

Confucianism and Compact Discs: Alternative Dispute Resolution and its Role in the Protection of United States Intellectual Property Rights in China

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I. INTRODUCTION

The protection of one's intellectual property rights on a worldwide scale has become a major issue in the realm of international trade.¹ A developing country that is hungry for technology quickly learns that the engine that drives technological advance is the protection of intellectual property rights.² A system of intellectual property rights that excludes others from the unauthorized use of information is essential to protect the creators and users of the information so that they will continue to produce it.³ Due to the enormously high expense involved in research and development, exclusionary rights are necessary to allow the creators to recover their investment and make a profit.⁴ The absence of strong intellectual property rights protection in foreign markets carries serious economic costs for United States industries.⁵

Historically, China has offered little in the way of protection for intellectual property rights of its own citizens and those of other countries. More recently, however, China has worked hard to replace its old laws—which were more suited to the era of Confucius—with a legal infrastructure

¹ In general, an intellectual property right is the ownership of a right to possess or otherwise use or dispose of products created by human ingenuity. See GENERAL ACCOUNTING OFFICE, U.S.-CHINA TRADE: IMPLEMENTATION OF AGREEMENT ON MARKET ACCESS AND INTELLECTUAL PROPERTY 4 (1995). Intellectual property law generally includes copyright, trademark, patent and trade secret law.

² See Paul B. Birden, Jr., *Trademark Protection in China: Trends and Directions*, 18 LOY. L.A. INT'L & COMP. L.J. 431, 431 (1996).

³ See Nicole Telecki, Note, *The Role of Special 301 in the Development of International Protection of Intellectual Property Rights After the Uruguay Round*, 14 B.U. INT'L L.J. 187, 188 (1996).

⁴ See *id.*

⁵ See Angela Mia Beam, Comment, *Piracy of American Intellectual Property in China*, 4 L.J. INT'L L. & PRAC. 335, 336 (1995).

that will support modern technological products.⁶ Despite great strides and progress toward changing the laws, American firms are still wary about effective enforcement of these new laws.⁷ With China seeking re-entry into the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO), the present state of the protection of intellectual property rights in China, as well as the settlement of disputes with foreign nations, could be altered in the near future.⁸ Part II of this Note introduces the historical theories behind the lack of protection of intellectual property rights in China and briefly describes the current intellectual property laws that have been promulgated in the People's Republic of China (PRC). Part III analyzes the protection of U.S. intellectual property rights in China within the framework of GATT, WTO and the World Intellectual Property Organization (WIPO) and their alternative dispute resolution mechanisms. Finally, Part IV offers reasons American firms should utilize alternative dispute resolution techniques rather than resort to filing suit in the People's Courts of China.

II. HISTORY OF NEGLECT AND THE CURRENT LAWS PROTECTING INTELLECTUAL PROPERTY RIGHTS IN CHINA

A. *Confucianism and the Neglect of Intellectual Property Laws in China*

Chinese cultural traditions do not regard individual creativity as the sole right of the creator; as a result, intellectual works belong to the human

⁶ See Birden, *supra* note 2, at 432.

⁷ See Beam, *supra* note 5, at 357. In 1994, a spokesman for the Walt Disney Company—which has a substantial stake in the protection of its intellectual property rights in China—stated: “The laws are on the books, but the penalties typically have held no teeth.” *Id.* To date, the piracy of American products still persists at an alarming rate in the People's Republic of China (PRC). American companies have lost and will continue to lose over \$1 billion annually as a result of China's lax enforcement of its intellectual property rights laws. *See id.* at 336.

⁸ See generally Camille A. Laturno, Comment, *International Arbitration of the Creative: A Look at the World Intellectual Property Organization's New Arbitration Rules*, 9 TRANSNAT'L LAW. 357 (1996). GATT provides for detailed rules for dispute resolution of conflicts between signatories. *See id.* at 374–376. WTO members must use the dispute resolution procedures set out in GATT when they seek to remedy a violation of a Uruguay Round Agreement of GATT. *See Telecki, supra* note 3, at 218.

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society in the PRC.⁹ Thus, rather than condemning plagiarism, many consider copying or imitation a time-honored learning process.¹⁰ Historically, Confucianism was the dominating ideology, the government was a centralized monarchy and the economy was based upon self-sufficient agriculture.¹¹ Each of these factors contributed to the creation of a Chinese culture that turned away from science and praised conformity and imitation.¹² Artists and politicians, in this society based on the values of Confucianism, gained their validity from mimicking previous work and not from original creativity.¹³

The leadership of China has followed and promulgated these ideologies throughout history in guiding Chinese law and social order.¹⁴ The importance of conformity and lack of individual rights are demonstrated in Chinese laws and customs.¹⁵ In comparison, the western world was developing commerce, trade and commercial law.¹⁶ In 1976, the philosophy of China's leadership shifted dramatically from isolationism and

⁹ See WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 29 (1995).

¹⁰ See Frankie Fook-Lun Leung, *Tradition of Copying in China Fuels the Piracy of Intellectual Property*, L.A. TIMES, Mar. 5, 1995, at D2.

¹¹ See Liwei Wang, *The Chinese Traditions Inimical to the Patent Law*, 14 NW. J. INT'L L. & BUS. 15, 15-17 (1993).

¹² See Beam, *supra* note 5, at 337-338 (citing Wang, *supra* note 11, at 18). This is exemplified by the fact that the Chinese language does not have an equivalent of the word "science." See Beam, *supra* note 5, at 338 n.18.

¹³ See Beam, *supra* note 5, at 338. Confucius lived as a scholar and teacher until he died in 479 B.C. at the age of 72. His teachings focused on the humanities. See *id.* He stated, "I transmit rather than create; I believe in and love the ancients." *Id.* Copying bore witness to the quality of the work copied and to its creator's degree of understanding and civility. See *id.*

¹⁴ See *id.* Commerciality and commerce were scorned. The sciences were referred to by the ruling class as a bizarre craft and cunning work. See *id.*

¹⁵ See *id.* at 339. The emperor was the supreme lawmaker and could change or abolish all laws. See Wang, *supra* note 11, at 44. The private interests of the common people were considered insignificant. See *id.* at 48. The legal system did not even integrate such common individual rights as equality between individuals and freedom of contract. See *id.* at 46.

