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Citation: 5 Minn. J. Global Trade 503 1996



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## Up Against a Great Wall: The Fight Against Intellectual Property Piracy in China

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The technological advances of the past decade have pushed intellectual property (IP) piracy to the forefront of international politics.<sup>1</sup> In Beijing, Windows '95 sells for four dollars and movies such as *Forrest Gump* and *Jurassic Park* sell for six dollars.<sup>2</sup> China currently has the capacity to produce up to ninety million illicit CDs a year, yet its domestic market can only absorb five million CDs.<sup>3</sup> Consequently, China exports CDs and other pirated products to Hong Kong, Southeast Asia, Latin America, and even North America.<sup>4</sup> China's continued failure to enforce its IP laws has prompted American industrial interests to lobby the United States Trade Representative (USTR) to impose sanctions of more than \$1 billion on Chinese imports into the United States.<sup>5</sup>

The United States uses trade sanctions as its primary weapon in the fight against piracy because many foreign coun-

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1. Intellectual property is usually divided into three categories: copyrights, patents, and trademarks. A copyright is "the exclusive right held by the author or developer of an original work of authorship to make copies of such work and utilize them for commercial purposes." STEPHEN R. ELIAS, *INTELLECTUAL PROPERTY LAW DICTIONARY* 42 (1985). Works that receive copyright status in the United States and many other countries include: literary works, audiovisual works, computer software, graphic works, musical arrangements, and sound recordings. *Id.* at 43.

A patent is a "right of protection granted to an inventor which can be used to exclude others from manufacturing, selling or using his or her invention as it is specifically described in the patent." *Id.* at 146.

A trademark is "a word, phrase, logo, or other graphic symbol used by a manufacturer or merchant to distinguish his or her line of products from the products of others." *Id.* at 107.

2. Amy Borrus et al., *Counterfeit Disks, Suspect Enforcement: China's Feeble Piracy Crackdown Puts Clinton in a Quandary*, *BUS. WK.*, Sept. 18, 1995, at 68.

3. *Intellectual Property: U.S. Looking for Proof that China is Clamping Down on Pirated Disks*, 13 *Int'l Trade Rep.* (BNA) 193 (Feb. 7, 1996).

4. UNITED STATES TRADE REPRESENTATIVE, 1995 TRADE POLICY AGENDA AND 1994 ANNUAL REPORT 58 (1994) [hereinafter 1995 TRADE POLICY].

5. Helene Cooper & Marcus W. Brauchli, *U.S. Threatens Sanctions Against China in Reprise of Last Year's Copyright Fight*, *WALL ST. J.*, Jan. 23, 1996, at A2.

tries depend on the U.S. market for exports.<sup>6</sup> In 1988, Congress passed Special 301, mandating the USTR to use trade sanctions or other limits on market access to retaliate against inadequate protection of IP rights.<sup>7</sup> In recent years, the United States has frequently employed Special 301 against countries such as India, Taiwan, and China.<sup>8</sup> While the United States has successfully used its economic clout in the past, the strategy appears to have failed with regard to China.

This Note considers why the strategy of using economic influence as leverage failed to establish an effective IP regime in China. Part I of this Note details the current IP strategy of the United States and the events leading up to the crisis with China. Part II discusses potential reasons why the current use of strong-arm tactics by the United States has failed to establish an effective IP regime in China, and finally, Part III presents an alternative strategy that is based on positive economic incentives.

## I. BACKGROUND

### A. SPECIAL 301

Special 301 is part of the Omnibus Trade and Competitiveness Act of 1988.<sup>9</sup> It allows the United States to use the threat of unilateral retaliation to persuade and motivate trading partners to reform inadequate IP acts, policies, or practices.<sup>10</sup> In implementing Special 301, the USTR creates three lists—the priority foreign country list, the priority watch list, and the watch list.<sup>11</sup> Priority foreign countries are countries that have the most onerous or egregious acts, policies, or practices in the area of IP and have failed to enter into good faith negotiations or to make significant progress in bilateral or multilateral negotiations.<sup>12</sup> Countries on the priority watch list are similar to prior-

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6. Y. Kurt Chang, *Special 301 and Taiwan: A Case Study of Protecting United States Intellectual Property in Foreign Countries*, 15 NW. J. INT'L L. & BUS. 206, 212 (1994).

7. *Id.*

8. Ann Main, *Pursuing U.S. Goals Bilaterally: Intellectual Property and 'Special 301'*, BUS. AM., Sept. 25, 1989, at 6.

9. *Id.*

10. Kristie M. Kachuriak, *Chinese Copyright Piracy: Analysis of the Problem and Suggestions for Protection of U.S. Copyrights*, 13 DICK. J. INT'L L. 599, 614 (1995).

11. Judith H. Bello & Alan F. Holmer, "Special 301": *Its Requirements, Implementation, and Significance*, 13 FORDHAM INT'L L.J. 259, 267 (1990).

12. 19 U.S.C.A. § 2242(b)(1) (West Supp. 1995).

ity foreign countries except these countries are engaging in good faith negotiations, or are making significant progress in negotiations.<sup>13</sup> Countries on the watch list, the least serious of the three categories, warrant attention because particular problems exist with respect to the protection or enforcement of IP rights.<sup>14</sup>

In determining the Special 301 lists, the USTR considers data from the Register of Copyrights, the Commissioner of Patents and Trademarks, and the National Trade Estimates.<sup>15</sup> Special 301 requires the USTR to release the lists each spring, within thirty days of the release of the National Trade Estimates.<sup>16</sup> After releasing the lists, the USTR has thirty days to initiate an investigation into the acts, policies, or practices of priority foreign countries.<sup>17</sup> Special 301 allows the USTR six months to complete the investigation and to negotiate a solution.<sup>18</sup> If the issues remain unresolved, the USTR may take any or all of the following actions: (1) suspend trade benefits; (2) impose duties or other restrictions; and (3) enter into binding agreements committing the priority foreign country to stop the offending practices or to compensate the United States.<sup>19</sup>

## B. IMPLEMENTATION OF SPECIAL 301

The United States has successfully used its economic clout, often under Special 301, to obtain agreements that oblige foreign countries to implement IP laws, to amend existing laws, or to enforce laws.<sup>20</sup> However, many of these new laws are simply

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13. *USTR Fact Sheets on Super 301 Trade Liberalization Priorities and Special 301 on Intellectual Property, Released May 25, 1989*, 6 Int'l Trade Rep. (BNA) 715, 719 (May 31, 1989).

14. 1995 TRADE POLICY, *supra* note 4, at 98.

15. 19 U.S.C.A. § 2242(b)(2) (West Supp. 1995). The National Trade Estimates are annual reports published by the USTR that identify and analyze acts, policies, or practices of foreign countries that constitute significant barriers to or distortions of American exports. 19 U.S.C.A. § 2241(a)(1) (West Supp. 1995). The reports also estimate, if feasible, the value of additional goods and services of the United States that would have been exported had the acts, policies, or practices not been in place. *Id.*

16. The USTR must identify violating countries within thirty days of the release of the National Trade Estimates. 19 U.S.C.A. § 2242(a) (West Supp. 1995). However, a priority foreign country may be designated at any time. 19 U.S.C.A. § 2242(c) (West Supp. 1995).

