, and the nature of civil and criminal penalties imposed on counterfeiters, which may ultimately undermine the substance of IPR protection in the EU.¹⁴¹

¹³⁴ See EUROPEAN UNION CHAMBER OF COMMERCE IN CHINA, *supra* note 126.

¹³⁵ See Juhan Ke, *Mei Weihe Qianghua Dui Hua Jingji Shiya [Why the United States Intensifies Economic Pressure on China]*, LIAOWANG XINWEN ZHOUKAN [OUTLOOK WEEKLY], Aug. 10, 2006 (translation provided by author).

¹³⁶ Tschang Chi-chu, *EU Traders Call for Bite in China's Law*, THE DAILY STAR, Oct. 17, 2004.

¹³⁷ *Id.*

¹³⁸ For example, Council Directive 89/104/EEC, art. 2, 1988 O.J. (L 40) 1 (EC) was designed to harmonize national legislative provisions and practice within the EU in accordance with trademark protection.

¹³⁹ TDC Trade.com, Business Alert-EU: Proposed Intellectual Property Enforcement Directive Condemned as Too Harsh, Sept. 11, 2003, <http://www.tdctrade.com/alert/eu0318e.htm> (last visited Nov. 8, 2007).

¹⁴⁰ See Patrick Birkinshaw, *Reform of Information and Openness: Fundamental Human Rights?*, 58 ADMIN. L. REV. 177, 194-95 (2006) (mentioning that the UK, together with the US, enjoys a stronger protection of commercial confidentiality).

¹⁴¹ TDC Trade.com, *supra* note 139.

In order to protect intangible properties within Europe and generate a uniformly high level of penalties against those found guilty of counterfeiting and piracy, the EU has adopted a fierce enforcement policy reflected by the Directive on the Enforcement of Intellectual Property Rights.¹⁴² However, strategic implications in the context of EU-China trade relations, particularly when the EU takes aim at third countries, place China on the top of the list.¹⁴³ In its newly released action plan, entitled “Strategy for the Enforcement of IPR in Third Countries,”¹⁴⁴ the European Commission sets high standards for trade policy and grants itself a broad mandate to exert pressure on third countries. However, the reality is to convince China’s policymakers of the genuine benefits of IPR protection, rather than attempting to impose unilateral solutions to the infringement concerned. As European leaders have acknowledged, any proposed solutions will only be effective if they are prioritized and considered to be beneficial and essential by the recipient country.¹⁴⁵

It is clear that any attempt to copy other models of IPR enforcement, particularly the United States’ Section 301 approach, would not be wise. Nevertheless, in the action plan, the EC set out a target for identifying and focusing on the “most problematic countries” as “priority countries” in terms of IPR violations.¹⁴⁶ These countries will be identified according to a regular survey to be conducted by the Commission among all stakeholders and the result of the survey should form the basis for renewing the list of priority countries for the subsequent period.¹⁴⁷ China was considered one of the most problematic countries according to the results of the survey.¹⁴⁸ Although this strategy asserts that “it does not intend to impose unilateral solutions to the

¹⁴² See Council Directive 2004/48/EC, preamble, 2004 O.J. (L 157) 56 (EU) available at http://www.europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_195/l_19520040602en00160025.pdf.

¹⁴³ See European Commission, Strategy for the Enforcement of Intellectual Property Rights in Third Countries, 2005 O.J. (C 129) 5-8, available at http://trade.ec.europa.eu/doclib/docs/2005/april/tradoc_122636.pdf.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 5.

¹⁴⁷ *Id.*

¹⁴⁸ EUROPEAN COMMISSION, OVERVIEW: SURVEY ON ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS IN THIRD COUNTRIES (2004), http://trade.ec.europa.eu/doclib/docs/2004/august/tradoc_113229.pdf (some countries, including China, are “large scale producers of pirated and counterfeit goods”); EUROPEAN COMMISSION, 2004 IPR ENFORCEMENT SURVEY: PEOPLE’S REPUBLIC OF CHINA, http://trade.ec.europa.eu/doclib/docs/2004/august/tradoc_113209.pdf (discussing the increase in copyright infringements, the wide variety of counterfeit goods, and the problems with co-ordinating an organized effort against the problem).

problem,¹⁴⁹ it does provide institutional framework and capacities for the implementation of any actions, including trade sanctions, which are considered to be necessary under certain circumstances.¹⁵⁰ It therefore raises concerns on whether a European-styled Section 301 might ultimately be developed.

V. FEASIBLE APPROACHES: COERCION OR HARMONY?

According to Confucius, “[t]he true gentleman is conciliatory but not accommodating; common people are accommodating but not conciliatory (*junzi he er bu tong, xiaoren tong er bu he*).”¹⁵¹ This famous quote means that wise persons can have harmonious relationships with others without assimilation while inferior people can have superficial assimilation without harmony.

Methods of dispute resolution in any society usually reflect that society’s normative practices and legal culture.¹⁵² Within a global trade context, cultural differences regarding the appropriate method often give rise to a “multiplicity of perceptions” affecting outcomes of the negotiations.¹⁵³ Differences should be properly handled in line with the principle of seeking common ground while reserving differences. Here, the authors will explore negotiation strategies, taking into account interactions between cultural orientation and commercial behavior, in particular from a China-EU perspective.

A. BALANCE-OF-POWER, BALANCE-OF-INTERESTS, OR BALANCE-OF-DEVELOPMENT: THEORETICAL DIMENSIONS

One popular theory amongst international relations scholars is the balance-of-power theory.¹⁵⁴ “Premised on the anarchic nature of the

¹⁴⁹ European Commission, *supra* note 143, at 1.

¹⁵⁰ *Id.* at 10-11.

¹⁵¹ THE ANALECTS OF CONFUCIUS 177 (Arthur Waley trans. & annot., 5th ed. 1964).

¹⁵² Tanya Kozak, *International Commercial Arbitration/Mediation at CIETAC (China International Economic and Trade Arbitration Commission)* (1999 Dispute Resolution Award in Law Studies, Canadian Forum on Civil Justice), available at <http://cfcj-fcjc.org/clearinghouse/drpapers/kozak.htm> (last visited Nov. 10, 2007).

¹⁵³ *Id.*

¹⁵⁴ T.V. Paul, *Introduction: The Enduring Axioms of Balance of Power Theory and Their Contemporary Relevance*, in BALANCE OF POWER 1, 1 (T.V. Paul et al. eds., 2004).

international system, the theory holds that countries have to balance power with power, through unilateral initiatives or collective means, to protect themselves against foreign aggression and possible extinction.¹⁵⁵ In the point of view of Confucius, the balance-of-power approach seeks “superficial assimilation” by force without “harmony.”¹⁵⁶ Since the sixteenth century, balance-of-power theories have brought about profound impacts on international relations;¹⁵⁷ however, with end of the Cold War and the increasing prominence of international institutions, scholars and observers have argued that the balance-of-power theory is losing its relevance.¹⁵⁸ In recent years, scholars and policymakers, such as Robert O. Keohane and Joseph S. Nye, have increasingly emphasized the need to “replace the balance-of-power theory with a balance-of-interests theory,”¹⁵⁹ asserting that, “in order to govern situations of complex interdependence successfully international regimes must be congruent with the interests of powerfully placed domestic groups within major states, as well as with the structure of power among states.”¹⁶⁰

In contrast with the balance-of-power approach, which is confrontational to international relations, the balance-of-interests approach is more conciliatory and harmonious.¹⁶¹ According to Professor Schweller, “the most important determinant of alignment decisions is the compatibility of political goals” rather than imbalances of power or threat;¹⁶² thus, the underlying rationale of the balance-of-interests theory is the reciprocal adaptation of two parties.¹⁶³ This shift in focus from balance-of-power to the balance-of-interests reflects the growing popularity of international regimes, which are determined primarily by interests rather than the distribution of power.¹⁶⁴

¹⁵⁵ See Peter K. Yu, *Toward a Nonzero-Sum Approach to Resolving Global Intellectual Property Disputes*, 70 U. CIN. L. REV. 569, 604 (2002).

¹⁵⁶ See THE ANALECTS OF CONFUCIUS, *supra* note 151 and the accompanying text.

¹⁵⁷ See Jack S. Levy, *What Do Great Powers Balance Against and When?*, in BALANCE OF POWER, *supra* note 154, at 40-41 (discussing various European historical events and the balance of power theory).

¹⁵⁸ Mark R. Brawley, *The Political Economy of Balance of Power Theory*, in BALANCE OF POWER, *supra* note 154, at 76-98; James J. Wirtz, *The Balance of Power Paradox*, in BALANCE OF POWER, *supra* note 154, at 127-46.

¹⁵⁹ Yu, *supra* note 155, at 604.

¹⁶⁰ See ROBERT O. KEOHANE & JOSEPH S. NYE, POWER AND INTERDEPENDENCE (3d. ed. 2001).

¹⁶¹ Yu, *supra* note 155, at 604-05 (comparing the balance of power and balance of interests approaches).