¹⁶ See Beam, *supra* note 5, at 339. Throughout Europe, laws for the protection of authors, inventors and other innovators were developed during the seventeenth and eighteenth centuries. See ALFORD, *supra* note 9, at 6.

communism to one of world market participation.¹⁷ Four years later, China adopted its "Open Door Policy"—which led to the opening of its domestic markets, welcoming foreign investors and its participation in multilateral treaties.¹⁸ Today, an antithesis of policy and culture exists in the PRC; while China does not recognize or respect intellectual property rights, the success of its economy is fueled by intellectual property.¹⁹ The efforts of China's leaders to create a free market economy have also created an illegal market of counterfeit products—most significantly compact discs and computer software.²⁰ Responding to pressure from other nations, particularly the United States, China set out to reform its laws in order to adequately protect intellectual property rights.

B. *China's Trademark Law*

China first enacted trademark legislation in 1950 and again in 1963, with the 1963 legislation taking effect in 1980 when China became a signatory to the WIPO.²¹ Implementation rules were then adopted for this legislation in 1983 and amended in 1988 to provide for foreign trademark registration.²² Under Article 3 of the Trademark Law, a trademark registrant enjoys "the exclusive use rights to such trademarks, and shall be protected by the law."²³ Unauthorized use of a trademark, as well as the

¹⁷ See Beam, *supra* note 5, at 340.

¹⁸ See Jennifer A. Meyer, *Let the Buyer Beware: Economic Modernization, Insurance Reform, and Consumer Protection in China*, 62 FORDHAM L. REV. 2125, 2132-2133 (1994).

¹⁹ See Beam, *supra* note 5, at 340. China's history of encouraging the imitation of human ingenuity, art and invention, when coupled with the recent acquisition by the Chinese people of the right to private ownership, has created a substantial market of counterfeit goods. See *id.* at 341. This is not surprising as the Chinese people are now able to make money while practicing Confucian idealism. See *id.*

²⁰ See Patrick H. Hu, "Mickey Mouse" in China: Legal and Cultural Implications in Protecting U.S. Copyrights, 14 B.U. INT'L L.J. 81, 93 (1996). Even though the new Copyright Law is in place, full enforcement of the rule of law lacks the general support of the people. Pirates are able to take advantage of the abundant economic opportunities prompted by the strong desire of the people for cultural modernization. See *id.* at 92.

²¹ See Birden, *supra* note 2, at 433.

²² See *id.* The Trademark Law was revised again in 1993.

²³ Trademark Law of the People's Republic of China, translated in 5 THE CHINA LAW REFERENCE SERVICE 5100/93.07.01, art. 3 (Chris Hunter ed., 1996) [hereinafter Trademark Law].

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unauthorized manufacture or sale of another's registered mark, constitutes an infringement.²⁴ A trademark is valid for a period of ten years, is renewable for an additional ten years and is assignable through the grant of a license.²⁵

The administrative authority that governs trademark issues is the State Authority for Industry and Commerce (SAIC).²⁶ Unless the trademark applicant is a foreigner, a registrant has the option of either filing the application himself or entrusting it to a SAIC-approved agent; foreign entities who wish to apply for trademark registration must submit their application through a SAIC-approved agent.²⁷ In addition, the agents must be given power of attorney, with the scope of their power and their nationality described in this document.²⁸ Under China's Trademark Law, an injured party has only two avenues of recourse: either an administrative official is asked to handle the matter or proceedings may be instituted directly in a People's Court.²⁹ In 1993, the Trademark Law was amended to reflect the concurrent changes in the Criminal Law of China.³⁰ Unauthorized copying of a trademark or knowingly selling goods bearing

²⁴ *See id.* at art. 38, cls. 1, 3.

²⁵ *See id.* at art. 23-24, 26.

²⁶ *See id.* at art. 2.

²⁷ *See id.* at art. 10. All trademark activity by foreigners, from the initial application to infringement complaints, must be entrusted to one of these agents. *See Birden, supra* note 2, at 456. All applications or other documents must be completed in, or translated into, Chinese. *See id.* Under the Madrid Convention, of which China and the U.S. are signatories, foreigners having trademarks registered in their country of origin may register them at the branch of the International Bureau in their country of origin. *See id.* at 456-457. Once registered at the International Bureau, the registrant's mark secures protection in other signatory countries as if the registrant had filed in that country. *See id.* at 457.

²⁸ *See Birden, supra* note 2, at 456.

²⁹ *See Trademark Law, supra* note 23, at art. 39. It is a prudent strategic decision to begin an action for infringement at the administrative office. *See Beam, supra* note 5, at 346. Department decisions can be challenged in a People's Court, but not vice versa. *See id.*

³⁰ *See Birden, supra* note 2, at 475. The Criminal Law was changed in response to a Supreme People's Court decision in a criminal case against a counterfeiter who was distilling fake liquor. The distiller received the death penalty. *See id.* at 479-480. In addition, a Higher People's Court sentenced a man to death for selling spirits under fake trademarks, even though there was no injury to any third party. *See id.* at 481. In that same year, another man was sentenced to death for selling cigarettes under an infringed trademark. *See id.*

counterfeit trademarks currently subjects the party to criminal prosecution in addition to civil compensatory damages.³¹

C. China's Patent Law

China realized that in order to facilitate and continue absorption of advanced technology from abroad and to develop a technological infrastructure within its own borders, more protection for intellectual property rights would be needed.³² In 1984, China passed a patent law that on its face extended to foreign patent holders a level of protection similar to that of other internationally accepted models.³³ The Patent Law extended protection to inventions, utility models and designs, but not to pharmaceuticals.³⁴ In addition, the law required patent owners to manufacture their product in China.³⁵

In 1992 the Patent Law was amended as a result of a Memorandum of Understanding (MOU) between the U.S. and China.³⁶ The new amendments extend protection to chemicals and pharmaceuticals.³⁷ Article 62 of the Patent Law exempts the unknowing use or resale of a patented product from the law's proscription of unauthorized use or sale of patented products.³⁸ The injured party may sue for both an injunction and

³¹ See *id.* at 475-476.