17. 19 U.S.C.A. § 2412(b)(2)(A) (West Supp. 1995).

18. 19 U.S.C.A. § 2414(a)(3)(A) (West Supp. 1995).

19. Kim Newby, *The Effectiveness of Special 301 in Creating Long Term Copyright Protection for U.S. Companies Overseas*, 21 SYRACUSE J. INT'L L. & COM. 29, 38 (1995).

20. Keith M. Rockwell, *U.S. Laws Seen as Successful in Curbing Patent Piracy*, J. Com., Mar. 10, 1993, at 3A, available in WESTLAW, JOC database.

paper tigers that are part of an annual spring-time flurry of activity associated with the USTR's announcement of the Special 301 lists.<sup>21</sup> Once the threat of retaliation passes, foreign countries tend to do little in terms of follow-up or enforcement.<sup>22</sup> China's early failure to abide by the IP agreement it signed with the United States in February, 1995, is the most visible example of this problem.<sup>23</sup> Aside from China, the United States has also had IP problems with numerous other countries, including India and Taiwan.<sup>24</sup>

## 1. India

The United States first named India a priority foreign country in 1991 because its laws provided inadequate patent protection for pharmaceutical and chemical products.<sup>25</sup> Under India's IP laws, items such as food, medicine, or drugs produced by chemical processes could not be patented.<sup>26</sup> India also failed to protect biotechnological inventions, methods of agriculture, and processes for treatment of humans, animals, or plants.<sup>27</sup> Other

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The United States concluded bilateral IP agreements with a number of important trading partners, including South Korea, China, Taiwan, the Philippines, Russia, and Poland. *Protection of Intellectual Property Rights*, 5 U.S. DEPT. ST. DISPATCH 126 (1994).

21. Francis S.L. Wang, *Taming the Infringers: "Special 301 Process" Fosters Copyright and Trademark Protection*, NAT'L L.J., May 17, 1993, at S1.

22. *Nations Act on Intellectual-Property Issue*, WALL ST. J., Apr. 23, 1993, at B11.

23. Maggie Farley & James Gerstenzang, *China Piracy of U.S. Products Surges Despite Accord*, L.A. TIMES, Oct. 10, 1995, at A1. For a discussion of China's failure to enforce this agreement, see *infra* notes 61-66 and accompanying text.

24. The United States named India a priority foreign country in 1991, 1992, and 1993 and Taiwan in 1992. *Intellectual Property: Kantor Singles Out Brazil, India, Thailand for Special 301 Designation*, 10 Int'l Trade Rep. (BNA) 726 (May 5, 1993); *Intellectual Property: U.S., Taiwan Reach Key Agreement on Patent, Trademarks, Copyrights*, 9 Int'l Trade Rep. (BNA) 1001 (June 10, 1992).

25. *Intellectual Property: USTR Cites India, Taiwan, Thailand as Worst Intellectual Property Offenders*, 9 Int'l Trade Rep. (BNA) 784 (May 6, 1992).

26. UNITED STATES TRADE REPRESENTATIVE, 1995 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 144-45 (1995) [hereinafter 1995 NTE]. India's laws recognize patent protection for processes, but not for products. *Intellectual Property: India's Patent Law Changes Lapse in Absence of Parliament's Approval*, 12 Int'l Trade Rep. (BNA) 613 (Apr. 5, 1995). This distinction allows one to manufacture a product as long as the process used is slightly different from the protected process. *Id.*

27. 1995 NTE, *supra* note 26, at 145.

items of contention included India's broad compulsory licensing provisions and its failure to enforce already existing IP laws.<sup>28</sup>

In 1993, after a seven-month long investigation into India's IP practices, the United States retaliated by revoking duty-free privileges under the Generalized System of Preferences (GSP).<sup>29</sup> The revocation affected approximately \$80 million in pharmaceuticals, chemicals and related products.<sup>30</sup> During 1993, the issue of pharmaceutical and chemical patents remained unresolved, but India improved its laws in the areas of copyright and trademark protection.<sup>31</sup> As a result of these changes, the USTR moved India down to the priority watch list in 1994.<sup>32</sup>

India's failure to join the Paris Convention and to establish pharmaceutical and chemical patent protection continues to be a concern of the United States.<sup>33</sup> In 1995, India promulgated an

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28. UNITED STATES TRADE REPRESENTATIVE, 1991 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 105 (1991) [hereinafter 1991 NTE]. Compulsory licensing occurs when the government requires a patent or copyright holder to allow others to produce the protected product. A. JOHN MICHEL & KURT KELMAN, *DICTIONARY OF INTELLECTUAL PROPERTY* 168 (1954). India's stringent compulsory licensing provisions often render patents and copyrights meaningless. 1991 NTE, *supra*, at 104.

29. John Maggs, *U.S. to List Nations that Fail to Protect Intellectual Property*, J. COM., Apr. 30, 1993, at 5A, available in WESTLAW, JOC database. The GSP is a system under which industrialized countries such as the United States give preferential tariff treatment to manufactured goods imported from certain less developed countries. *The Language of Trade*, BUS. AM., July 1994, at 6.

30. 1995 NTE, *supra* note 26, at 144.

31. UNITED STATES TRADE REPRESENTATIVE, 1993 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 123 (1993) [hereinafter 1993 NTE]. The amended copyright law provides for: rental rights for video cassettes; protection for works transmitted by satellite, cable, or other means; and limited judicial discretion with respect to the level of penalties imposed on copyright pirates. 1995 NTE, *supra* note 26, at 145.

India also established the Copyright Enforcement Advisory Council and announced that it would accord national treatment for the use of trademarks owned by foreign proprietors. 1993 NTE, *supra*, at 123. The council is responsible for policy development and coordination, initiating a program for training police officers and prosecutors, and the compilation of data on copyright offenses on a nation-wide basis. *Id.*

32. *USTR Announcement on Foreign Government Procurement (Title VII) and Intellectual Property Protection (Special 301)*, 12 Int'l Trade Rep. (BNA) 791, 795 (May 3, 1995).

33. 1995 NTE, *supra* note 26, at 144.

The Paris [Convention was] signed in Paris in 1883 and last revised in 1967. Under the Convention, each member State must accord the same protection to the inventions, trademarks and other subject matter of industrial property of the nationals of the other member States as it accords to those of its own nationals. The Convention also provides certain facilities to foreigners; for example, it allows them, without losing their claim to novelty, to file their applications for patents up

ordinance allowing patents on pharmaceutical products.<sup>34</sup> The ordinance lapsed, however, when economic nationalists in the Indian Parliament refused to approve the bill within the required six-week period.<sup>35</sup> Aside from India's parliamentary politics, the Indian belief that drugs and medicines should be in the public domain also hinders the establishment of patent protection for pharmaceutical and chemical products.<sup>36</sup>

## 2. Taiwan

In 1992, the United States named Taiwan a priority foreign country because of its widespread cable television and video piracy, exports of pirated software and CDs, and inadequate enforcement of IP laws.<sup>37</sup> On June 5, 1992, less than two months after being named a priority foreign country, Taiwan signed a Memorandum of Understanding (MOU) with the United States concerning the protection of IP rights.<sup>38</sup> Under the MOU, Taiwan agreed to improve copyright protection of recordings, video, and software and to bring its patent and trademark laws up to internationally recognized standards.<sup>39</sup> Taiwan complied with the MOU by passing a Bilateral Copyright Agreement and a Cable Television Bill.<sup>40</sup> Taiwan also instituted a Comprehensive Action Plan for Protection of IP Rights, which calls for the establishment of a central agency for the coordination of IP

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to a year after first filing in the country of origin. It contains provisions concerning the conditions under which a State may license the use of a patented invention in its own territory if, for example, the owner of the patented invention does not exploit it in such territory.