¹⁶² Randall L. Schweller, *Bandwagoning for Profit: Bringing the Revisionist State Back*, INT'L SECURITY, Summer 1994, at 72, 88.

¹⁶³ *Id.* at 106.

¹⁶⁴ Yu, *supra* note 155, at 605.

In light of the North-South disparity over economic strength and technological sophistication, attempts to bridge the divide have taken place through a variety of international sources such as the United Nations, the Organisation for Economic Cooperation and Development, the G8, and the EU.¹⁶⁵ A key development through these sources was the G8 Summit at Kyushu-Okinawa in 2000, which was seen as “the result of a unique international collaboration.”¹⁶⁶ In the light of the significant “digital divide” reflecting the increased economic disparity, the Kyushu-Okinawa Summit adopted the Charter on the Global Information Society and agreed to establish a Digital Opportunity Task-force (“DOT”).¹⁶⁷ The DOT aimed to bridge the “digital divide” which was threatening to exacerbate the existing social and economic inequalities between countries and communities,¹⁶⁸ particularly between the developed and developing world. In light of this, some scholars are calling for a balance-of-development approach in order to reconcile the economic tensions of developed and developing nations, taking into account the affordability, sustainability, and other special needs of less developed countries.¹⁶⁹

In a legal context, the WTO and TRIPs Agreement provide a number of principles and provisions that enable countries to focus on sustainable development and pursue a cooperative approach to resolving issues of the North-South disparity.¹⁷⁰ According to the principles of the WTO, the trading system “should be more accommodating for less-developed countries, giving them more time to adjust, greater flexibility,

¹⁶⁵ See Abdul Paliwala, *Digital Divide Globalisation and Legal Regulation*, 6 UTS L. REV. 24 (2004).

¹⁶⁶ G8, *Digital Opportunities for All: Meeting the Challenge, Report of the Digital Opportunity Task Force (DOT Force) Including a Proposal for a Genoa Plan of Action*, at 1 (May 2001), available at <http://www.g8italia.it/en/docs/STUWX141.htm>.

¹⁶⁷ OFFICE OF INT'L INFORMATION PROGRAM, OKINAWA CHARTER ON GLOBAL INFORMATION SOCIETY, available at <http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan002263.pdf>.

¹⁶⁸ G8, *supra* note 166.

¹⁶⁹ Salah Hannachi, Ambassador of The Republic of Tunisia to Japan, *Kyushu-Okinawa Summit from Balance of Power to Balance of Development* (Paper for the 2000 G8 Pre-Summit Public Policy Conference, July 17, 2000), available at <http://www.g8.utoronto.ca/scholar/hannachi2000> (discussing the need for world solidarity).

¹⁷⁰ Gary W. Smith, *Intellectual Property Rights, Developing Countries, and Trips: An Overview of Issues for Consideration during the Millennium Round of Multilateral Trade Negotiations*, 2 (6) J. WORLD INTEL. PROP. 969-975 (1999), available at <http://www.blackwell-synergy.com/doi/pdf/10.1111/j.1747-1796.1999.tb00102.x?cookieSet=1>.

and more privileges.”¹⁷¹ In addition, Article 67 of the Agreement requires developed countries to provide “technical and financial cooperation” to developing and less-developed countries in an effort to “facilitate the implementation” of the TRIPs Agreement.¹⁷² According to this article, assistance should be provided “on request and on mutually agreed terms and conditions”.¹⁷³ The aim of the cooperation is to provide “assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and . . . support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel.”¹⁷⁴ These principles and provisions, in a more concrete perspective, provide the legal basis for EU-China cooperation.

B. CULTURAL TRAITS IN COMMERCIAL NEGOTIATIONS

1. INDIVIDUAL RIGHTS AS PRIORITY: EUROPEAN CULTURE IN NEGOTIATIONS

European culture has traditionally prioritized individual rights enforced through individual legal remedy.¹⁷⁵ Many Europeans believe in the “reality principle,”¹⁷⁶ making full use of the modern information and communication tools in the battleground of debate and confrontation to achieve their goals without having to worry about “loss of face.”¹⁷⁷ To this end, litigation is a popular method in commercial dispute settlements.

¹⁷¹ World Trade Organization, Principles of the Trading System, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited Nov. 10, 2007).

¹⁷² Marrakesh Agreement Establishing the World Trade Organization, Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights (Apr. 15, 1994), available at www.wto.org/English/docs_e/legal_e/27-trips_08_e.htm.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ FRANCO MORETTI, THE WAY OF THE WORLD: THE BILDUNGSROMAN IN EUROPEAN CULTURE, 38-41 (1987).

¹⁷⁶ *Id.* at 95.

¹⁷⁷ *Id.*

2. LIVE IN HARMONY: WHAT WE CAN LEARN FROM CONFUCIANISM

In contrast, “living in harmony” (*he wei gui*) is an essential element of Chinese culture when confronting disputes.¹⁷⁸ A significant aspect of the Confucian attitude towards dispute resolutions is its emphasis on the principle of harmony and the virtue of “giving way” (*lirang*).¹⁷⁹ According to Confucian philosophy, there is a natural harmony in human affairs and the best way to resolve a dispute is through moral persuasion and agreement rather than coercion.¹⁸⁰ This culture is associated with maxims such as “harmony is the gate to riches” (*he qi sheng cai*) and “more harmony, more prosperity” (*jia he wan shi xing*).¹⁸¹

Chinese cultural and social values reflect a significant relationship between law and other social factors and these values, to a significant degree, illustrate the basic notion of how Chinese laws function domestically and internationally.¹⁸² Influenced by Confucian philosophy, the primary emphasis in society is on maintaining harmonious social relations.¹⁸³ The main purpose of law and regulations is to shape social roles and to sustain the cardinal order in daily encounters.¹⁸⁴ This traditional perception contributes substantially to the contemporary Chinese attitude towards dispute settlement.¹⁸⁵

Although the influence of Confucian values has diminished in China over the past decades, it is still apparent that the Chinese tend to comply with authorities and adopt subtle negotiation, persuasion, and conflict avoidance techniques in most spheres of the personal and

¹⁷⁸ HYUNG I. KIM, FUNDAMENTAL LEGAL CONCEPTS OF CHINA AND THE WEST: A COMPARATIVE STUDY 17 (1981) (“the purpose of law is to guide the people’s conduct so as to create harmonious social order in accord with the natural order”).

¹⁷⁹ JAY FOLBERG & ALISON TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION 1 (1984) (discussing the importance of mediation in ancient China where the Confucian emphasis was on harmonious relationships, persuasion, and agreement).

¹⁸⁰ *Id.*

¹⁸¹ See *Zhongguo Chuantong ‘He’ Wenhua yu Goujian Hexie Shehui* [Traditional Chinese Harmony Culture and the Establishment of Harmonious Society], NEWS.CN, http://www.qh.xinhuanet.com/economyxn/2006-09/22/content_8117135.htm (translation by author).

¹⁸² Shin-yi Peng, *The WTO Legalistic Approach and East Asia: From the Legal Culture Perspective*, 1 ASIAN-PAC. L. & POL’Y J. 13:9-10, <http://www.hawaii.edu/aplpj/pdfs/13-peng.pdf>.

¹⁸³ Folberg & Taylor, *supra* note 179, at 1.

¹⁸⁴ Peng, *supra* note 182, at 13:10.

¹⁸⁵ *Id.* at 13:10, 13:13.

commercial relations—modern Chinese ideologies have not challenged this perception.¹⁸⁶ As a result, there is arguably an entrenched cultural inhibition within Chinese people from launching a formal complaint. Even today, presenting before the court (*dui bu gong tang*) is seen as a last resort. Articulation of grievances is regarded as “a loss of face” (*mianzi*),¹⁸⁷ and the suppression of disputes is a widely recognized tactic in handling discord.¹⁸⁸ In this context, it is not surprising that many Chinese prefer to settle disputes through a more flexible, less confrontational process, such as consultation or mediation, through which the relevant parties can maintain an amicable “relationship” during and after the dispute settlement.¹⁸⁹ Influenced by this perception, the Chinese show a stronger preference for mediation, consensus building, bargaining, and conciliation than for adversary and inquisitorial litigation.¹⁹⁰

3. CROSS-CULTURAL INTERACTIONS

In Chinese philosophy, disputes should be “dissolved” rather than “resolved.”¹⁹¹ Forbearance is therefore expected towards disputes and mutual concessions are encouraged and preferred.¹⁹² In many circumstances, even if a party is believed to be in the right, it is desirable for this party to be decent and merciful to the wrong party and forgive gracefully as courtesy.¹⁹³ This is usually a yardstick for measuring whether a person is a “true gentleman” or “common people” as Confucius defines.¹⁹⁴ China’s deeply rooted cultural traditions promote settling disputes by verbal and peaceful negotiations, which differ from the European tradition of dispute resolutions.¹⁹⁵ Economic globalization has undoubtedly had a significant impact on the extent to which culture

¹⁸⁶ *Id.* at 13:09, 13:13.