³² See Jill Chiang Fung, Note and Comment, *Can Mickey Mouse Prevail in the Court of the Monkey King? Enforcing Foreign Intellectual Property Rights in the People's Republic of China*, 18 LOY. L.A. INT'L & COMP. L.J. 613, 626 (1996). Commentators were unanimous in their verdict that China needed a patent law extending a proprietary interest in an invention or technological innovation to the party responsible for its creation. See *id.*

³³ See *id.* at 627. Between 1980 and 1983, China sent a number of envoys with legal, scientific and political backgrounds out to extensively study the patent laws and practices of various developed countries. As a result, the Patent Law contains many features common to established patent laws of those countries. See *id.* at 626.

³⁴ See Birden, *supra* note 2, at 443.

³⁵ See *id.*

³⁶ See *id.* Responding to U.S. firms' complaints of piracy and infringement by the Chinese, the U.S. Trade Representative (USTR) threatened sanctions against China. In response to the threatened sanctions, China agreed to tighten its intellectual property protection in the 1992 MOU. See Fung, *supra* note 32, at 627.

³⁷ See Birden, *supra* note 2, at 443.

³⁸ See Fung, *supra* note 32, at 627.

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compensatory damages.³⁹ In addition, the Patent Law provides that an infringer may be subject to criminal prosecution if an individual “passes off” or transfers the patent to another person.⁴⁰

D. *China’s Copyright Law*

China enacted its Copyright Law and its implementing rules in 1990; both took effect on June 1, 1991.⁴¹ The major deficiency from which the Copyright Law suffered was that it failed to protect foreign unpublished works.⁴² The 1992 Memorandum of Understanding signed between China and the U.S.—under pressure of trade sanctions by the U.S., marked China’s agreement to amend the Copyright Law.⁴³ The amendments to the Copyright Law extended copyright protection to foreign owners of software, books, film and other mediums previously unprotected; in addition, copyright infringement was made a criminal offense.⁴⁴

The Copyright Law protects an author in fields such as literature, art, natural science, social science and engineering technology.⁴⁵ In addition to

³⁹ *See id.* at 628.

⁴⁰ *See id.* The Chinese term “jia mao,” translated in the Patent Law as meaning “passes off,” implies knowledge or intent. *See Fung, supra* note 32, at 628. Therefore, alleging intentional infringement appears to be an essential element of a complainant’s case for criminal patent infringement. *See id.*

⁴¹ *See* Copyright Law of the People’s Republic of China, *translated in* 5 THE CHINA LAW REFERENCE SERVICE 5100/90.09.07 (Chris Hunter ed., 1996) [hereinafter Copyright Law].

⁴² *See* Birden, *supra* note 2, at 438.

⁴³ *See id.* China also agreed to seek accession to the Berne Convention for the Protection of Literary and Artistic Works; this became a reality after China amended the Copyright Law and Software Protection Regulations. *See id.* at 438–439.

⁴⁴ *See* Beam, *supra* note 5, at 347. Copyright infringement cases involving foreign parties are usually handled by the National Copyright Administration of China (NCAC). An American copyright owner must first file his claim with the NCAC; then the NCAC will either take further action or request that the local administrative office pursue the claim. *See id.* at 347–348.

⁴⁵ *See* Fung, *supra* note 32, at 628. The copyright protection period generally covers the author’s lifetime plus 50 years. Works that individuals have created in performing employment duties are deemed professional works for which the authors receive copyrights. However, their employer firms have a priority right of use: for two years after the completion of such work, the author may not allow a third party to use the work without the approval of the firm. *See id.* at 628–629.

the length of the protection period, copyrights are inheritable.⁴⁶ The Copyright Law grants authorship rights of published and unpublished works to Chinese citizens, whether they are legal persons or real persons.⁴⁷ Additionally, it protects foreign works first published in China; foreign works first published outside China are protected in accordance with all international treaties to which China is a party.⁴⁸

E. Differences Between Chinese and United States Intellectual Property Laws

Problems in intellectual property protection are attributable to principal differences between Chinese and U.S. intellectual property laws.⁴⁹ China adheres to a “first-to-file” principle in both patent and trademark applications.⁵⁰ The United States has in place a “first-to-invent” principle under which the first party to file a patent or trademark application may not necessarily be the party that ultimately receives the patent.⁵¹ In contrast to China’s Copyright Law, U.S. law protects all unpublished works without regard to nationality or domicile of the author; China’s Copyright Law protects only unpublished works that were produced by Chinese citizens.⁵² China also grants to the copyright holder the right to protect the integrity of her work—a right not granted to copyright holders under the U.S.

⁴⁶ *See id.* at 628.

⁴⁷ *See* Hu, *supra* note 20, at 87–88.

⁴⁸ *See id.* China is a member of the Berne Convention for the Protection of Literary and Artistic Works, the Madrid Convention and the International Convention for the Protection of Industrial Property (Paris Convention), as well as the World Intellectual Property Organization (WIPO). *See* Beam, *supra* note 5, at 342; Birden, *supra* note 2, at 452; Fung, *supra* note 32, at 631.

⁴⁹ *See* Fung, *supra* note 32, at 633.