Alison Butler, *The Trade-Related Aspects of Intellectual Property Rights: What is at Stake?*, FED. RESERVE BANK OF ST. LOUIS 34, 43 (Nov.-Dec. 1990) (citing WIPO, GENERAL INFORMATION, 1990).

34. *India Modifies Patent Laws*, J. PROPRIETARY RTS., Mar. 1995, at 33.

35. *Intellectual Property: India's Patent Law Changes Lapse in Absence of Parliament's Approval*, 12 Int'l Trade Rep. (BNA) 613 (Apr. 5, 1995). The passage and implementation of the bill is required as part of India's accession to the WTO. *India's WTO Patent Bill Fails in Parliament*, Marketletter, Apr. 10, 1995, available in WESTLAW, MKTLTR database.

36. *Intellectual Property: Patent Protection Talks With India Not Close to Breakthrough, Official Says*, 9 Int'l Trade Rep. (BNA) 1223 (July 15, 1992). In 1982, Indira Ghandi stated "the idea of a better-ordered world is one in which medical discoveries will be free of all patents and there will be no profiteering from life and death." Peggy E. Chaudhry & Michael G. Walsh, *International Property Rights: Changing Levels of Protection Under GATT, NAFTA and the EU*, 30 COLUM. J. WORLD BUS. 80, 88 (1995).

37. *Intellectual Property: U.S., Taiwan Reach Key Agreement on Patent, Trademarks, Copyrights*, 9 Int'l Trade Rep. (BNA) 1001 (June 10, 1992).

38. Chang, *supra* note 6, at 218.

39. *Id.*

40. *Id.* at 218-19.

rights protection.<sup>41</sup> In 1993, the USTR praised Taiwan for its prompt compliance in the areas of copyrights, cable television, and trademark protection and removed it from the priority foreign country list.<sup>42</sup>

While Taiwan appears to be a model of how the U.S. IP strategy should work, a closer look reveals that Taiwan actually resisted American pressure to establish an effective IP regime when it was dependent on American economic and military support.<sup>43</sup> Taiwan only acted after its domestic industries began to feel the costs of piracy.<sup>44</sup> The timing of Taiwan's actions suggests that foreign countries are more sensitive to the cost of piracy on their domestic industries than to American pressure.

### 3. China

In recent years, China has replaced Japan as the source of high-profile trade controversies, and IP issues top the list.<sup>45</sup> The United States first named China a priority foreign country in 1991.<sup>46</sup> At the time, the United States desired patent and copyright protection within the standards of the Paris and Berne Conventions.<sup>47</sup> In the area of copyright protection, the United

41. *Id.*

42. *Trade Agency Reports Advances in Protecting Intellectual Property*, WALL ST. J., Aug. 3, 1993, at B2; *Intellectual Property: Kantor Singles Out Brazil, India, Thailand For Special 301 Designation*, 10 Int'l Trade Rep. (BNA) 726 (May 5, 1993).

43. WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE* 108 (1995).

44. Frankie Fook-Lun Leung, *Tradition of Copying in China Fuels the Piracy of Intellectual Property*, L.A. TIMES, Mar. 5, 1995, at D2. Piracy helped Taiwan's business people understand that stiffer IP regulations also provide them with better protection. Yvonne Yuan, *Taiwan Takes On Its Pirates*, WORLD PRESS REV., Sept. 1994, at 49.

45. *Clinton Likely to Shun New Initiatives that Could Stir GOP*, 13 Int'l Trade Rep. (BNA) 4 (Jan. 24, 1996) (discussing China's continued failure to develop and enforce an effective IP regime).

46. Morton David Goldberg & Jesse M. Feder, *China's Intellectual Property Legislation: New Copyright Regulations Leave Much to be Desired*, CHINA BUS. REV., Sept.-Oct. 1991, at 8.

47. *China: U.S. Takes First Steps On Sanctions Against Chinese Goods Under Special 301*, 8 Int'l Trade Rep. (BNA) 1754 (Dec. 4, 1991). For a description of the Paris convention, see *supra* note 33.

The Berne [Convention was] signed in Berne in 1886 and last revised in 1971. Under the Convention, each member State must accord the same protection to the copyright of the nationals of the other member States as it accords to that of its own nationals. The Convention also prescribes some minimum standards of protection; for example, that copyright protection generally continues throughout the author's life and for fifty years thereafter. It includes special provisions for the benefit of developing countries.



States was concerned with China's failure to treat computer software as literary work, a provision that allows non-commercial entities to copy software, and China's failure to protect literary work unless it was first published in China.<sup>48</sup> In the area of patent protection, China only protected pharmaceutical and chemical *processes*, whereas the United States desired protection of *products* as well.<sup>49</sup>

Initially, Chinese officials argued that the United States should not expect China, a developing country, to comply with the IP standards of the United States, a highly industrialized nation.<sup>50</sup> Chinese officials also argued that because pharmaceutical and chemical products are often critical to sustaining human life, industrialized countries have an obligation to share these advances with developing countries.<sup>51</sup>

After nine months of negotiations, China and the United States signed a Memorandum of Understanding (MOU) in 1992.<sup>52</sup> In the MOU, China agreed to extend patent protection to pharmaceutical and chemical products and to join the Berne Convention by October 15, 1992.<sup>53</sup> In addition, China agreed to treat computer software as literary work, with a protection term of fifty years.<sup>54</sup>

Although China joined the Berne Convention and began promulgating IP laws,<sup>55</sup> China failed to enforce these new laws.<sup>56</sup> As a result, in 1994, the United States named China a priority foreign country for the second time in four years.<sup>57</sup> The United States desired: (i) effective measures to immediately cur-

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Butler, *supra* note 33, at 43 (citing WIPO, GENERAL INFORMATION, 1990).

48. Vanessa Lide, *USTR Targets China*, CHINA BUS. REV., July-Aug. 1991, at 7.

49. *Id.* Product protection is important in the pharmaceutical and chemical industries because process protection does not prevent competitors from producing the same product through a slightly different process. See *supra* note 26 (explaining the product/process problem in India).

50. *Intellectual Property: China Calls Designation Under Special 301 "Unacceptable," Warns Trade Ties Endangered*, 8 Int'l Trade Rep. (BNA) 644 (May 1, 1991).

51. *Id.*

52. *China: U.S.-China Intellectual Property Accord Ends Threat of U.S. Retaliatory Duties*, 9 Int'l Trade Rep. (BNA) 139 (Jan. 22, 1992).