¹⁸⁷ In China, *face* refers to one’s self-image reflecting certain social and professional position. Power and status were acquired from gaining face. *Face* is all-important in most Asian cultures. See David Yau-Fai Ho, *On the Concept of Face*, 81 AM. J. SOC. 867, 870, 879 (1976).

¹⁸⁸ Peng, *supra* note 182, at 13:10.

¹⁸⁹ *Id.* at 13:13.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 13:10.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ THE ANALECTS OF CONFUCIUS, *supra* note 151, at 13:23.

¹⁹⁵ Kozak, *supra* note 152.

can be used to generalize interaction.¹⁹⁶ Regardless of any Western influence on dispute resolution in modern Chinese society, it appears that Confucian philosophy continues to have far reaching effects on the Chinese manner of conduct, dictating a harmonious approach as a preferred method of dispute resolution.¹⁹⁷ The “mediation system” (*tiaojie*), which is arguably considered successful in China, is a natural result of this culture.¹⁹⁸

In this context, rather than relying on formal and professional mechanisms for dispute resolution, European companies and policymakers need to bear in mind China’s cultural antipathy towards conflict. In China, the order of preference for dispute resolution is: (a) negotiation, (b) mediation, (c) arbitration, (d) litigation, and (e) unilateral sanction.¹⁹⁹ Negotiation is at the most collaborative end of the spectrum and constitutes any form of communication where disputes are settled peacefully without resort to arbitration or a trial.²⁰⁰ Disputants who seek to maintain existing business relationships tend to rely on a collaborative procedure such as negotiation,²⁰¹ since winning a case at the sacrifice of losing business is by no means the best choice. Unilateral sanction, which is at the most aggressive end of the spectrum, manifests arrogant hegemony and may only deepen the estrangement and erode the hard-earned partnership.²⁰²

C. ENVIRONMENT TO FOSTER GENUINE MUTUAL TRUST

In the developing world, policymakers are frequently lobbied to improve their IPR enforcement mechanisms to meet the international

¹⁹⁶ *Id.*

¹⁹⁷ Peng, *supra* note 182, at 13:10.

¹⁹⁸ Michael T. Colatrella, Jr., “Court-Performed” Mediation in the People’s Republic of China: A Proposed Model to Improve the United States Federal District Courts’ Mediation Programs, 15 OHIO ST. J. ON DISP. RESOL. 395-96, 399 (demonstrating that in the unique Chinese approach to resolving disputes in a peaceful way, mediation (*tiaojie*) is grounded in both the cultural values and the historical development of China and has proved to be the most popular method for resolving disputes in modern China).

¹⁹⁹ Based on the spectrum of dispute resolution techniques outlined by Danny Ciraco, *Forget the Mechanics and Bring in the Gardeners: An Exploration of Mediation in Intellectual Property Disputes*, 9 U. BALT. INTELL. PROP. L.J. 47, 53 (2000).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² Compare with *id.* (Ciraco describes “adjudication” as the most confrontational end of the spectrum).

standard;²⁰³ however, the decisions of a policymaker are determined by multiple factors and not by lobbyists preference alone.²⁰⁴ What makes a claim unique as a determinant of a decision, however, is that this claim reveals success or failure of a government decision. Instead of repeating rhetorical sermons, the EU should try to establish the sense of common interests by bringing China “in the same boat.” In order to maintain a sustainable trade relationship where frictions can be avoided or overcome by negotiation, both the EU and China have to foster an environment for genuine mutual trust.²⁰⁵ The establishment of credibility usually reflects cultural adaptation and facilitates a healthy atmosphere and the momentum for settling disputes. Only a shared awareness of rooted cultural commonalities can lead to the deepening of links between Europe and China.²⁰⁶ In this scenario, the EU and China can act as two structuring poles of a harmonious Eurasia to play their pivotal roles in a multipolar world. This is the essential issue to which the authors now turn.

VI. SIX-STEP STRATEGY

As discussed above, China has made significant progress in establishing and strengthening its IPR protection system and has, in large part, met the substantive standards set out by the TRIPs Agreement; however, enforcement has often been weak. To target enforcement shortfalls, this article contemplates a six-step strategy that seeks to reformulate the existing ineffective IPR policy towards EU-China relations. First, this strategy covers actions that are needed to cultivate a stable and harmonious relationship between the EU and China and to foster a mutual understanding, particularly an understanding of China by EU scholars, policymakers, and the general public, and the avoidance of application of the inappropriate “tying policy.” Secondly, the strategy

²⁰³ TRIPs supporters, usually the developed countries, promote that a uniform set of relatively high standards of protection fuels creativity and innovation, and thereby encourages a more rapid and effective transfer of technology. From this point of view, it is beneficial for the developing countries to update their intellectual property laws and strengthen their enforcement mechanisms. See Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamic of International Intellectual Property Lawmaking*, 29 *YALE J. INT'L L.* 1, 2 (2004).

²⁰⁴ Scott H. Ainsworth, *The Role of Legislators in the Determination of Interest Group Influence*, 22 *LEGIS. STUD. Q.* 517, 528 (1997) (mentioning that “a lobbyist’s optimal strategy does not depend simply on legislators’ preferences or predilections”). See also Martin Reuss, *The Myth and Reality of Policy History: A Response to Robert Kelley*, 10 *PUB. HIST.* 41, 41 (1988) (stating that a policy making process can only commence when policy-makers recognize a problem).

²⁰⁵ Gosset, *supra* note 106.

²⁰⁶ Gosset, *supra* note 82.

focuses on the long-term efforts that are needed to promote a self-sustainable IPR regime in China with creative escalating tactics of regional and industrial expansions.

A. STEP ONE: LENIENCY RATHER THAN COERCION

Repeated campaigns for external pressure against China regarding stronger IPR protection reflect an ignorance of the harmonious characteristics of Chinese culture and bureaucratic nature of the Chinese political systems.²⁰⁷ The enigmatic cultural and political landscape has shaped a unique model of Chinese philosophies that have exercised comprehensive influence over the effectiveness of the enforcement of the IPR.²⁰⁸ While such external pressure may lead to a prompt updating of IPR laws and regulations, it is the unique cultural perception and the complex network of bureaucracies that influence the attitude of the citizenries towards IPR and decide IPR policy of Chinese authorities.²⁰⁹ To cultivate and foster a stable relationship between the EU and China, based on the understanding of the Chinese unique culture, a “leniency” strategy is required.

1. LIMITATIONS OF THE COERCIVE POLICY

Under a coercive approach, a trading party relies on their superiority in various aspects to force another party to do what it might otherwise refuse to do.²¹⁰ This approach has been widely practiced throughout the history of international trade,²¹¹ a prime example being Section 301 of the Trade Act of 1974.²¹² While a coercive approach is arguably effective in facilitating immediate compliance and inducing short-term concessions,²¹³ such gains are ephemeral if not accompanied

²⁰⁷ ANDREW MERTHA, THE POLITICS OF PIRACY, INTELLECTUAL PROPERTY IN CONTEMPORARY CHINA 230-31 (2005). See also Yiqiang Li, *Evaluation of the Sino-American Intellectual Property Agreements: A Judicial Approach to Solving the Local Protectionism Problem*, 10 COLUM. J. ASIAN L. 391, 393-94 (1996) (explaining the bureaucratic norms of Chinese political structure); William P. Alford, *Making the World Safe for What? Intellectual Property Rights, Human Rights and Foreign Economic Policy in the Post-European Cold War World*, 29 N.Y.U. J. INT'L L. & POL. 135, 136 (1997).

²⁰⁸ Shi, *supra* note 19, at 46.

²⁰⁹ MERTHA, *supra* note 207, at 230-31.

²¹⁰ Yu, *supra* note 155, at 573.

²¹¹ *Id.*

²¹² See generally, Grier, *supra* note 30.

²¹³ Yu, *supra* note 155, at 581.

by straightforward domestic enforcement of IPR.²¹⁴ It tends to invite retaliation²¹⁵ and, in many circumstances, invokes emotional “eye for eye, tooth for tooth” response.²¹⁶ In addition, as Ms Julie Cheng has commented, coercive strategy in the current new era of cooperative global efforts is anachronistic.²¹⁷ Moreover, as has been mentioned above, trade sanctions are against principles and provisions of the WTO. Up to this point, the coercive strategy has proved to be inappropriate in achieving its goals. For example, when the U.S. administration immersed itself with criticizing China over its IPR enforcement problems, Chinese leaders paid a visit to France and placed an order for an estimated 1.5 billion dollars worth of Airbus planes, instead of Boeing planes, sending a deliberate signal to Washington that Beijing can turn to European partners if the bilateral trade with the United States remains intractable.²¹⁸ Arguably this demonstrates a preference in China towards the EU’s flexible and cooperative strategy.

In addition, the coercive approach does not always reflect the wishes of the transnational corporations. Many European entrepreneurs with businesses in China have mixed emotions about being in China.²¹⁹ While many companies, particularly in the software, media, and high-tech areas, are lobbying for enhanced IPR protection in China in general, many companies on the ground are more keen on maintaining the existing business revenues and, therefore, reluctant to confront the Chinese authorities through trade sanction.²²⁰ It seems that these companies are not sending clear signals to their own governments.