⁵⁰ *See id.* at 634. China grants a patent or trademark to the first registrant to file the appropriate application and does not require a showing of prior use to obtain the initial registration of a trademark. Mere use will not result in exclusive rights to a trademark, with the exception of well-known marks under the Paris Convention. *See id.*

⁵¹ *See id.*

⁵² *See* Hu, *supra* note 20, at 91; *see also supra* text accompanying note 48. Unpublished works by U.S. authors are not protected under the Copyright Law of the PRC. Therefore, initial publication is extremely important to an author seeking copyright protection in China. *See id.*

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Copyright Act.⁵³ Additionally, China's Copyright Law grants the author of "occupational work" greater rights than those conferred upon such an author by U.S. copyright laws.⁵⁴

Possibly the most significant differences between the two nations' intellectual property laws are their implementation and enforcement. Although judicial remedies exist in China for intellectual property infringement cases, the government places an emphasis on administrative and other non-adjudicative resolutions such as mediation and arbitration.⁵⁵ The Chinese governmental system generally disfavors litigation; however, it does not necessarily follow that this will result in a diminution of protection for U.S. intellectual property rights in China.⁵⁶ Once China succeeds in raising its intellectual property protection to internationally acceptable standards, methods of alternative dispute resolution may result in speedier and less costly resolution of infringement claims.⁵⁷

II. CHINA, THE UNITED STATES AND THE ROLE OF MULTILATERAL AGREEMENTS IN THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS AROUND THE GLOBE

A. *Special 301*

In response to pressure from American firms and the glaring inadequacies of the protection of U.S. intellectual property rights abroad, Congress has twice utilized an existing self-help provision of the 1974 Trade Act known as Section 301.⁵⁸ Congress expanded the scope of Section 301 by passing Special 301 as part of the 1988 Omnibus Trade and

⁵³ *See id.* Under U.S. law, only the author of a work of visual art has this right. In China, the author has this right regardless of the medium utilized. *See id.*

⁵⁴ *See Hu, supra* note 20, at 91. In the case of work made in the course of an employment relationship, the U.S. Copyright Act grants the employer, or other person for whom the work was prepared, the copyright ownership. Under China's Copyright Law, the employer only has the right to use the author's work within the scope of the employer's business for up to the first two years of the work's existence. *See Hu, supra* note 20, at 91.

⁵⁵ *See Fung, supra* note 32, at 634.

⁵⁶ *See id.*

⁵⁷ *See id.*

⁵⁸ *See Telecki, supra* note 3, at 191; *see also* Trade Act of 1974, 19 U.S.C. § 2411 (1994).

Competitiveness Act, which specifically addresses intellectual property in international trade.⁵⁹ Special 301 allows the United States to assert its intellectual property interests unilaterally against its trading partners. The U.S. will do so in order to procure a greater likelihood of a favorable result stemming from bilateral negotiations with such nations.⁶⁰ The U.S. Trade Representative (USTR) must initiate an investigation of the listed country's acts, policies and practices unless it would be detrimental to U.S. economic interests.⁶¹ When the investigation involves a trade agreement, such as the Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (TRIPS), the USTR initiates the consultations in the appropriate dispute settlement body.⁶² If a resolution is not reached between the listed country and the United States, then the USTR must initiate dispute settlement proceedings.⁶³

B. *The Uruguay Round of Negotiations of the General Agreement on Tariffs and Trade*

Negotiators at the Uruguay Round implemented much needed substantive improvements to international intellectual property protections and to the enforcement of such rights under the General Agreement on Tariffs and Trade (GATT).⁶⁴ Negotiations for the inclusion of intellectual

⁵⁹ See Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. §§ 2411-2419 (Supp. 1996); Telecki, *supra* note 3, at 191.

⁶⁰ Special 301 requires the President to retaliate against countries, through the USTR, that do not provide adequate, effective and nondiscriminatory intellectual property protection. See *id.* The Special 301 process that brings the U.S. to the negotiating table is triggered when the USTR submits a list of priority countries to the President and to the appropriate Congressional committees. See 19 U.S.C. §§ 2241(a), 2242(a) (1994). The list contains those countries that deny adequate and effective protection of intellectual property rights and those that have the greatest adverse impact, actual or potential, on U.S. products. See 19 U.S.C. § 2242(b)(1) (1994). A country may be deemed to be denying adequate and effective intellectual property protection even if it fully complies with the Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (TRIPS). See Telecki, *supra* note 3, at 196.

⁶¹ See Telecki, *supra* note 3, at 196.

⁶² See *id.* at 197.

⁶³ See 19 U.S.C. § 2413(a)(2) (1994).

⁶⁴ See Telecki, *supra* note 3, at 192.

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property under GATT were successfully introduced in 1986 during the Uruguay Round of negotiations.⁶⁵ The result was the adoption of the TRIPS Agreement, which took effect on January 1, 1996.⁶⁶ In 1993, the contracting parties to GATT established the World Trade Organization (WTO), which is responsible for administering GATT and its related agreements.⁶⁷ The TRIPS Agreement incorporates the minimum standards of protection of the Berne Convention as the GATT intellectual property rights standards.⁶⁸ The TRIPS Agreement brings the protection of global intellectual property rights within the scope of the WTO.⁶⁹ As a result, the Dispute Settlement Body (DSB), which is the organization that was established within the WTO to handle intellectual property disputes, is empowered to hear intellectual property disputes arising out of the TRIPS Agreement between GATT member nations.⁷⁰ The TRIPS Agreement provides a mechanism for dispute settlement through the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) that will be employed by the DSB.⁷¹

⁶⁵ See Fonda Y. Duvanel, Note, *The Evolution and Enforcement of Computer Software Copyright in the People's Republic of China*, 16 N.Y.L. SCH. J. INT'L & COMP. L. 337, 397 (1996).

⁶⁶ See *id.*

⁶⁷ See Telecki, *supra* note 3, at 192.

⁶⁸ See Duvanel, *supra* note 65, at 397. The Berne Convention is presided over by the WIPO; the convention provides copyright protection to works first published outside of the country in which an author subsequently requests that her work be protected. See Gregory S. Kolton, Comment, *Copyright Law and the People's Courts in the People's Republic of China: A Review and Critique of China's Intellectual Property Courts*, 17 U. PA. J. INT'L ECON. L. 415, 420 n.30 (1996). The Berne Convention is a multinational accord designed both to create reciprocal copyright protections among the member nations and to secure minimum standards of copyright protection. See *id.* The Berne Convention is not intended to supersede a member nation's copyright laws; rather, it is intended to supplement those laws to ensure consistent copyright protection. See *id.* Protection in the country of origin of the copyrighted work is governed by domestic law; when the author is not a citizen of the country in which the work was created, then he shall enjoy the same rights as national authors. See Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 223, 233, art. 5, cl. 3.

⁶⁹ See Telecki, *supra* note 3, at 192.

⁷⁰ See *id.* at 197.

⁷¹ See *id.* at 192-193.