53. *Id.*

54. *Id.*

55. Lee M. Sands, *IPR Watchdogs*, CHINA BUS. REV., Nov.-Dec. 1994, at 16-17.

56. Arthur Wineburg, *The Close of Round Two*, CHINA BUS. REV., July-Aug., 1995, at 20-21.

57. Sands, *supra* note 55, at 17.

tail IP piracy, (ii) the creation of an IP enforcement regime, and (iii) improved market access for IP products.<sup>58</sup> On February 4, 1995, after twenty months of negotiations, the USTR threatened to impose 100% tariffs on \$1.08 billion of Chinese imports into the United States effective February 26, 1995, if outstanding IP issues were not resolved.<sup>59</sup> In the end, China and the United States reached an agreement just before the February 26 deadline, and avoided a trade war.<sup>60</sup> In this agreement, China agreed to shut down its twenty-nine illicit CD factories, to ease restrictions on Chinese imports of legally produced audiovisual products, to improve border enforcement against the import and export of articles violating IP rights, and to establish a system of permits and licenses for the production of audiovisual and software products.<sup>61</sup>

One year after the signing of the agreement, it remains largely unenforced.<sup>62</sup> Not only has China failed to shut down its illicit CD factories, but it has allowed new ones to open.<sup>63</sup> One of the more flagrant violations involves the Chinese Ministry of State Security, which opened and began to operate an illicit CD factory after the signing of the agreement.<sup>64</sup> Furthermore, the

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58. *Id.* at 17-18.

59. 1995 TRADE POLICY, *supra* note 4, at 58.

60. Wineburg, *supra* note 56, at 20.

61. *Id.*

62. Borrus et al., *supra* note 2, at 68. Representatives of American companies describe the situation as being "on the one yard line, with ninety-nine yards to go." *Id.* China has acted against some retailers of pirated goods. The government recently raided 3,177 shops that sell pirated products and confiscated 1.9 million CDs, 752,000 audio and videotapes, 45,000 books, and 37,000 software programs. *Id.*

The courts have also begun to change. A Beijing court recently awarded Walt Disney \$27,405 in a copyright infringement case. *Beijing Court Awards Disney in Copyright Case*, ASIAN WALL ST. J., May 19, 1995, at 4. The decision was the first victory for an American company since the United States and China signed the 1992 MOU. *Id.*

Despite the flutter of enforcement activity, piracy continues because China has failed to address the source of the problem — the producers of pirated goods. Borrus et al., *supra* note 2, at 68. China has also failed to implement a title verification system and an effective customs regime. *Intellectual Property: U.S. Sets Deadlines for China for Intellectual Property Compliance*, 12 Int'l Trade Rep. (BNA) 48 (Dec. 6, 1995).

63. Kennedy Maize, *Piracy Enforcement Problems in China*, NEWSBYTES NEWS NETWORK, Sept. 1, 1995, available in WESTLAW, NEWSBYTE database. Of the 29 CD factories, International Intellectual Property Alliance officials knew of only one, the Shenfei factory, that had stopped producing pirated disks. Kathy Chen, *China is Faulted by U.S. Group on Piracy Pact*, WALL ST. J., Oct. 13, 1995, at A10.

64. Maize, *supra* note 63.

drop in the price of pirated goods indicates that the 1995 IP agreement has not affected the production of such goods.<sup>65</sup>

While inadequate enforcement is the primary problem in China, there are other contributing factors. The rudimentary Chinese judicial system is ill-equipped to handle IP cases.<sup>66</sup> In addition, the market reforms of the late 1980's granted officials in the coastal provinces the power to control their own economic affairs, making it more difficult for authorities in Beijing to establish an IP regime.<sup>67</sup> Further complicating the problem of effective enforcement is the fact that many government officials have an economic interest in allowing or even encouraging IP violations.<sup>68</sup>

At a broader level, China's political culture also affects efforts to establish an effective IP regime.<sup>69</sup> Traditionally, Chinese society has emphasized the Confucian vision of the importance of a "shared and still vital past."<sup>70</sup> This vision is premised on the belief that the essence of human understanding has been discerned by "those who have gone before."<sup>71</sup> Consequently:

[t]he replication of particular concrete manifestations of such an endeavor by persons other than those who first gave them form never carried, in the words of the distinguished art historian and curator Wen Fong, the "dark connotations . . . it does in the West." . . . On the contrary, in the Chinese context, such use was at once both more affirmative and more essential. It evidenced the user's comprehension of and devotion to the core of civilization itself . . .<sup>72</sup>

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65. Borrus et al., *supra* note 2, at 68. CD-ROMs that were selling for \$100 a year ago are now selling for \$6.50. *Id.* The drop in price corresponds to an oversupply of pirated goods. *Id.*

66. Lee M. Sands & Deborah M. Lehr, *Expanding Trade and Opening Markets in China*, *China Bus. Rev.*, July-Aug. 1993, at 11. Chinese courts are understaffed and many judges lack the necessary background to rule on IP cases. Tan Loke Khoon, *Counter Feats: The Art of War Against Chinese Counterfeiters*, *CHINA BUS. REV.*, Nov.-Dec. 1994, at 14. This judicial inexperience often results in poor implementation or misinterpretation of IP laws. *Id.*

67. Borrus et al., *supra* note 2, at 68.

68. Wineburg, *supra* note 56, at 21. Counterfeiting is often a source of income for local officials and a source of jobs and investment for the community. Khoon, *supra* note 66, at 15. China's designated copyright enforcement agency, the NCA, is under-staffed, poorly funded, and hindered by its dependence on local officials who often have little or no interest in enforcing IP laws. Derek Dessler, *China's Intellectual Property Protection: Prospects for Achieving International Standards*, 19 *FORDHAM INT'L L.J.* 181, 231 (1995).

69. "[P]olitical culture comprises enduring values and practices central to a nation's identity . . .". ALFORD, *supra* note 43, at 120.

70. *Id.* at 19.

71. *Id.* at 25.

72. *Id.* at 28-29.

Because copying is a highly honored and accepted process in China, the process of establishing an effective IP regime challenges certain traditional Chinese values.

China's views of IP rights are shaped not only by its political culture but also by its status as a developing country. Developing nations often see Western IP rules as an effort by developed nations to keep them impoverished, whereas developed nations consider an IP regime that is not up to their standards to be piracy.<sup>73</sup> Furthermore, developing nations often claim a right to the ideas and knowledge of developed nations because they believe developed nations have an obligation to assist them in their efforts to modernize.<sup>74</sup> In China, the reference to pirated programs as "patriotic software," because the programs speed China's modernization at little or no cost, illustrates this conflict.<sup>75</sup>

### C. THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY

Throughout the Uruguay Round of Negotiations of the General Agreement on Tariffs and Trade (GATT), the United States lobbied for a multilateral IP agreement. While critics accuse the United States of hampering the Uruguay Round, others assert that the U.S. use of Special 301 increased the prospects for an

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73. Chang, *supra* note 6, at 215.

74. Differences between the developed and the developing nations occur at two levels—the economic level and the moral level. Economically, an IP regime is undesirable because instituting, monitoring, and enforcing such a system requires already scarce financial resources. Newby, *supra* note 19, at 51. From the perspective of developing countries whose resources are already limited, the idea of spending time and money developing products and processes that have already been developed is absurd. *Id.* These arguments for the sharing of knowledge are supported by the finding that strong IP laws do not necessarily improve global efficiency. Butler, *supra* note 33, at 44 n.25 (citing Judith C. Chin & Gene Grossman, *Intellectual Property Rights and North-South Trade*, PRINCETON U. DISCUSSION PAPERS IN ECON. 143 (Nov. 1988)).