2. BRA WAR: SIGN OF DANGER

The “bra wars” refer to an unresolved stalemate over EU-imposed sanctions on Chinese textiles in the summer of 2005.²²¹ After

²¹⁴ Julia Cheng, Note, *China’s Copyright System: Rising to the Spirit of TRIPs Requires an Internal Focus and WTO Membership*, 21 FORDHAM INT’L L. J. 194, 2007 (1998).

²¹⁵ See Scott Fairley, *Extraterritorial Assertions of Intellectual Property Rights in International Trade*, in INTERNATIONAL TRADE AND INTELLECTUAL PROPERTY: THE SEARCH FOR A BALANCED SYSTEM 141, 144 (George R. Stewart et al. eds., 1994).

²¹⁶ See Yu, *supra* note 155, at 579-80.

²¹⁷ Cheng, *supra* note 214, at 2007.

²¹⁸ Craig R. Whitney, *China Awards Huge Jet Order to Europeans*, N.Y. TIMES, Apr. 11, 1996, at A1.

²¹⁹ See Ke, *supra* note 135.

²²⁰ *Id.*

²²¹ Nick Assinder, *Bra War Threatens Blair China Talks*, BBC NEWS ONLINE, Sept. 5, 2005, http://news.bbc.co.uk/1/hi/uk_politics/4213110.stm.

realizing that there had been a substantial rise in Chinese exports of some of the liberalized textile product categories, the EC launched an investigation and took urgent action on curbing the import of Chinese t-shirts and flax yarn.²²² On June 10, 2005, the EC and the Chinese Ministry of Commerce reached an agreement, which was to have been effective until the end of 2007.²²³ This agreement covered ten of the thirty-five textile categories of Chinese imports that were made quota-free on January 1, 2005.²²⁴ There has been blistering criticism, however, towards the “bra wars” from scholars and practitioners.²²⁵ Even within the EU, there is a significant divide among EU member states.²²⁶ While a written agreement was reached, the EU Commission’s efforts, thus far, to resolve the textiles crisis have borne no tangible results.²²⁷

In the area of IPR enforcement, there have been claims to apply deterrent sanctions and remedies based on the Directive on the Enforcement of Intellectual Property Rights.²²⁸ The “bra war” was a signal of danger. Vigilant attention is required to prevent trade war from extending to the China-EU IPR debate, which has so far been rational.

3. AVOID EUROPEAN-STYLED “SECTION 301”

In promoting China’s IPR enforcement, there are various facilitating and inhibiting factors which may ultimately affect the decisionmaking process. As has been mentioned, it is apparent that the effect of pursuing a strategic collaborative approach outweighs the impact of using the trade weapon, which can only solidify China’s

²²² Shubha Madhukar, “*Bra War*” Storms EU and China, DOMAIN-B.COM, Sept. 3, 2005, http://www.domain-b.com/industry/textiles/20050903_bra_war.html#1 (last visited Nov. 10, 2007).

²²³ *Id.*

²²⁴ *Id.*

²²⁵ Maxine Frith, *Revealed: How Bra Wars Devastate World’s Poor*, THE INDEPENDENT, Aug. 27, 2005, available at <http://news.independent.co.uk/world/politics/article308381.ece>. See also Kate Rankine & David Rennie, “*Bra Wars*” May Push up Price of Clothes, TELEGRAPH, Aug. 25, 2005, available at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2005/08/25/nbra25.xml> (stating that the “bra wars” will only hurt the struggling European retailers).

²²⁶ Madhukar, *supra* note 222. “The northern [European] states with big retail interests, such as Denmark, Finland, Germany, Sweden and the Netherlands have voiced their big concerns that the quotas could mean layoffs of their retailers’ staff and therefore want the quotas lifted.” *Id.* Contrary to the northern states are the southern textile producing states—France, Greece, Italy, Portugal and Spain—who require protection “against free trade to prevent the European textile industry from being wiped out.” *Id.*

²²⁷ *Id.*

²²⁸ See Council Directive 2004/48/EC, *supra* note 142 at 45, 61, 81.

domestic resistance and result in intermittent and incoherent responses. China's harmonious philosophy and the lessons derived from U.S. sanctions have shown that a coercive policy is ineffective. In view of China-EU trade relations, a European-styled "Section 301," provided it were so conceived, would not be a desirable solution to settle trade disputes. The EU should therefore avoid utilizing harsh trade sanctions and pursue practical and workable approaches to resolving disputes and differences.

B. STEP TWO: FROM "TYING PRACTICE" TO UNDISCOUNTED POLICY

Tying sale is the practice of making the sale of one product conditional on the purchase of a second distinctive product.²²⁹ It is a quota sale characterized by a combination package which is normally regarded as anti-competitive as it is implied that one or more components of the package are sold individually by other businesses as their primary product; thereby this bundling of goods would hurt their business.²³⁰ Through the practice of "tying," the supplier threatens to withhold the key product, thereby increasing sales of products that are undesirable.²³¹ In political terms, a "tying sale" refers to a policy which can only be applied in a conditional manner towards a particular country, while for other countries there is no such restriction. This conditional treatment acts as leverage to force or lure a country into accepting an unfavourable political decision or arrangement. Under such circumstances, countries which are being unfairly treated will naturally suspect the sincerity of the motives. Due to lack of mutual credibility, it is difficult to push forward a constructive and cooperative relationship.

A noticeable example is the United States' linkage of human rights to trade with China.²³² In the aftermath of the Tiananmen Square Protests in 1989, many U.S. politicians lobbied to link the normalization

²²⁹ See, e.g., European Commission, Glossary: Tying or Tied Selling, http://ec.europa.eu/comm/competition/general_info/t_en.html.

²³⁰ *Id.*

²³¹ *Id.*

²³² See Randall Peerenboom, *Assessing Human Rights in China: Why the Double Standard?*, 38 CORNELL INT'L L. J. 71 (2005) (discussing the human rights double standard as applied to China); EVAN S. MEDEIROS, NAT'L SEC. COMMITTEE ON UNITED STATES-CHINA RELATIONS, UNITED STATES-CHINA RELATIONS: COMPARATIVE SECURITY AND FOREIGN POLICY PROCESSES, DELEGATION REPORT, NCUSCR PUBLICATION, <http://www.ncuser.org/Publications/Medeiros.html> (noting that "Sino-American relations have been plagued with a number of difficulties that have complicated the expansion . . . of further institutionalization of political, economic, and military ties between Washington and Beijing").

of Chinese-American trade to improvements in China's human rights record and greater social and political reform in China.²³³ The U.S. Congress and the Clinton administration continued to grant annual extensions of normal MFN status and Normal Trade Relations Status as leverage to get the concessions they sought from China.²³⁴ In 2004, the EU emulated the United States by linking Market Economy Status ("MES") to IPR and refusing to grant China the MES.²³⁵ The EU Commission insisted that conditions must be met in order for China to be entitled to the MES.²³⁶

The "tying practice" also happens in the area of IPR enforcement in China. The Chinese government has made considerable efforts to improve enforcement: the speed and scale of actions would be inconceivable in other countries, either due to prohibitive costs, inadequate judiciaries, or bureaucratic apparatus and, from the perspective of some legal practitioners, the effectiveness of China's administrative relief is to be encouraged and commended.²³⁷ China, however, is much more vulnerable to criticism than some other countries because free trade has been adulterated with political elements.

It is difficult to separate political and commercial considerations in practice; however, looking back to China's previous and current

²³³ *Id.*

²³⁴ *Id.*

²³⁵ See European Commission, *China—Market Economy Status in Trade Defence Investigations*, June 28, 2004, http://ec.europa.eu/trade/issues/bilateral/countries/china/pr280604_en.htm. MES is a technical status granted to a national economy or individual businesses, used by trading partners during anti-dumping investigations, for the purpose of assessing the conditions under which exported goods are produced. *Id.* For a comprehensive analysis of MES and Non-Market Economy Status, see Joseph A. Laroski, Jr., *NMEs: A Love Story, Nonmarket and Market Economy Status Under U.S. Antidumping Law*, 30 *LAW & POL'Y INT'L BUS.* 369, 370-71, 394-98 (1999).

²³⁶ *Id.* The conditions include:

- (1) State influence: ensuring equal treatment of all companies by reducing state interference, which takes place either on an ad hoc basis or as a result of industrial policies, as well as through export and pricing restrictions on raw materials;
- (2) Corporate governance: increasing the level of compliance with the existing Accounting Law in order to ensure . . . the usability of accounting information for trade defence investigations;
- (3) Property and bankruptcy law: ensuring equal treatment of all companies in bankruptcy procedures and in respect of property and intellectual property rights; [and]
- (4) financial sector: bringing the banking sector under market rules.

Id.

²³⁷ Alan Adcock, *Opportunity Knocks for IP Owners in China*, ROUSE & CO., INT'L, Feb. 1, 2004, <http://www.iprights.com/cms/templates/articles.aspx?articleid=222&zzoneid=2> (last visited on Nov. 10, 2007).

reactions, this “conditional treatment” will only make matters worse. Up to this point, in order to facilitate the process of China’s IPR enforcement, the EU is best advised to abandon the conditional treatment, and readjust its strategic mentality to be in line with the present status. But how to handle this is a difficult task that should be treated prudently.