C. *The DSU and its Dispute Resolution Mechanism*

The DSU establishes a mechanism to enforce the intellectual property rights accorded to signatories of the TRIPS Agreement.⁷² In addition, the DSU outlines the rules and procedures for a stronger and more formal dispute settlement system in which TRIPS standards may be enforced.⁷³ In response to its obligations under TRIPS and the DSU, the United States amended Special 301 to ensure that it would not conflict with these two accords.⁷⁴ Now that TRIPS sets standards for intellectual property in international trade, the role of Special 301 as a tool to improve protection of such rights will take on a new character to conform to the United States' obligations under TRIPS and the DSU.⁷⁵ This is especially true with respect to the protection of U.S. intellectual property rights in China as the PRC is seeking re-entry into GATT. The United States continues to oppose China's admission into GATT; the ability of the U.S. to stall China's admission to the WTO is one of its most valuable bargaining tools.⁷⁶ The United States has conditioned its approval on China's willingness to provide expanded market access and greater protection for U.S. intellectual property in China.⁷⁷

⁷² *See id.* at 192.

⁷³ *See id.* Under TRIPS, each member nation of the agreement is to provide the minimum standards of protection to eligible citizen and non-citizen intellectual property holders alike. Members of GATT may not implement measures that discriminate against their trading partners. *See id.* at 193-194.

⁷⁴ *See id.* at 194. Special 301 now coordinates its time limits to agree with the formal requirements of the DSU. *See* Myles S. Getlan, Comment, *TRIPS and the Future of Section 301: A Comparative Study in Trade Dispute Resolution*, 34 COLUM. J. TRANSNAT'L L. 173, 205-210 (1995). Congress, however, retained the Special 301 mechanism requiring the USTR to (1) monitor the intellectual property protections of other TRIPS members and non-members, (2) assert U.S. interests in adequate and effective intellectual property protection and nondiscriminatory market access and (3) promote the further development of intellectual property standards. *See id.* at 212.

⁷⁵ *See id.* at 212-217.

⁷⁶ *See* Duvanel, *supra* note 65, at 398. More than eight years have passed since China announced that it would seek admission to the WTO. The U.S. has stated that it would support China's entry into GATT if China met all of the organization's criteria for entry; however, it continues to oppose China's admission. The U.S. believes China is incapable of fully complying with the terms of GATT and the TRIPS Agreement. *See id.*

⁷⁷ *See id.*

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Special 301 requires that, when a resolution cannot be reached between the United States and a priority country that is under investigation by the USTR, the USTR must initiate dispute settlement proceedings.⁷⁸ If the investigation involves the TRIPS Agreement, then the settlement proceedings must be initiated pursuant to the DSU.⁷⁹ Thus, Special 301 serves as a mechanism by which the U.S. can simultaneously pursue its trade interests and protect its rights in the DSU forum. This way, the dispute will be resolved in a manner that allows those treaties to function as intended by China and the U.S.⁸⁰

However, questions arise as to whether the DSU is an efficient mechanism for effective dispute resolution. The DSU does not include the rule of precedent as legally binding.⁸¹ A DSU panel has no obligation to decide a case in accordance with any previous case, nor to distinguish past decisions from present ones.⁸² However, some commentators claim that panel reports have been inspired by the Vienna Convention to become an obvious source for predicting what the interpretation of a rule will be.⁸³ Member nations have argued over whether the DSU facilitates negotiations and settlements or whether it is really an adjudicative process.⁸⁴

A member nation of GATT may bring a claim for injuries caused by the failure of another member nation to carry out one of its express obligations under the TRIPS Agreement.⁸⁵ The DSU is concerned not only with injuries to trade volume, but also with injuries to the trade relationships between the member nations.⁸⁶ The DSU panel may order the

⁷⁸ See 19 U.S.C. § 2413(a)(2) (1994).

⁷⁹ See Telecki, *supra* note 3, at 197.

⁸⁰ See *id.* at 199.

⁸¹ See *id.* at 200.

⁸² See *id.* A DSU panel report only decides the specific case it addresses. Nonetheless, panels will often look to prior panel reports for guidance. See *id.*

⁸³ See Pierre Pescatore, *Drafting and Analyzing Decisions on Dispute Settlement*, in 1 HANDBOOK OF WTO/GATT DISPUTE SETTLEMENT 26 (Pierre Pescatore et al. eds., 1995). Article 31(3)(b) of the Vienna Convention which states that “subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation,” supports this proposition. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 340.

⁸⁴ See Telecki, *supra* note 3, at 200.

⁸⁵ See General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 187, 266, art. XXIII, cl. a.

⁸⁶ See Telecki, *supra* note 3, at 202.

suspension of trade concessions between the two countries; in the alternative, under the provisions of the DSU, the parties may negotiate a compensatory settlement.⁸⁷ Although TRIPS provides the process to remedy the types of violations complained of in the PRC, it will be at least five years before U.S. companies will be able to avail themselves of this process against many of the countries that are presently on the Special 301 watchlist.⁸⁸ In the case of China, the U.S. may not be able to employ this process against China until the PRC is admitted to the WTO.

The standards required by Special 301 are similar to those standards that satisfy the requirements for claims brought under TRIPS and the DSU.⁸⁹ This facilitates the United States' use of the DSB to resolve its disputes under the TRIPS Agreement.⁹⁰ The TRIPS Agreement promotes the use of the DSU dispute settlement procedures by reducing tensions through reaching strengthened commitments to resolve disputes on trade-related intellectual property issues.⁹¹ The DSU requires member nations to invoke the dispute resolution mechanism whenever they find themselves parties to a dispute; member nations may not act as judge and jury in any case by making unilateral determinations regarding violations.⁹² Member nations may choose their dispute resolution mechanism; additionally, the DSU requires that members exercise their best judgment to determine, before seeking a resolution of the dispute within the WTO, whether actions brought under the procedures would be fruitful.⁹³ The DSU sets out procedures by which member nations initially engage in consultations in an

⁸⁷ See *id.*

⁸⁸ See *id.* TRIPS causes this delay by granting transition periods to countries that are either in the process of development or in transition from a centrally planned to a market economy. See *id.*

⁸⁹ See *id.* at 205.