The moral issues go beyond economics and consider the responsibilities of developed nations with regard to the sustenance of human life. See Chaudhry & Walsh, *supra* note 36, at 88. India's response to U.S. demands for patent protection for pharmaceutical products exemplifies the moral differences. Indian officials rejected patent protection for pharmaceutical products because they believed that in a country where many people lack access to basic health care, the ability to make drugs and medicines should be in the public domain. See *supra* note 36 and accompanying text.

75. James Cox, *U.S. Firms: Piracy Thrives in China*, USA TODAY, Aug. 23, 1995, at 2B.

acceptable IP agreement.<sup>76</sup> The Uruguay Round established the World Trade Organization (WTO) in 1995, which brought trade in services, investment, and IP protection into the multilateral system for the first time.<sup>77</sup> The Agreement on Trade-Related Aspects of Intellectual Property (TRIPs) establishes an international standard for the protection of IP rights for all members of the WTO.<sup>78</sup>

TRIPs includes the traditional GATT requirements of national treatment and most favored nation and it incorporates both the Paris and Berne Conventions.<sup>79</sup> It also includes:

[p]rotection of computer programs as literary works; [r]ental rights for computer programs and sound recordings; [f]ifty years of copyright protection for sound recordings and motion pictures; [p]roduct and process patent protection for virtually all types of inventions; . . . and [p]rotection for trade secrets, integrated circuits, industrial designs, and non-generic geographical indications used to describe wines and spirits.<sup>80</sup>

In addition, TRIPs requires access to civil and administrative procedures and includes provisions on evidence of proof, injunctive relief, payments for damages, and indemnification of parties wrongfully enjoined or restrained.<sup>81</sup>

In terms of compliance, the agreement gives countries one year from the date they enter the WTO to comply.<sup>82</sup> Developing countries are given an additional four years to comply and the least developed countries are entitled to a ten-year phase-in period.<sup>83</sup> WTO members "are not required to provide pipeline pro-

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76. Michael L. Doane, *TRIPs and International Intellectual Property Protection in an Age of Advancing Technology*, 9 AM. U. J. INT'L L. & POL'Y 465, 492 (1994). After the United States initiated negotiations under Special 301, Brazil agreed to the immediate implementation of TRIPs without regard to the transition period available to developing nations. *Id.*

77. *The WTO: What It Is, What It Does*, FOCUS (World Trade Organization, Geneva, Switz.), Jan.-Feb. 1995, at 4.

78. Carlos A. Primo Braga, *Protection On A Global Scale*, CHINA BUS. REV., Mar.-Apr. 1995, at 25.

79. Doane, *supra* note 76, at 477. See *supra* notes 33, 47 (describing the Paris and Berne Conventions).

80. *Protection of Intellectual Property Rights*, 5 U.S. DEPT. ST. DISPATCH 126 (1994).

81. Primo Braga, *supra* note 78, at 25.

82. Agreement on Trade-Related Aspects of Intellectual Property Rights, 33 I.L.M. 1197, in General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, April 15, 1994, 33 I.L.M. 1125, Annex 1C.

83. *Id.* at art. 65. Additional exceptions provide that a non-developing country may qualify for the additional four year transition period if it "is in the process of transformation from a centrally-planned into a market, free-enterprise economy and which is undertaking structural reform of its intellectual

tection — retroactive protection of a subject matter already patented in another member country and not yet marketed in the country that will be assuming new obligations under TRIPs”— during the transition period.<sup>84</sup>

Even though the United States signed TRIPs, it continues to use Special 301.<sup>85</sup> Foreign countries criticize the U.S. implementing legislation for the Uruguay Round because it allows the USTR to identify a country “for Special 301 treatment notwithstanding its compliance with TRIPs.”<sup>86</sup> The danger of the USTR’s ability to continue to pressure developing nations with regard to IP issues is that it may nullify the transitional arrangements of TRIPs.

## II. THE FAILURE OF THE U.S. STRATEGY WITH REGARD TO CHINA

In terms of economic clout, the United States appears well positioned to establish an effective IP regime in China. China’s trade surplus with the United States was approximately \$35 billion in 1995 and is expected to be around \$50 billion in 1996.<sup>87</sup> In addition, the United States is critical of China’s acceptance into the WTO.<sup>88</sup> Despite its economic leverage, the United States failed to pressure China into establishing an effective IP regime. Rather than abide by the IP agreement that it signed with the United States in 1995, China opened five additional CD factories, boosting its production capacity to ninety million CDs

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property system and facing special problems in the preparation and implementation of intellectual property laws and regulations.” *Id.*

A developing country may qualify for an additional five year transition period for specific technology areas that need to be protected under TRIPs, but were not so protected on the general date of application. *Id.*

84. Primo Braga, *supra* note 78, at 27.

85. Doane, *supra* note 76, at 492. The multilateral system of the WTO is designed to end annual threats of unilateral “Special 301” trade actions. Chakravarthi Raghavan, *Trade: Sutherland Says Bilateralism, Unilateralism Undermines WTO*, Inter Press Service, Apr. 25, 1995, available in WESTLAW, ALLNEWSPLUS database.

86. *Intellectual Property: GATT Bill Brings Major Reforms to Domestic Intellectual Property Law*, 11 Int’l Trade Rep. (BNA) 50 (Dec. 21, 1994).

87. Cooper & Brauchli, *supra* note 5, at A2.

88. *Intellectual Property: U.S., China Announce Broad Agreement on Intellectual Property Protection*, 12 Int’l Trade Rep. (BNA) 401 (Mar. 1, 1995). “China is [currently] negotiating with a multilateral group of trading partners, including the United States, in an effort to become a member of the World Trade Organization.” *Id.*

in a domestic market that can only absorb five million CDs.<sup>89</sup> Initially, the United States threatened to impose over \$1 billion in sanctions if China did not comply by February 26, 1996, the one-year anniversary of the agreement.<sup>90</sup> Since then, however, the Clinton administration has pulled back from what was once a firm deadline because it is wary of being too confrontational with China.<sup>91</sup> The fact that an IP regime is not in China's interests and the politics of Sino-American relations explain much of the failure of the current U.S. IP strategy.

#### A. AN EFFECTIVE IP REGIME IS NOT IN CHINA'S INTEREST

Unlike Taiwan, China is not at a point in its development where protecting IP rights is in its best interests. Taiwan established an effective IP regime because its "explosive economic expansion, increasing awareness of the need for indigenous technology, ever-more-pluralistic political and intellectual life, growing commitment to formal legal processes, and international aspirations . . ." made the need for IP law evident.<sup>92</sup> In contrast, China remains a consumer of IP and is therefore unlikely to see gains from the vigorous protection of IP rights.<sup>93</sup>

In general, an effective IP regime in developing countries will increase the cost of living and make certain medicines unaffordable.<sup>94</sup> These costs are likely to be even greater in China where the products and profits of piracy permeate so much of Chinese society. The Chinese government is not only a major user of pirated goods,<sup>95</sup> but also a major producer of pirated goods, such as video games and CDs.<sup>96</sup> In addition, some Chi-

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89. *Intellectual Property: U.S. Looking for Proof that China is Clamping Down on Pirated Disks*, 13 Int'l Trade Rep. (BNA) 6 (Feb. 7, 1996).