C. STEP THREE: “CASTING A LONG LINE TO CATCH A BIG FISH”

The English proverb, “to kill the goose that lays golden eggs,” refers to the destruction of a reliable and valuable source of income through stupidity or greed.²³⁸ The expression reflects the practice that some developed countries are eager to pursue immediate benefits without paying much attention to the future interests. In contrast, there is a Chinese proverb, “casting a long line to catch a big fish,” implying that patience is profitable.

China is of immense importance and great potential to the world economy. China’s ascension has drawn world attention and enhanced China’s status in the global arena. On the other hand, the Chinese economy remains fragile and uneven and patience is required for maximum benefits.²³⁹ Compelling or inducing China to accept a higher standard of IPR protection amounts to “killing the goose that lays golden eggs.” In order to catch a “big fish,” the most sensible thing would be “cast a long line.”

In addition, China is still encountering uncertainty in terms of its social stability and sustainable development. In light of this uncertainty, promoting constructive and cooperative relationships with China is an emotional and political investment. Whether the gain outweighs the loss in the long run largely depends on how the cooperation is managed and how it stands to work. In the first instance, it requires altruistic endeavors with an expectation of future beneficial returns. This goal can be accomplished by facilitating China’s integration into the global economy. To facilitate and accelerate such integration, the EU may promote the emergence of new political ecology by improving China’s standing in the international community, such as supporting its participation at the G8 summits.²⁴⁰

²³⁸ THE OXFORD DICTIONARY OF IDIOMS 127 (Judith Siefing ed., 2d ed. 2004).

²³⁹ Sharif Shuja, *The Limits of Chinese Economic Reform*, CHINA BRIEF (The Jamestown Found., Washington, D.C.), Aug. 2, 2005, at 8.

²⁴⁰ Yu, *supra* note 2, at 200-01.

Within many foreign pharmaceutical companies, R&D funds are in excess of one billion dollars.²⁴¹ On health-related R&D the United States' Federal Government invested more than twenty-five billion dollars in 2005.²⁴² In contrast, the largest amount spent on pharmaceutical R&D in China was only RMB one hundred million in 2003, which is just equivalent to twelve million dollars.²⁴³ China's R&D expenditure as a percentage of its GDP was 1.34 percent in 2005.²⁴⁴ Foundations need to be set up to support innovation and enhance competitiveness. The key to achieving this is to have sufficient funds for investing in IP-related industries and research institutions.

Today's investment in bridging the economic divide is a wise step towards gaining many rewarding benefits through the initiatives implemented IPR policies. The "casting a long line to catch a big fish" strategy should not be a "zero-sum game" where it is impossible for both players to win or to lose. Given China-EU relations, it is feasible to set up a strategic China-EU cooperation scheme to help China with technical assistance and capacity building. It is a "cradle" for nurturing and safeguarding the infant interests of the innovation enthusiasm from the domestic enterprises.

Fortunately, there have been encouraging signs towards fostering a microclimate for a stronger IPR protection. The percentage of R&D in China has been rising steadily;²⁴⁵ R&D funding for Chinese universities has increased significantly in recent years,²⁴⁶ and overseas Chinese scientists are gradually returning to China.²⁴⁷ Provided this escalating tendency remains, patience is required until an effective high-value industry and efficient IPR enforcement system comes.

²⁴¹ Cui Ning & Qin Jize, *IPR Strategy to Define Government's Role*, CHINA DAILY, June 14, 2004, available at http://www.chinadaily.com.cn/english/doc/2004-06/14/content_339108.htm.

²⁴² CONGRESSIONAL BUDGET OFFICE, RESEARCH AND DEVELOPMENT IN THE PHARMACEUTICAL INDUSTRY (2006), <http://www.cbo.gov/ftpdocs/76xx/doc7615/10-02-DrugR-D.pdf>.

²⁴³ Ning & Jize, *supra* note 241.

²⁴⁴ China Supply Chain Council, *China's R&D Investment in 2005 Accounts for 1.34% GDP*, Sept. 18, 2006, <http://www.supplychain.cn/en/art/?1043> (last visited Nov. 10, 2007).

²⁴⁵ Raphael Minder, *EU Fears China's Rising R&D Spending*, FIN. TIMES, Oct. 10, 2005, available at http://www.ft.com/cms/s/0/3a7563b0-38fa-11da-900a-00000e2511c8.html?ncklick_check=1.

²⁴⁶ John R. Allison & Lianlian Lin, *The Evolution of Chinese Attitudes Toward Property Rights in Invention and Discovery*, 20 U. PA. J. INT'L ECON. L. 735, 779 (1999).

²⁴⁷ Yahong Li, *The Wolf Has Come: Are China's Intellectual Property Industries Prepared for the WTO?*, 20 UCLA PAC. BASIN L.J. 77, 105 (2002).

**D. STEP FOUR: FROM “MASSIVE OFFENSIVE” TO “DEFEAT IN
DETAIL”—ESTABLISH THE IP SPECIAL REGIONS AND IP SPECIAL
INDUSTRIES**

“Knowledge advances by steps and not by leaps.”²⁴⁸ This rule applies very well to IPR implementation and enforcement in China. Even at a time when adequate protection of IPR is necessary in certain industries or regions, policymakers should seriously consider differentiation in terms of the level of economic development and technological strengths. Otherwise, as Professor Linsu Kim points out, the “one-size-fits-all” approach is a recipe for disaster for a country which has some way to go before it reaches a developed level of economic growth and technological accumulation.²⁴⁹ Slow and steady wins the race. In this context, the tactics of regional and industrial expansion is of great significance.

1. REGIONAL EXPANSION: ESTABLISHMENT OF IP SPECIAL REGIONS

Regional economic differences in China are considerable,²⁵⁰ posing serious challenges to the rate of China’s economic growth.²⁵¹ Statistics indicate that the income ratio between Shanghai’s residents—the highest in China—and urban residents in Guizhou Province—whose combined income is the lowest in China—was 2.33:1 in 2002.²⁵² Globalization has significantly contributed to the widening of this regional gap, and China’s further integration into the global economy cannot automatically bridge the gap between disparities of different regions.²⁵³

²⁴⁸ Attributed to Lord Macaulay, Quotes, <http://www.cs.iastate.edu/~jia/quotes.html>.

²⁴⁹ United Nations Conference on Trade and Development [UNCTAD], *Issue Paper 2: Technology Transfer and Intellectual Property Rights - The Korean Experience 6* (prepared by Linsu Kim), available at http://www.ictsd.org/pubs/ictsd_series/iprs/CS_kim.pdf.

²⁵⁰ United Nations University World Institute for Development Economics Research [UNU-WIDER], *Financial Development, Growth, and Regional Disparity in Post-Reform China*, at 11, Research Paper 2006/90 (Aug. 2006) (prepared by Zhicheng Liang), available at <http://www.wider.unu.edu/research/2004-2005/2004-2005-6/cip2/papers/Liang1.pdf>.

²⁵¹ *Id.*

²⁵² Zhao Huanxin & Fu Jing, *Balanced Progress Planned for Country*, CHINA DAILY, Mar. 8, 2004, available at http://www.chinadaily.com.cn/english/doc/2004-03/08/content_312752.htm.

²⁵³ See Chia Siow Yue, *Economic Globalization and Equity in East Asia*, in *Globalization and Equity* (presented at GDN Forum, Cairo, Jan. 19-21, 2003), available at http://www.gdnet.org/pdf/Fourth_Annual_Conference/parallels1/EastAsia/Yue_paper.pdf.

Counterfeiting and piracy fuels economic development until a country reaches the stage where a higher level IPR enforcement becomes economically advantageous to its indigenous industries in general.²⁵⁴ In light of this, many countries insist on an appropriate level of IPR protection because of varying stages of economic development.²⁵⁵ China is more of a consumer than a producer of intellectual property, and is not in a position to see sufficient values in intellectual property; however, this does not mean China should wait until the regional gap is fully bridged. In geographical terms, the public in urban and coastal areas are generally more aware of the importance of IPR protection.²⁵⁶ In the industrialized regions, conditions have generally been met to apply for strong intellectual property standards.²⁵⁷ In Shanghai, Guangdong, Jiangsu, Zhejiang, and Shandong more and more domestic enterprises are desperate for an upgraded IPR enforcement mechanism and are lobbying the government for an appropriate adjustment.²⁵⁸ To adopt a unique IPR protection system in such a big country with significant economic disparity is becoming a factor restricting economic development.

One approach to tackling this problem may be the creation of IP Special Regions (“IPSR”) where, according to laws and regulations already in place, special authorities are created to adopt local legislations,²⁵⁹ or promulgate relatively strict interpretations.²⁶⁰ For

²⁵⁴ Frederick M. Abbott, *The WTO TRIPs Agreement and Global Economic Development*, in PUBLIC POLICY AND GLOBAL TECHNOLOGICAL INTEGRATION 4-12 (Frederick M. Abbott & David J. Gerber eds., 1997) (explaining that higher level IPR standard can only be applied willingly by a developing country at a stage where genuine benefits are realized).