⁹⁰ See *id.* The USTR evaluates a priority country's acts according to similar standards that the DSB will apply in making a ruling or recommendation. See *id.* For a discussion of the specific situations in which the U.S. might employ Special 301 to enforce TRIPS standards, see Telecki, *supra* note 3, at 208.

⁹¹ See Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Dec. 15, 1993, 33 I.L.M. 81, 84, preamble (1994).

⁹² See Telecki, *supra* note 3, at 214.

⁹³ See Understanding on Rules and Procedures Governing the Settlement of Disputes, Dec. 15, 1993, 33 I.L.M. 112, 115, art. 3.7 (1994).

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effort to reach a mutually satisfactory agreement.⁹⁴ If the consultations are unsuccessful, the parties proceed before tribunals that will decide the dispute, under WTO rules, with an eye toward a result that will have the fewest negative effects on international trade.⁹⁵ The U.S. must refrain from using its remedial powers unilaterally under Special 301 to force development of international intellectual property standards beyond those established by the TRIPS Agreement.⁹⁶ However, the U.S. is still able to utilize Special 301 against China;⁹⁷ in addition, the WIPO has recently established a set of arbitration rules to settle international intellectual property disputes.

D. *The WIPO and its Arbitration Rules*

In response to the worldwide concern over piracy of intellectual property and the enforcement of such rights, the WIPO has created its own dispute resolution mechanism to handle intellectual property disputes. Arguably, arbitration is the most adept mechanism by which to resolve an international intellectual property dispute.⁹⁸ Notwithstanding the numerous treaties and bilateral agreements that exist relating to intellectual property, there is no set of uniform standards to protect such rights worldwide.⁹⁹ The

⁹⁴ See Telecki, *supra* note 3, at 215.

⁹⁵ See *id.*

⁹⁶ See *id.* at 218–219.

⁹⁷ The U.S. has in the past initiated two Special 301 actions against China. See Hu, *supra* note 20, at 82. The first action led to the signing of the 1992 Memorandum of Understanding on Intellectual Property Rights. See *id.* at 84. In this bilateral agreement, China agreed to improve protection of U.S. inventions and copyrighted works. See *id.* Despite the implementation of this MOU, the U.S. still complained about inadequate protection for its intellectual property rights and the lack of enforcement of these newly agreed upon standards. See *id.* In 1994, China was placed on the Special 301 priority list for the second time. See *id.* at 84–85. This action led to an eleventh-hour agreement between the two nations that avoided a mutually threatened trade war. See *id.* at 85. Under the 1995 MOU, China agreed to rectify copyright piracy, address ineffective enforcement through various raids of counterfeiting plants and improve market access. See *id.* at 103.

⁹⁸ See Laturno, *supra* note 8, at 369–370.

⁹⁹ See *id.* at 363. The basic international norm for intellectual property protection is the national treatment test; all intellectual property rights held by foreigners and nationals are to be treated alike. See *id.* Therefore, the level of protection a foreigner receives may be lower than that provided by his country of origin. See *id.* at 363–364.

role of the International Court of Justice (ICJ) has declined in recent years; therefore, a new mechanism for resolving the highly technical international intellectual property disputes was needed.¹⁰⁰ The result is the new WIPO arbitration rules.

International arbitration requires knowledge of the legal framework of more than one country; the arbitrator must be familiar with differing rules of procedure and the myriad problems of enforcement.¹⁰¹ A unique feature of intellectual property disputes is that they often involve complex technical subject matters.¹⁰² One advantage of international arbitration is that the parties involved may select the arbitrator or arbitrators they believe to be best suited to handle these issues.¹⁰³

The character of intellectual property disputes makes them especially suited for resolution through arbitration rather than through litigation.¹⁰⁴ Intellectual property disputes often possess an international character, involve a business relationship that lasts for many years, contain issues of a highly technical matter and regularly involve confidential information.¹⁰⁵ The advantages of arbitration as the dispute resolution mechanism include the following: assurance of neutrality, greater flexibility to choose the procedure and substantive law, privacy, lowered costs, greater enforceability of arbitration awards across international borders and the convenience of established international arbitration institutions such as the WIPO.¹⁰⁶

The WIPO is considered the proper forum for addressing intellectual property matters at the international level among its 147 members, of which China is one.¹⁰⁷ However, developed nations have complained that WIPO is ineffective in its fight against the rampant counterfeiting that occurs in

¹⁰⁰ See *id.* at 367. Important ICJ decisions have not been respected by the nations involved, and the use of international courts is ordinarily restricted to legal disputes. See *id.*

¹⁰¹ See *id.* at 368.

¹⁰² See *id.* at 369.

¹⁰³ See Laturno, *supra* note 8, at 369-370. Settlement of such a dispute should be conducted by an arbitrator with specialized knowledge in the particular area of intellectual property law and who possesses the technical skills necessary to comprehend the issues of the dispute. See *id.*

¹⁰⁴ See *id.* at 371 n.102.

¹⁰⁵ See *id.*

¹⁰⁶ See *id.* at 370-371.

¹⁰⁷ See *id.* at 373.

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developing countries.¹⁰⁸ Concurrently, the developing nations argued that establishing high standards of protection of intellectual property rights under GATT would allow the firms of developed nations to monopolize technology and unfairly exploit this advantage against enterprises of developing countries.¹⁰⁹ Arbitration under the WIPO rules is more appealing when there is a possibility for amiable resolution of these disputes not available under GATT.¹¹⁰

The WIPO dispute resolution procedures were designed to mirror those being developed under the TRIPS Agreement and GATT, with parties being able to proceed quickly to arbitration to settle their dispute.¹¹¹ The WIPO arbitration rules are not designed exclusively to resolve intellectual property disputes; arguably, they could be used to arbitrate any general business dispute.¹¹² While this lack of specialization may be viewed as a weakness by some, the rules contain several provisions prohibiting the disclosure of trade secrets and other confidential information.¹¹³

The WIPO arbitration rules allow parties that encounter a post-contractual dispute outside the scope of their original agreement, or parties not bound by a valid contract or agreement prior to the dispute, to utilize the rules and agree to arbitrate once the dispute has arisen.¹¹⁴ There are

¹⁰⁸ See Monique L. Cordray, *GATT v. WIPO*, 76 J. PAT & TRADEMARK OFF. Soc'y 121, 131 (1994).