90. Cooper & Brauchli, *supra* note 5, at A2.

91. Robert S. Greenberger, *Chinese Moves Press U.S. Into a Corner*, WALL ST. J., Feb. 8, 1996, at A10 ("[the administration has] no deadline, but [it] won't wait forever"). On February 21, 1996, USTR Mickey Kantor stated that his office would need more time to decide whether to take retaliatory trade action. *Intellectual Property: U.S. Needs Time Before Determining China's Adherence to Pact*, USTR Says, 13 Int'l Trade Rep. (BNA) 319 (Feb. 28, 1996).

92. ALFORD, *supra* note 43, at 108.

93. Chang, *supra* note 6, at 214.

94. Arthur Wineburg, *U.S. Threats Spur Asian Laws on Intellectual Property*, NAT'L L.J., July 13, 1992, at 29.

95. *Forcing the Issue on Intellectual Piracy; Beijing Must Answer for China's Failure to End Counterfeiting*, L.A. TIMES, Oct. 11, 1995, at 8. Reports suggest that 90% of government offices use pirated U.S. software. Wineburg, *supra* note 56, at 21.

96. See *supra* note 65 and accompanying text; Dessler, *supra* note 68, at 230. Most of the CD factories are cash cows for provincial governments, ruling

nese villages depend completely on the production of pirated goods for their livelihood.<sup>97</sup>

In the past, China was responsive to U.S. demands because the cost of enacting laws and joining international conventions was low. Within a year of signing the 1992 MOU, China fulfilled its obligations to join the Berne Convention and the Universal Copyright Convention.<sup>98</sup> In addition, China amended its patent law to protect products and processes and to extend the term of protection from fifteen to twenty years.<sup>99</sup> But now that the United States is demanding the enforcement of China's IP laws, China may not be willing, or even able, to pay the cost of maintaining an IP regime designed primarily to protect the IP of the United States.<sup>100</sup>

Aside from the economic costs, China remains a country that is largely indifferent to the concept of IP rights, which are based on the ideas of individual recognition, ownership, and profit.<sup>101</sup> Because these ideas are also the basis for democracy and capitalism, IP rights are more readily accepted in the United States than in China.<sup>102</sup> In fact, China's political culture has traditionally considered copying a highly honored and accepted process.<sup>103</sup> Consequently, without further political liberalization and a greater "commitment to the institutions, personnel, and values needed to undergird a rights-based legality, detailed refinements" in China's IP laws will be of limited value.<sup>104</sup>

The fact that India has established a more effective IP regime than China,<sup>105</sup> but has also been embroiled in IP disputes

families or the army. Wallace Collins, *Protecting U.S. Copyrights In China and Elsewhere*, N.Y. L.J., Mar. 31, 1995, at 5.

97. Farley & Gerstenzang, *supra* note 23, at A1. The local police have little desire to shut down an illicit industry if the entire village depends on it. *Id.*

98. 1993 NTE, *supra* note 31, at 55. See *supra* note 53 and accompanying text (explaining China's obligations under the MOU).

99. 1993 NTE, *supra* note 31, at 56.

100. Chang, *supra* note 6, at 222.

101. Paul Steidlmeier & Cecilia Falbe, *International Disputes Over Intellectual Property*, 52 REV. SOC. ECON. 339, 349 (1994).

102. *Id.* at 346. Asian countries tend to emphasize the good and protection of the larger society, as opposed to the individual. Jeffrey J. Blatt, *Asian Tech Transfers On the Rise*, NAT'L L.J., Nov. 14, 1994, at C1.

103. See *supra* notes 70-73 and accompanying text (explaining China's political culture).

104. ALFORD, *supra* note 43, at 120.

105. *Intellectual Property: Indian Intellectual Property Issues Called Less Problematic than China's*, 12 Int'l Trade Rep. (BNA) 455 (Mar. 8, 1995).



with the United States,<sup>106</sup> illustrates how economic costs and political culture affect a country's interest. Even though India's history of democracy and capitalism is much shorter than that of the United States,<sup>107</sup> India is more Westernized than China, and, as a result, the Indian public should be more familiar with the ideas of individualism and ownership. In addition, India's well developed pharmaceutical and software industries<sup>108</sup> have an economic interest in an effective IP regime. Nevertheless, nationalistic forces in the Indian Parliament have undermined India's attempt to effectively enforce its IP regime.

## B. THE POLITICS OF SINO-AMERICAN RELATIONS

### 1. The Emptiness of U.S. Threats

China continues to play by its own rules, ignoring international obligations such as the 1995 IP agreement, because it realizes the emptiness of U.S. threats. The current high level of trade between China and the United States, China's trade potential, and cooperation in other international issues make stable Sino-American relations important to the United States.<sup>109</sup> China is expected to be the world's largest economy by the year 2010,<sup>110</sup> with an estimated need to spend \$750 billion to modernize over the next decade.<sup>111</sup> The United States is hesitant to impose sanctions against China because China may respond by becoming more hostile to the United States and by switching from American to European and Japanese products.<sup>112</sup> In the future, the U.S. ability to use its economic influence over China will only diminish as China's economy grows relative to the U.S. economy.<sup>113</sup>

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106. See *supra* notes 25-36 and accompanying text.

107. CENTRAL INTELLIGENCE AGENCY, *THE WORLD FACTBOOK* 184-85 (1994).

108. Srikumar S. Rao, *Yankee, Be Good: Lessons From the Front for Corporations Investing in India's Sputtering Economic Liberalization*, *FIN. WORLD*, Nov. 7, 1995, at 58 (describing India's growing software and pharmaceutical industries).

109. Greenberger, *supra* note 91, at A10.

110. *The Titan Stirs*, *ECONOMIST*, Nov. 28, 1992, at S3 (calculations based on figures from the World Bank).

111. Greenberger, *supra* note 91, at A10.

112. Paul Blustein & R. Jeffrey Smith, *Economic, Political Concerns Put Clinton on the Spot in China Policy*, *WASH. POST*, Feb. 11, 1996, at A26. In the midst of the dispute over the President of Taiwan's visit to the United States, China passed over Chrysler and Ford to become partners with Mercedes-Benz in a \$1 billion joint venture to build minivans and automobile engines in China. Susan V. Lawrence et al., *A Dangerous Face-Off: The Dire Consequences of Fraying Relations with Beijing*, *U.S. NEWS & WORLD REP.*, July 24, 1995, at 27.

113. LAURA D'ANDREA TYSON, *WHO'S BASHING WHOM?* 260 (1992).

The credibility of U.S. threats are further diminished by the risk averse nature of American politicians, who are highly sensitive to American business interests. During the past few years, China has grown from "just . . . a promising market" to a critical one to American companies such as Motorola, AT&T, and Boeing.<sup>114</sup> Consequently, a major disruption in trade — or retaliation by Beijing in the form of shunned deals would devastate the American business community.<sup>115</sup> American firms would not only lose market share, but they would also be at a competitive disadvantage in the future.<sup>116</sup>

American business interests are not oblivious to China's poor human rights record or to its failure to protect IP rights, but argue that "by operating in China, American companies contribute to economic freedom and expand economic choices for the Chinese people."<sup>117</sup> In contrast, trade sanctions would create tension and resentment toward the United States, leaving the United States with less ability to influence China's behavior.<sup>118</sup>

U.S. dependence on China's cooperation in other foreign policy issues further diminish the credibility of U.S. threats. Recently, the United States sought China's assistance in persuading North Korea to accept light-water nuclear reactors supplied by South Korea.<sup>119</sup> China also holds a crucial vote on international arms control issues such as the nuclear Non-Proliferation Treaty and the Missile Technology Control Regime because it is one of the world's five declared nuclear powers.<sup>120</sup>

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114. Amy Borrus et al., *Itching to Jab Beijing*, BUS. WK., Feb. 12, 1996, at 44; Lawrence et al., *supra* note 112, at 27.