²⁵⁵ See Thomas G. Rawski, *Chinese Industrial Reform: Accomplishments, Prospects and Implications*, 84 AM. ECON. REV. 271, 271-72 (1994) (stating that IPR protections are normally weaker in emerging markets than in developed markets).

²⁵⁶ Sibao Shen & Yongmin Cai, *Lun WTO yu Woguo Fada Diqu Fazhi Jianshe [The WTO and the Legal Construction in the Less-developed Regions]*, LEGAL DAILY, Sept. 5, 2006, available at http://www.legaldaily.com.cn/zt/2006-09/05/content_402908.htm, (noting that people’s sense of law in certain economically developed regions has significantly enhanced over the past years) (translation by author).

²⁵⁷ *Id.*

²⁵⁸ See Jianming Cao, *Nuli Tigao Zhishi Chanquan de Sifa Baohu Shuiping [Improving the Judicial Protection for Intellectual Property Rights in China]*, CHINA INTELL. PROP. NEWS, June 28, 2004 (translation by author).

²⁵⁹ Local legislation is an important feature of the whole legislative system and has played an important role in the social and economic development in China. For a detailed introduction, see *Local Legislation in China*, CHINA.ORG.CN, Sept. 28, 2003, <http://www.china.org.cn/english/kuaixun/76344.htm> (last visited Nov. 10, 2007).

²⁶⁰ As an important aspect of China’s judicial system, the judicial interpretation refers to the interpretations issued by the national supreme judicial authorities on questions concerning

instance, Guangdong may be selected as a pilot of IPSR to enact local legislations such as Measures to Protect Intellectual Property in Guangdong Province.²⁶¹ Guangdong's experience, if successful, should be promoted across a wider area.

In achieving this goal, government support of these selected regions is indispensable for the survival of the special region. Based on this awareness and in an effort to establish a comprehensive legal system by 2010, China has been engaged in implementing its National Intellectual Property Strategy to facilitate innovation capabilities and increase the competitive edge of large Chinese companies.²⁶² In concrete terms, relevant Chinese government departments should contemplate assistance such as allocating special funds to facilitate R&D, providing preferential bank loans to intellectual property developers and innovators, formulating preferential tax policies for the IPR industry, and offering professional training to trade officials and entrepreneurs of these regions.

Within China-EU relations, the EU is expected to fully support this differentiated strategy.²⁶³ Should this be accepted, the EU would be a major beneficiary and would be amply compensated because the foreign business area in China is centred largely in the east and southeast regions, in which the "special regions" are supposed to be established. Nevertheless, institutional innovation is a complicated and systemic task which needs prudence and patience.

2. INDUSTRIAL EXTENSION: CREATION OF IP SPECIAL INDUSTRIES

Similar to the economic disparity within regions of China, there is a vast imbalance between different industries in terms of technological

specific application and clarification of laws in the judicial practices according to the authorization of the NPC. The Supreme People's Court and the Supreme People's Procuratorate, by virtue of the relevant decrees adopted by the NPC, both hold the power of formulating the judicial interpretation. For a comprehensive account of the judicial interpretation, see Peter Howard Corne, *Creation and Application of Law in the PRC*, 50 AM. J. COMP. L. 396, 397 (2002).

²⁶¹ According to the Chinese Constitution, "the people's congresses of provinces and municipalities directly under the Central Government, and their standing committees, may adopt local regulations." XIAN FA 100, § 3 (2004) (P.R.C.).

²⁶² See Jianke Jiang, *Shidai Huhuan Zhishi Chanquan: Fang Guojia Zhishi Chuanquan Ju Juzhang Tian Lipu* [A New Era Calls for an Improved Intellectual Property: An Interview with Tian Lipu, commissioner of the State Intellectual Property Office], PEOPLE'S DAILY, Aug. 25, 2005 (mentioning that China is endeavouring to implement the national intellectual property strategy of revitalizing the nation through science and education) (translation by author).

²⁶³ As discussed in sec. IV(A)(3) *supra*.

capacities. Although weaker IPR protection would be more beneficial at a stage where China is considered an intellectual property consumer as a whole, different industries may call for different levels of IPR protection to adapt to varying economic conditions.²⁶⁴ While some industries, such as pharmaceuticals, are concerned that IPR protection standards set out in TRIPs are too high for China and the full implementation means sacrificing the interests of China's infant industries,²⁶⁵ other industries, such as software and electronics, are singing a different tune and expressing their growing discontent over the incapacity of the IPR mechanisms.²⁶⁶

The one area the United States and other Western countries would most like to see improve in terms of China's IPR regime is copyright, an area in which China is most likely to make a breakthrough.²⁶⁷ The Western countries have become particularly concerned with what is perceived as the lack of enforcement of China's copyright laws, particularly in cases of copyright infringement involving the piracy of computer software and compact movie discs.²⁶⁸ The recent U.S. complaints to WTO about piracy in China addressed such concerns.²⁶⁹ In contrast to other Chinese industries, due to its rapid development, the Chinese software industry may be more receptive to IPR protection than other industries. As observed by Professor Keith Maskus, while the Chinese software industry is still in its infancy (which illustrates the low level of resistance from local manufacturers to the high levels of piracy), "the domestic software industry is growing rapidly in particular business applications that do not suffer much copying, but has faced obstacles in developing larger and more fundamental program platforms."²⁷⁰

As early as 1995, an organization named China Software Alliance ("CSA") was brought into existence by a few major software

²⁶⁴ See Li, *supra* note 247, at 80-81 (different industries may need different intellectual property standards to suit their own pace of development).

²⁶⁵ See *id.* at 80.

²⁶⁶ Jiang, *supra* note 262.

²⁶⁷ Michael N. Schlesinger, *A Sleeping Giant Awakens: The Development of Development of Intellectual Property Law in China*, 9 J. CHINESE L. 93, 119 (1995) (copyright protection in China is an area to which the international community is particularly sensitive).

²⁶⁸ *Id.*

²⁶⁹ See Office of the U.S. Trade Representative, *supra* note 37.

²⁷⁰ See KEITH E. MASKUS, INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY 149 (2000).

firms such as Legend (then called Lenova) and Stone.²⁷¹ In the first period of its establishment, there were few members of CSA and their voice was very weak.²⁷² Now CSA has become the biggest software association in China, with branches in forty major cities.²⁷³ This reflects a growing trend that piracy in China is no longer restricted to foreign-produced software.

The CSA has been keen on cooperating with the Chinese authorities and foreign organizations and promoting the campaigns against piracy.²⁷⁴ It lobbied the National People's Congress in the mid 1990s to emphasize the significance of having a separate software protection regulation and successfully convinced the legislature to add clauses that prohibit purchasers from trying to decipher software that makers had encrypted to prevent piracy.²⁷⁵ To bolster copyright enforcement, the CSA cooperated with the Business Software Alliance of the United States to set up and maintain a national hotline for reporting piracy and initiated appeals through public media to promote public awareness of the enforcement of intellectual property laws.²⁷⁶

A similar situation occurs to the movie discs. In this area, evidence also shows that rampant piracy in China is hurting local industries more than foreign companies.²⁷⁷ According to a recent study by independent research firm LEK Consulting, conducted on behalf of the Motion Picture Association of America,²⁷⁸ whose member studios include Time Warner, Walt Disney, Sony Pictures Entertainment, and Twentieth Century Fox, China loses 90 percent of its potential market for movies due to piracy.²⁷⁹ In 2005, China's domestic moviemakers lost roughly 1.5 billion dollars to piracy, almost three times as much as MPA member studios' losses of a combined five hundred sixty-five million dollars in China.²⁸⁰

²⁷¹ National Cultural Informational Resources Shared Network, <http://edit.ndcnc.gov.cn/datalib/2003/Organize/DL/DL-72955/> (translation by author).

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ See Li, *supra* note 247, at 100.

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 100-01.

²⁷⁷ See, e.g., CRAIG ELWELL & MARC LABONTE, CRS REPORT FOR CONGRESS: IS CHINA A THREAT TO THE U.S. ECONOMY (2007), available at fpc.state.gov/documents/organization/81360.pdf.

²⁷⁸ Press Release, L.E.K., The Cost of the Movie Piracy, http://www.mpa.org/press_releases/leksummarympa.pdf (last visited Oct. 22, 2007).

²⁷⁹ Tschang Chi-Chu, *China: Piracy Plague*, STRAITS TIMES, July 1, 2006, http://app.mfa.gov.sg/pr/read_content.asp?View,4712.

²⁸⁰ *Id.*

As noted by Professor Alford, Chinese industries are becoming victims of the counterfeiting and piracy.²⁸¹ With increasing violations that result in losses to Chinese rights-holders, there will be domestic pressure for better IPR protection; thus, domestic commercial interests in stronger copyrights are now playing a role in promoting enforcement, and this has achieved some impressive results with the government's assistance.²⁸²

In this context, it is necessary for the policymakers to apply differential treatments and offer special support to such particular industries as the software or movie industries. These fast-growing and well-developed industries can receive relatively higher protection and act as forerunners of the international standard.