¹⁰⁹ See Mitsuo Matsushita, *Taiwan and the GATT: Panel Three: A Japanese Perspective on Intellectual Property Rights and the GATT*, 1992 COLUM. BUS. L. REV. 81, 82. These countries claimed that GATT, with its strong enforcement mechanism, should not be used to negotiate intellectual property rights and that these rights should continue to be dealt with through the WIPO. See Laturno, *supra* note 8, at 376.

¹¹⁰ See Matsushita, *supra* note 109, at 82.

¹¹¹ See generally International Disputes: WIPO Committee Agrees to Draft Treaty of Settling Disputes, Pat. Trademark & Copyright L. Daily (BNA) (Nov. 29, 1990). In addition, the AAA International Arbitration Rules heavily influenced the WIPO Arbitration Rules. See generally Laturno, *supra* note 8, at 382.

¹¹² See generally World Intellectual Property Organization: Mediation, Arbitration, and Expedited Arbitration Rules, 34 I.L.M. 559 (1995) [hereinafter Arbitration Rules].

¹¹³ See Arbitration Rules, *supra* note 112, at 576-577, art. 52. One of the advantages of arbitration at any institution is confidentiality; however, the detailed confidentiality provisions created by WIPO may curtail a party from falsely claiming infringement solely to ascertain the other party's trade secrets. See Laturno, *supra* note 8, at 379-380.

¹¹⁴ See Arbitration Rules, *supra* note 112, at 568, art. 1. Intellectual property

instances in which a party or the government of one of the parties may adopt a public policy defense, claiming that the arbitration agreement is unenforceable.¹¹⁵ This public policy defense is available to signatories of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which is used by member nations such as China and the U.S. in the enforcement of arbitral awards.¹¹⁶ There has been a reluctance among American courts to reverse an arbitral award on the basis of any of the defenses set out in the New York Convention.¹¹⁷

In order to serve the interests of parties who chose WIPO for its specialized assistance in intellectual property arbitration, WIPO maintains lists of specialized mediators and arbitrators.¹¹⁸ The WIPO arbitration rules cover all aspects of selecting the arbitrator or arbitrators who will hear the dispute. The number of arbitrators shall be agreed upon by the parties, but in the absence of agreement, there shall be only one arbitrator.¹¹⁹ If a party has failed to appoint an arbitrator, then the WIPO Arbitration Center will make the appointment.¹²⁰ When the parties cannot agree upon the nationality of an arbitrator, the arbitrator shall be of a nationality different from the parties involved.¹²¹ If there is a justifiable doubt as to the arbitrator's impartiality or independence, that arbitrator may be challenged

disputes—usually claims of infringement by one party against another—often arise between parties who do not have a contractual relationship with one another. The rules define "Arbitration Agreement" as an agreement by the parties to submit to arbitration disputes that have arisen or that may arise between them. *See id.* This allows for the post-dispute decisions to arbitrate under the WIPO rules.

¹¹⁵ *See* Kojo Yelapaala, *Restraining the Unruly Horse: The Use of Public Policy in Arbitration, Interstate and International Conflict of Laws in California*, 2 *TRANSNAT'L LAW* 379, 460 (1989).

¹¹⁶ *See id.* The New York Convention provides for mutual recognition and enforcement of arbitral awards by member nations and limits the defenses that may be raised in opposition to the awards, in an attempt to eliminate excessive litigation following an arbitration. *See* William K. Slate II, *International Arbitration: Do Institutions Make a Difference?*, 31 *WAKE FOREST L. REV.* 41, 44 (1996).

¹¹⁷ *See* Slate, *supra* note 116, at 45. Courts have been careful to take into account the strong public policy in favor of arbitration and to adopt standards applicable on an international scale. *See id.*

¹¹⁸ *See id.* at 51.

¹¹⁹ *See* Arbitration Rules, *supra* note 112, at 570, art. 16.

¹²⁰ *See id.* at 571, art. 19.

¹²¹ *See id.* at 572, art. 20.

by either party.¹²²

E. *Institutional vs. Ad Hoc Arbitration*

Institutional arbitration, as offered by the WIPO Arbitration Center, is preferable to ad hoc arbitration under almost all circumstances.¹²³ The institution's participation in the arbitration process is a balance between necessary supervision and the parties' freedom to dictate the conduct of the proceedings.¹²⁴ Without the assistance of the institution, the goals of arbitration could not be as efficiently realized.¹²⁵ In contrast, ad hoc arbitration places the parties on their own to establish the rules of the arbitration, arrange for the procurement of arbitrators and deal with such issues as objections, compensation and award procurement.¹²⁶

Institutional experience and expertise are reflected in the rules and procedures established by a particular institution to govern the proceedings.¹²⁷ Thus, a party involved in an international intellectual property dispute would be well advised to pursue arbitration under an institution such as the WIPO Arbitration Center, which has a specialized knowledge of international intellectual property.¹²⁸ The institution's rules, which allow it to monitor and schedule the conduct of the proceedings, will allow for expedited arbitration for international parties in addition to lower costs.¹²⁹ Institutions provide neutral parties with education and training in

¹²² *See id.* at 572, art. 24. The place of arbitration shall be decided by the WIPO Arbitration Center unless otherwise agreed upon by the parties. *See id.* at 574, art. 39.

¹²³ *See generally* Slate, *supra* note 116.

¹²⁴ *See id.* at 52.

¹²⁵ *See id.* The goals of arbitration are speed, economy and justice. *See id.*

¹²⁶ *See id.* at 52-53. One advantage of ad hoc arbitration is the avoidance of administrative costs connected with institutional arbitration. However, at least one commentator has suggested that the costs associated with ad hoc arbitration could be exorbitant. *See* Laturno, *supra* note 8, at 387 n.243.