115. Borrus et al., *supra* note 114, at 44.

116. Orrin G. Hatch, *Protecting Intellectual Property Rights in China*, COMPUTER L. REP., Feb. 1993, at 67-68, reprinted in *Special 301 and the Fight Against Trade Piracy: Hearing Before the Subcomm. on International Trade of the Senate Comm. on Finance*, 103rd Cong., 1st Sess. 68 (1993) [hereinafter *Hearings*].

117. Greenberger, *supra* note 91, at A10 (conclusion of a report by the Business Coalition for U.S.-China Trade).

118. *Hearings*, *supra* note 116, at 68.

119. R. Jeffrey Smith, *China Nuclear Deal With Iran is Feared; U.S. Worries Transfer Could Lead to Arms*, WASH. POST, Apr. 17, 1995, at A1. China is one of North Korea's biggest trading partners and sources of hard currency. Steve Glain, *U.S. May Be Weighing a Response Short of Sanctions if North Korea Deal Fails*, WALL ST. J., Apr. 19, 1995, at A11.

120. *U.S. Requests China's Help With North Korea; Beijing Asked to Break Nuclear Pact Dispute*, WASH. POST, Apr. 14, 1995, at A25. The Missile Technology Control Regime is a multilateral accord that bars the transfer of certain types of missile technology. Smith, *supra* note 119, at A1.

## 2. The Constraints of Domestic Politics

Domestic politics often reduce the diplomatic options available to a country. For example, economic nationalists have hindered India's ability to establish effective pharmaceutical and chemical patent protection.<sup>121</sup> In the early 1990's, the Bharatiya Janata Party (BJP), India's largest opposition party, stepped up its campaign against foreign companies prompting the cancellation of Enron's \$2.8 billion power project and the closing of several Kentucky Fried Chicken outlets.<sup>122</sup> The nationalist sentiment made it easier, if not politically necessary, for Indian officials to disregard U.S. threats.

In China, the uncertainty surrounding Deng Xiaoping's successor limits the political options available to China's leaders.<sup>123</sup> Chinese officials, intent on preserving their control in the post-Deng era, are under increasing pressure not to be perceived as soft on anything, least of all foreign policy.<sup>124</sup> Consequently, China is unlikely to compromise on IP issues and other more sensitive issues such as Taiwan and human rights.<sup>125</sup>

Ironically, China's strong stance against the United States increases the pressure on President Clinton and the USTR to take a strong stance against China.<sup>126</sup> The upcoming presidential election in the United States magnifies the Clinton administration's need to strike a tough pose in its dealings with China.<sup>127</sup> The political pressure is also a result of a Congressional shift from free trade to economic nationalism and the apparent failure of Clinton's policy of engagement, which has not improved China's human rights or IP record.<sup>128</sup> Congressional

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121. *India's WTO Patent Bill Fails in Parliament*, Marketletter, Apr. 10, 1995, available in WESTLAW, MKTLTR database.

122. Mark Nicholson, *Elections Cloud Investment in India: Opening the Economy has Wide Support Despite Recent Events*, FIN. TIMES, Aug. 21, 1995, at 3; Rao, *supra* note 108, at 55. Interestingly, the BJP presents itself as an economic nationalist and a liberaliser; its slogan is "India needs computer chips, not potato chips." *India's Economic Nationalists*, ECONOMIST, Aug. 12, 1995, at 28.

123. R. Jeffrey Smith, *China Aids Pakistan Nuclear Program; Parts Shipment Reported by C.I.A. Could Jeopardize U.S. Trade Deals*, WASH. POST, Feb. 7, 1996, at A1.

124. Karsten Prager, *Bulls in the China Shop*, TIME, June 5, 1995, at 35.

125. Joyce Barnathan et al., *International Business: China*, BUS. WK., Jan. 15, 1996, at 44.

126. Cooper & Brauchli, *supra* note 5, at A2; Greenberger, *supra* note 91, at A10.

127. Paul Blustein, *Trade-Policing Unit Shows Clinton Shift*, WASH. POST, Jan. 6, 1996, at D1.

128. Borrus et al., *supra* note 114, at 45.

Republicans have already set the stage "for a nasty spring debate over renewing [China's] Most Favored Nation trade status."<sup>129</sup>

Further complicating the IP situation are recent concerns about China's political and military efforts to influence the March 23, 1996, elections in Taiwan and the alleged sales of nuclear and missile technology from China to Iran and Pakistan.<sup>130</sup> If the allegations of arms sales are true, Clinton would be under even greater pressure to impose economic sanctions,<sup>131</sup> thus presenting another test of Clinton's willingness to impose sanctions against China.<sup>132</sup>

### III. AN ALTERNATIVE STRATEGY FOR ESTABLISHING AN EFFECTIVE IP REGIME IN CHINA

The refusal of Chinese government and business officials to enforce IP laws is best explained by the fact that piracy of foreign products continues to be a source of profit.<sup>133</sup> Consequently, the United States needs to encourage China to develop its own world class technologies. The proposed strategy entails enlarging China's role in the world economy through membership in the WTO<sup>134</sup> and the artful use of Special 301 to express disapproval of foreign policies or practices that inadequately protect IP rights.

#### A. CHINA'S MEMBERSHIP IN THE WTO

China is the eleventh largest trading nation, and its economy is expanding and modernizing at a remarkable pace.<sup>135</sup> Accession to the WTO would not only enlarge China's role in the world economy, but it would also require compliance with TRIPs.<sup>136</sup> The WTO has two distinct advantages over Special

129. Robert A. Manning, *China Knocking; They Want to Enter the World Economy, But Will They Play by the Rules?*, WASH. POST, Jan. 7, 1996, at C4.

130. Greenberger, *supra* note 91, at A10.

131. *Id.* "If the Clinton administration determines that China sold Pakistan ring magnets, used in centrifuges that enrich uranium for nuclear weapons, a 1994 law would require the president to either cut off U.S. Export-Import Bank loan guarantees" worth as much as \$10 billion or waive such penalties. *Id.*

132. *Id.*

133. Butler, *supra* note 33, at 41.

134. Jeffrey D. Sachs, *Consolidating Capitalism*, FOREIGN POL'Y, Spring 1995, at 62.

135. Russell Cheetham, *Why We Need China to Succeed*, WALL ST. J. EUR., Sept. 5, 1995, at 6; *Forcing the Issue on Intellectual Piracy; Beijing Must Answer for China's Failure to End Counterfeiting*, L.A. TIMES, Oct. 11, 1995, at B8.