E. STEP FIVE: FROM "PIERRE CARDIN" TO "HISENSE"—PROMOTE THE ROLE CONVERSION

Pierre Cardin and Hisense are two totally unrelated brands from different countries—the former is a French fashion magnet while the latter is a new Chinese star in electronic equipment; however, their similar experiences in China brought them together, and provided a significant theme for study and debate.

1. PIERRE CARDIN: SACRIFICE OF INNOCENCE

Pierre Cardin, the French fashion icon, was quick to embrace the Chinese market.²⁸³ In 1979, he organized a trade agreement with China to produce Pierre Cardin clothes.²⁸⁴ Since then Pierre Cardin has been so famous in China that he is sometimes mistaken for the French president.²⁸⁵ Some years later, in June 2001, Pierre Cardin was surprised to discover at an international fashion show in Nanjing City, Jiangsu Province that he had a "twin brother" the "Italian Pierre Cardin (Hong

²⁸¹ Alford, *supra* note 207, at 136.

²⁸² MASKUS, *supra* note 270, at 149.

²⁸³ See *Pierre Cardin: China Could Lead 21st Century Fashion*, PEOPLE'S DAILY, May 20, 2002, available at http://english.peopledaily.com.cn/200205/20/eng20020520_96074.shtml (last visited Oct. 21, 2007).

²⁸⁴ THE COLUMBIA ENCYCLOPEDIA, PIERRE CARDIN (6th ed. 2001-05), <http://www.bartleby.com/65/ca/Cardin-P.html>.

²⁸⁵ History of Fashion, Pierre Cardin, <http://www.dilpreetbawa.com/historyofashion/cardin.html>; see also www.pierrecardin.com

Kong) International” which turned out to be counterfeit.²⁸⁶ Later, Cardin found a large number of Chinese companies registering corporate names under the Chinese translation of Pierre Cardin (*Pier Kadan*) or similar names, resulting in massive sales of counterfeit Pierre Cardin products in large department stores all over the country.²⁸⁷ What astonished Cardin was the number of Cardin counterfeits brands such as London Pierre Cardin Fashion (Shanghai) and Italian Pierre Cardin Fashion Group (Guangzhou), let alone confusing brands such as Pierre Kardin, Piere Cardin, or Piekadan.²⁸⁸

Cardin made a formal complaint followed by a nationwide crackdown against the counterfeits of Pierre Cardin and other well-known brands.²⁸⁹ These lawless companies at last received their deserved punishment. The crackdown campaign reverberated as it was meant to; however, it was very unlikely that counterfeits would completely vanish. Cardin became an innocent sacrifice leaving for many violators no lessons but profits.

2. HISENSE: FORERUNNER OF “IPR VICTIMS”

Hisense Group, a well-known Chinese manufacturer of electronic household appliances, alleged that the German powerhouse Bosch-Siemens stole its trademark and registered it in Germany in bad faith.²⁹⁰ “Hisense” was officially identified as a well-known trademark in China by the Trademark Bureau under the State Administration of Industry and Commerce (“SAIC”).²⁹¹ What surprised Hisense was that Siemens applied for “HiSense” as the registered trademark for its own commodities.²⁹² In the same year, Siemens applied for registrations through the channels of the Madrid system and EEC system.²⁹³ In

²⁸⁶ Ying Ying, *Crackdown Stepped up against Counterfeit Merchandise*, SIPO.GOV, http://www.sipo.gov.cn/sipo_English/news/iprspecial/200412/t20041206_37131.htm.

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Chinese Trademarks Repeatedly Registered Abroad*, CHINA ECON. INFO. NETWORK, Mar. 3, 2005, <http://www1.cei.gov.cn/ce/doc/cep1/200503040799.htm>.

²⁹¹ See *Haixin Gongsi Jianjie [Introduction to Hisence]*, CHINA ECON. NETWORK, Aug. 3, 2005, http://www.ce.cn/cysc/jiadian/jdmq/hx/qyjj/200508/03/t20050803_4334408.shtml (translation by author).

²⁹² *Id.*

²⁹³ *Chinese Trademarks Repeatedly Registered Abroad*, *supra* note 290.

addition, it made a claim for priority, completely blocking Hisense's trademark registration within the EU.²⁹⁴

As a result, Hisense had to launch its back-up trademark "Hsense" when selling in Germany.²⁹⁵ However, at the end of 2004, Siemens launched legal proceedings against Hisense at Cologne Local Court in Germany, claiming that Hisense's backup trademark "HSense" had infringed its trademark "HiSense" due to the likelihood of confusion.²⁹⁶ In retaliation, in December 2004, Hisense Corporation demanded that the German Trademark Bureau rescind the "HiSense" trademark registered by Bosch-Siemens according to law, which proved to be in vain.²⁹⁷ Hisense attempted to settle the dispute through negotiation with Siemens, but was offered a trademark transfer price as high as forty million euros, which was unacceptable to Hisense.²⁹⁸

Unlike the Pierre Cardin case, which seemed to go unnoticed in China, the Hisense case reverberated widely. The Hisense executives realized that, under an "eye for eye, tooth for tooth" doctrine, they became an unfortunate victim of a behavior that most were familiar with. As acknowledged by the general manager of Hisense Import & Export Co. Ltd, the case was a "bitter lesson" for Hisense.²⁹⁹ While urging the enterprises to "mend the fence after a sheep is lost," Hisense invoked all the counterfeiters to "rein in at the brink of the precipice."³⁰⁰ What is more significant is that the Hisense case has acted as a symbol, implying that China has started the process of transformation from an infringer to a victim of IPR. From the Hisense case, it is fair to expect that the notion of Chinese intellectual property law may have been on the verge of losing its conventional, oxymoronic status.³⁰¹

²⁹⁴ *Id.*

²⁹⁵ *High Quote Blocking Hisense-BSH dispute*, CHINA DAILY, Sept. 26, 2004, http://www.chinadaily.com.cn/english/doc/2004-09/26/content_377815.htm.

²⁹⁶ *Chinese Trademarks Repeatedly Registered Abroad*, *supra* note 290.

²⁹⁷ *Id.*

²⁹⁸ *Chinese Companies Learn to Protect Their IPR*, THE ECONOMIC AND COMMERCIAL SECTION OF THE CONSULATE GENERAL OF THE PEOPLE'S REPUBLIC OF CHINA IN VANCOUVER, Apr. 28, 2005, <http://vancouver2.mofcom.gov.cn/aarticle/chinanews/200504/2005040008239.html>.

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ Graham Chynoweth, *Reality Bites: How the Biting Reality of Piracy in China is Working to Strengthen its Copyright Laws*, 2003 DUKE L. & TECH. REV. 3, 3-4 (2003) (noting China's accession to the WTO may lead to copyright violation becoming a reality to domestic companies and that Chinese copyright law "may be on the verge of losing its oxymoronic status").

3. BURIED QUARREL AND SHOOK HANDS

As one sign of this transformation, shortly after the news released, many distinguished scholars from the IPR arena, in addition to high-level officials convened by the Ministry of Commerce, gathered in Beijing in February 2005 to hold a “Symposium on Safeguarding the Chinese Trademarks Overseas.”³⁰² A consensus was reached that the intended purpose of Bosch-Siemens’ registering of “HiSense” was simply to set up a trade barrier through rush trademark registration strategy in an attempt to block the entry of Chinese enterprises into the international market that Bosch-Siemens already occupied or wanted to occupy.³⁰³

Hisense’s Management Counsel adjusted its strategy in dealing with this difficult case. While posing to confront Siemens in German court, Hisense’s think-tank suggested resolving the problem through inter-governmental negotiations with the relevant companies.³⁰⁴ In March 2005, following lengthy negotiations, the two sides reached a reconciliation agreement.³⁰⁵ According to this agreement, Bosch-Siemens agreed to transfer its “HiSense” trademark, which was registered in Germany and other European countries.³⁰⁶ Siemens also withdrew its accusation against Hisense, and Hisense withdrew its application to register the Bosch-Siemens trademark in China.³⁰⁷ The two big companies buried their quarrel and shook hands at last.

Apparently neither Hisense nor Bosch-Siemens expected that a mere business activity would have triggered such potential impact. Apart from sounding an alarm for Chinese enterprises, on the EU side, the Bosch-Hisense case also backed up the principle that Chinese culture cherished political stability and social harmony. This is a reality that the European businesses have to envisage when leaping into the Chinese market.

³⁰² *Chinese Trademarks Repeatedly Registered Abroad*, *supra* note 290.

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ Hexin Ximenzi Shangbiao Zhengyi Jiean, “HiSense” Huigui Haixin [*Hisense Reaches Deal with Siemens: “HiSense” Trademark Returns Home*], XINHUA NEWS NET, Mar. 9, 2005, http://news.xinhuanet.com/fortune/2005-03/09/content_2672391.htm (translation by author).

³⁰⁶ *Id.*

³⁰⁷ *Id.*

F. STEP SIX: FROM FREERIDER TO STAKEHOLDER—WHEN BEIJING EMBRACES THE OLYMPICS

When it comes to IPR enforcement in China, the obvious sentiment is, since all the countries, including the United States and Japan, have gone through the stage of obtaining huge profits through copying, why should China commit the folly of waiving this bestowed gift? The striking point here is how to avoid the suspicion of the Chinese by convincing them of the potential harm of imitation and the larger benefits of innovation. China will embrace IPR as long as they are associated with common interests of intellectual property. Concretely speaking, only when Chinese citizens are aware they are harming their own interests, will they move away from the counterfeiting and piracy and actively combat the infringement problems. As the 2008 Olympic Games approach, China is being provided a new stage to act as an active partner in the global protection of IPR.

The protection of IPR has become a significant feature in the scheme of the Olympics.³⁰⁸ As the codification of the fundamental principles and rules, the Olympic Charter is aimed at protecting the image and spirit of the Olympic Games and the intellectual property so that the value and integrity of the Olympic brand are maintained.³⁰⁹ Over the past two decades, the protection of Olympic IPR and other related rights has received great attention nationally and internationally and has formed the principal source of income for the Olympics.³¹⁰ As a practice, host countries of the Olympic Games promulgate regulations to prohibit the unauthorized use of confusingly similar phrases, symbols, terminology, and graphic design.³¹¹ The legal status of the Olympic IPR and other related rights are defined and implemented over the registration

³⁰⁸ Chris Brockie, *Business Doesn't Play with Games*, THE KOREA TIMES, Apr. 2, 2006, available at LEXISNEXIS.

³⁰⁹ See Int'l Olympic Comm., *Olympic Charter*, Chapter I § 7-14 (Sept. 1, 2004) available at http://multimedia.olympic.org/pdf/en_report_122.pdf.

³¹⁰ Regulations on the Protection of Olympic Symbols (promulgated by Decree No. 345 of the State Council of the P.R.C., Feb. 4, 2002, effective Apr. 1, 2002), CHINAPRLAW, available at <http://www.chinaprlaw.com/english/laws/laws21.htm>.

³¹¹ For example, in the United States, Section 110 of the Amateur Sports Act of 1978 protects various designations associated with the Olympics. Under this provision, the United States Olympic Committee has the exclusive right to use the name "United States Olympic Committee," its symbol and emblem, and the words "Olympic," "Olympiad," "Citius Altius Fortius," "Pan American," "Paralympiad," "America Espirito Sport Fratemitte," or any combination thereof. See 36 U.S.C. § 220506 (2001).

of trademark and copyright administered by the International Olympic Committee (IOC) and other Olympic organizing committees.³¹² Almost immediately after the 1993 announcement that Sydney, Australia, was to host the 2000 games, its customs service began planning for how to deal with detecting and combating counterfeit goods which infringed IPR associated with the Olympics.³¹³ Similarly, in the 2008 Olympic Games, it is estimated that the Beijing Organizing Committee will enter into thousands of contracts with the International Olympic cooperative partners, each involving IPR.³¹⁴

Since December 2000, the Chinese government has embarked on the Olympic intellectual property legislation and its enforcement, with particular emphasis given to the protection of Olympic symbols.³¹⁵ In November 2001 and April 2002, “the Regulation of Protection of Olympic Symbol of Beijing” and “the Regulation of Protection for Olympic Symbol” were respectively promulgated by the State Counsel.³¹⁶ The promulgation of these Regulations demonstrated China’s firm commitment to the successful staging of the 2008 Olympic Games. In addition, by April 1, 2005, the Beijing Organizing Committee for the 2008 Games Olympiad had registered more than fifty-eight symbols via the SAIC and the IOC.³¹⁷

In 2004, during the “Press Release on Beijing Intellectual Property Protection” held jointly by the information office of Beijing and the municipal government, the Olympic intellectual property protection campaign was launched.³¹⁸ Chinese authorities have made an appeal to the public to buy legitimate Olympic products from authorized sellers or retailers.³¹⁹ It was also announced that authorities at all levels would strictly enforce the relevant regulations.³²⁰

The General Administration of Customs and SAIC have also been requested to be on alert throughout the country to prevent any

³¹² Regulations on the Protection of Olympic Symbols, *supra* note 310.

³¹³ Brockie, *supra* note 308.

³¹⁴ Regulations on the Protection of Olympic Symbols, *supra* note 310.

³¹⁵ Olympic symbols include the Olympic five-ring symbol and flag, names of formal Olympics-related issues and slogans of the 2008 Olympics such as “New Beijing, Great Olympics” and “Beijing 2008.” *Olympic Symbols Receive Protection*, CHINA DAILY, Apr. 1, 2003, available at LEXISNEXIS.

³¹⁶ Regulations on the Protection of Olympic Symbols, *supra* note 310.

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ Brockie, *supra* note 308.

³²⁰ *Id.*

unauthorized use of Olympic-related intellectual property.³²¹ From 2002 to 2003, the SAIC identified 144 infringements against Olympic symbols at different levels.³²² Until December 2006, the SAIC in Beijing alone has identified eighty-nine cases of Olympic Symbol infringement and confiscated 3,225 goods with unlicensed Olympic symbols.³²³ Statistics also show that, in 2006, more than 4 percent of trademark violations in Beijing were Olympics-related.³²⁴ Recently, 112 advertising companies illegally using the slogan created for Beijing's 2008 Olympic bid, "New Beijing, Great Olympics," were ordered by authorities to cease infringement immediately.³²⁵ Customs officials throughout the country have seized approximately thirty shipments of export goods illegally using the Olympic symbols.³²⁶

At the same time, to commemorate the second anniversary of the issuance of the "Regulation of Protection for Olympic Symbol," the authorities organized a series of promotional events concerning the protection of the Olympic symbol and illustrated how to distinguish the genuine Olympic products from the counterfeits.³²⁷ With the 2008 Beijing Olympics fast approaching, it is clear that China has pledged to step-up efforts to fight any infringement of the Olympic symbols. China's seriousness in enforcing the Olympic intellectual property has been remarkable.

It is likely that the Beijing Olympics will mark a turning point in the development of the intellectual property system in China. It may be true that, since China received the Olympic Flag in Athens in 2004, it has undertaken a special mission to protect IPR. From Athens to Beijing, and from Beijing to London, we have reasons to expect a great change. It is hoped that the EU and China have much to gain in the cooperation. It may not be a satisfying mirage to predict that when the Olympic Flag is handed over to the City of London should be an appropriate time for

³²¹ See *China Pledges Increased Protection for Intellectual Property*, PEOPLE'S DAILY ONLINE, Apr. 27, 2002, http://english.peopledaily.com.cn/200202/27/eng20020427_94854.shtml.

³²² Regulations on the Protection of Olympic Symbols, *supra* note 310.

³²³ Press Release, Intellectual Property Protection in China, Beijing Investigated 89 Olympic Symbols Infringement Cases, (2006), http://www.ipr.gov.cn/ipr/en/info/Article.jsp?a_no=40390&col_no=893&dir=200612.

³²⁴ *China Gets Serious about Fake Olympic Merchandise*, INT'L HERALD TRIBUNE, Apr. 26, 2007, available at <http://www.iht.com/articles/2007/04/26/news/fakes.php> (In 2006, the Beijing authorities identified and prosecuted 2,072 trademark violations, 89 of which involved Olympics products.).

³²⁵ *Olympic Symbols Receive Protection*, *supra* note 315.

³²⁶ *Id.*

³²⁷ Regulations on the Protection of Olympic Symbols, *supra* note 310.

the people to ponder the excellences of the Olympic games in Beijing and, at the same time, applaud the surprisingly improved IPR system in China.

VII. CONCLUSION

In terms of IPR enforcement, the United States' efforts at improving IPR protection in China failed because of a number of reasons, most notably, the ignorance of Chinese culture and the lack of genuine understanding of its inherent influence on the legal and political regimes. The cat-and-mouse game has been carried on restlessly and the counterfeiting and piracy remain pervasive. The IPR enforcement problem has become a perennial conundrum.

Unlike China-U.S. relations, the EU and China have maintained harmonious relations in different domains. This distinctive consequence is largely due to the historical compatibilities and cultural adaptability between Europe and China. Cultural accumulation has equipped two old worlds with historical maturation to effectively deal with complexity and live in amity. The mutual interest and shared values have paved way for the two parts to carry out productive cooperation. It is possible for the EU and China to set an example for the world regarding the implementation and enforcement of IPR with an "approach that recognizes that there are bound to be short-term frustrations and difficulties but that aims to build confidence in the system."³²⁸ By energetically applying a six-step strategy, it is optimistic to predict that new norms for IPR can be established in China in the near future. Tortuous as the road of struggle is, the prospects are bright.

³²⁸ See Speech by Pascal Lamy, European Commissioner for Trade, to the China Europe International Business School, Shanghai, China, Dec. 3, 2001, available at http://www.delchn.cec.eu.int/en/eu_china_wto/wto1.htm.