136. See *supra* note 78 and accompanying text.

301. First, instead of demanding immediate results, the WTO allows developing countries up to five years to comply with TRIPs.<sup>137</sup> Second, even though enforcement provisions of the WTO are implemented bilaterally, the moral sanction of a multi-lateral organization such as the WTO minimizes the risk of a trade war and the associated costs to the United States.<sup>138</sup>

China's application for accession to the WTO has been problematic. China's insistence on playing by its own rules raises questions in Western minds about China's reliability and predictability as a trading partner.<sup>139</sup> In addition, China must address concerns about access to its agriculture market and its regulation of insurance, telecommunications, and financial services before it can be accepted into the WTO.<sup>140</sup> While the United States should not absolve China from its responsibility to address these issues, it should consider allowing China to accede to the WTO as a developing nation or as a developed nation in the process of transforming from a centrally-planned to a market economy because either of these options would allow China additional time to establish an IP regime.<sup>141</sup>

While additional time, by itself, is unlikely to establish an IP regime, Chinese officials have argued that a five-year time frame would be more reasonable than the strict time frame of Special 301.<sup>142</sup> Even in the United States, where the constitution provides for the protection of IP rights<sup>143</sup> and where Congress enacted specific copyright laws more than 100 years ago,<sup>144</sup> the effective enforcement of IP laws did not happen instantaneously. For example, U.S. copyright laws were not effectively enforced until a group of publishers filed a copyright-infringement lawsuit against Kinko's in 1989.<sup>145</sup>

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137. See *supra* note 83 and accompanying text.

138. *Knock, Knock: World Trade*, *ECONOMIST*, Jan. 13, 1996, at 72.

139. *Forcing the Issue on Intellectual Piracy*, *supra* note 135, at B8.

140. *GATT/WTO: U.S.-China Talks Called Productive; More Talks on WTO Accession are Set*, 12 Int'l Trade Rep. (BNA) 1961 (Nov. 29, 1995).

141. See *supra* note 83 and accompanying text.

142. Newby, *supra* note 19, at 44 ("Give us five years to end this problem. If we can solve these problems in five years, then I think we will have done a good job.")

143. U.S. CONST. art. I, § 8, cl. 8.

144. See 17 U.S.C.A., at VI (West 1977) (describing earlier copyright legislation).

145. Rubin G. Blumenthal, *Book Publishers Say Copier Chain Takes Too Much for Free*, *WALL ST. J.*, Apr. 26, 1989, at B9. The lawsuit concerned the use of illegally photocopied portions of copyrighted materials as custom textbooks. Meg Cox, *Kinko's, Publishers Reach Settlement of Copyright Suit*, *WALL ST. J.*, Oct. 18, 1991, at B6.

China's accession to the WTO as a developing nation will be difficult. Opponents argue that the eleventh largest trading nation must be accepted as a developed nation.<sup>146</sup> However, a country's ability to engage in international trade is not an accurate indicator of whether a country is developed or developing.<sup>147</sup> An accurate indicator needs to take into account the population of a country.<sup>148</sup> Because China is the world's largest country, population is an especially important factor in determining China's developmental status. A comparison of per capita Gross National Product (GNP) indicates that China's per capita GNP of \$490, is significantly smaller than the U.S. per capita GNP of \$23,120.<sup>149</sup> Furthermore, the World Bank's development diamond, which considers life expectancy, gross primary school enrollment, access to safe water, and GNP per capita, shows that China's level of development is consistent with other low-income countries.<sup>150</sup>

The United States should offer to support China's accession to the WTO, either as a developing nation or as a developed nation in the process of transforming from a centrally-planned to a market economy, if China closes some of its illicit CD factories and agrees to comply with the necessary WTO requirements.<sup>151</sup> Since China would not be exempted from any of the requirements that apply to other countries, this approach enlarges China's role in the world economy without compromising the legitimacy of the WTO.<sup>152</sup> In conclusion, WTO membership provides China with additional time to establish an effective IP regime, increases domestic support for IP rights by encouraging China's economic development, and spreads the diplomatic costs

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146. P.T. Bangsberg, *China Says It Won't Jettison National Interests to Join WTO*, J. COM., May 16, 1995, at 3A, available in WESTLAW, JOC database.

147. See INT'L BANK FOR RECONSTRUCTION AND DEV. / WORLD BANK, SOCIAL INDICATORS OF DEVELOPMENT viii (1994) (noting that none of the four key indicators of the development diamond take trade into account).

148. See *id.* (recognizing that the World Bank uses GNP per capita in its comparisons as opposed to GNP).

149. EUROPA PUBLICATIONS LIMITED, THE EUROPA WORLD YEAR BOOK 805, 3161 (1995).

150. INT'L BANK FOR RECONSTRUCTION AND DEV. / WORLD BANK, *supra* note 147, at 72.

151. "[E]ven the least developed . . . WTO member states have committed themselves to liberalization of trade in services, restraint of subsidies and addressing non-tariff barriers." Keith M. Rockwell, *China: Stonewalling the WTO*, J. COM., Oct. 27, 1995, at 6A, available in WESTLAW, JOC database.

152. *Id.* Allowing China into the WTO on its terms would set a very bad precedent. *Id.*

of establishing an effective IP regime in China among the member nations of the WTO.

#### B. THE ARTFUL USE OF SPECIAL 301

The United States must also continue to use Special 301 to express disapproval of foreign policies or practices that fail to adequately protect IP rights. Special 301 is not suited to fostering economic development, but it is an effective way to express disapproval. The artful use of Special 301 requires "awareness of the danger of abuse and the willingness to exercise self-restraint."<sup>153</sup> The United States must balance the use of threats of trade sanctions against the associated economic risks.<sup>154</sup>

Up to this point, the United States has avoided a trade war while successfully pressuring China to join the Berne Convention and to promulgate new IP laws.<sup>155</sup> The increased costs associated with enforcing these laws make it more likely that China will stand up to threats of trade sanctions in the future. Consequently, a symbolic role for Special 301 may be more appropriate in regards to China.

While the artful use of Special 301 should be the long-term U.S. policy, the present political situation with regard to China precludes such an option. The USTR has already threatened China with more than \$1 billion in trade sanctions if China fails to comply with the 1995 IP agreement.<sup>156</sup> If the USTR were to back down on such a specific threat, it would destroy the credibility of Special 301.<sup>157</sup>

### IV. CONCLUSION

The U.S. strategy of using economic influence to pressure other countries is no longer an effective way to deal with China's intellectual property (IP) problems. Special 301, the centerpiece of the current U.S. IP strategy, is most effective when the perceived costs of enacting or enforcing IP laws is low. However, the cost to China of maintaining an IP regime designed primarily to protect the IP of the United States may be quite high.

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153. Chang, *supra* note 6, at 225.

154. *Hearings*, *supra* note 116, at 68.

155. See Newby, *supra* note 19, at 51 (describing how countries work to provide the United States with signs of progress that are seldom backed up by enforcement).

156. Cooper & Brauchli, *supra* note 5, at A2.

157. *Id.*

Because the United States can no longer flex its economic muscle and expect China to comply with its demands, a new strategy is required. In the future, the United States needs to use Special 301 artfully to express its concerns about foreign policies or practices that fail to adequately protect IP rights. In addition, the United States should focus on encouraging developing countries to innovate. Specifically, with regard to China, the United States should make negotiating China's accession to the WTO as a developing nation a priority.