¹²⁷ *See* Slate, *supra* note 116, at 53. Parties who arbitrate with the help of an institution enjoy the benefits of time-tested rules and procedures that may be periodically revised. *See id.* The institution also serves as a quality control mechanism in that the arbitration process is overseen by a trained administrative staff, and the institution accumulates feedback from previous parties. *See id.* at 54.

¹²⁸ *See* Laturno, *supra* note 8, at 386.

¹²⁹ *See* Slate, *supra* note 116, at 55. There has been an increased emphasis, particularly in complex international cases, to achieve significant savings through

the methods of management and control of the proceedings in order to help facilitate this desired result.¹³⁰ Finally, an institution can be helpful in providing information concerning the conditions placed upon enforcement of an arbitration award in different parts of the world, as well as ensuring that its arbitrators maintain high ethical standards.¹³¹ Therefore, it is clear that parties to an international intellectual property dispute should utilize the WIPO Arbitration Center to settle their dispute in light of the myriad issues that are inherent in such disputes. Due to the fact that China is a member of WIPO, U.S. firms wishing to enforce their intellectual property rights in the PRC would be wise to utilize this specialized center as the arbiter of their infringement dispute. Filing suit in a People's Court, or filing for arbitration in China, have not proven to be the most successful methods for American parties.

III. THE PEOPLE'S COURTS, ARBITRATION AND MEDIATION IN THE PEOPLE'S REPUBLIC OF CHINA

A. *The Establishment of Intellectual Property Courts in China*

The traditional Chinese legal system is geared toward specific situations rather than individual rights.¹³² Also, Chinese justice favors the settlement of disputes over the defining of claims.¹³³ China has recently established specialized Intellectual Property Courts at both the Intermediate and Higher People's Court levels.¹³⁴ These courts are designed to handle a wide range of topics, such as patents, trademarks, copyrights, inventions and contracts

proper administrative management of the arbitration. *See id.* This can be accomplished through the arbitrator's organizational skill and management of the evidence. *See id.* Arbitrators must recognize that they have a responsibility for the pace of the proceedings and that adopting an activist attitude is the most important contribution an arbitrator can make toward overcoming delay. *See* Howard M. Holtzman, *What an Arbitrator Can Do to Overcome Delays in International Arbitration*, in AMERICAN BAR ASSOCIATION JUSTICE FOR A GENERATION 335, 339 (1985).

¹³⁰ *See* Slate, *supra* note 116, at 55.

¹³¹ *See id.* at 57, 58.

¹³² *See* Fung, *supra* note 32, at 615.

¹³³ *See id.* Imperial China bases its law on traditional social relationships and not on the individual who claims personal rights. *See id.* This is the product of Confucian legal theory. *See id.*

¹³⁴ *See* Kolton, *supra* note 68, at 436.

related to intellectual property matters.¹³⁵ The Intellectual Property Courts follow a procedure similar to their Civil Division counterparts.¹³⁶ The first, and most significant, case brought by a U.S. party in an Intellectual Property Court involved the Walt Disney Company.¹³⁷ The court found that a Chinese publishing company did infringe on Disney's copyrights by using well-known Disney characters without its permission or a license.¹³⁸ However, the court did not publish an opinion; this indicates that the new courts still need time to develop an organized and efficient system in order to adequately exercise their power.¹³⁹ In the past, U.S. firms were reluctant to launch litigation in China's People's Courts.¹⁴⁰ Today, China is using the Walt Disney decision to give American companies increased influence in the enforcement of their intellectual property rights.¹⁴¹ By focusing on trademark, patent and copyright prosecution, the Intellectual Property Courts are China's hope in the promotion of its development and investment climate.¹⁴²

B. *Corruption and Problems of Enforcement*

Despite these tangible improvements in the Chinese legal system, it is still not without flaws. Even when the People's Courts have awarded damages, collecting the characteristically small judgments can be

¹³⁵ *See id.*

¹³⁶ *See id.* at 437. Claims do not have to be presented in any special form for copyright cases. *See id.* The plaintiff must pay court costs up front; usually this amounts to between 0.5% and 3% of the total claim. *See id.* In addition, all plaintiffs filing suit in the Intellectual Property Courts must file a power of attorney request upon commencement of the proceedings. *See id.*

¹³⁷ *See id.* at 442. Disney claimed that the defendants were involved in the illegal production and distribution of children's books using well-known Disney characters without its permission. *See id.* at 442-443. Disney does not produce its own goods in China; it sells licenses to parties in the PRC so that they may make and sell Disney products. *See id.* at 443. The defendants claimed that they had purchased such a license. *See id.*

¹³⁸ *See id.* at 443.

¹³⁹ *See Fung, supra* note 32, at 613-614.

¹⁴⁰ *See id.* at 614.

¹⁴¹ *See id.* The award in favor of Disney may be an indication that the Chinese legal system is now more capable of correctly adjudicating and remedying copyright infringements. *See Kolton, supra* note 68, at 446.

¹⁴² *See Birden, supra* note 2, at 482.

difficult.¹⁴³ Additionally, People's Courts have little power to compel other Chinese governmental bodies to enforce their orders.¹⁴⁴ This shortcoming is of particular significance in light of the rampant corruption that exists in China with regard to its governmental officials.

Corruption is a significant problem in the PRC. Many Chinese infringers are protected by Chinese officials and, subsequently, are beyond the Intellectual Property Courts' jurisdiction.¹⁴⁵ The rise in official bribery and corruption resulted from China's shift from a centrally planned market economy to a market economy; this shift also resulted in the increase in trademark infringement.¹⁴⁶ In some instances, the bribed officials hamper efforts to eliminate counterfeit goods by obstructing both the investigation and confiscation of such goods.¹⁴⁷ Additionally, local and national Communist Party officials have been known to interfere with intellectual property lawsuits.¹⁴⁸

In 1992, China convened a national anti-corruption conference to help remedy this problem. As a result of the conference, the counterfeiting regulations of the PRC now allow for criminal prosecution of state officials who exploit their office to harbor an enterprise they know used a trademark

¹⁴³ See Kolton, *supra* note 68, at 448. This inadequacy may be attributed to the exceptionally weak enforcement power of the People's Courts, including the Intellectual Property Courts. Penalties for declining to heed a Chinese court order are virtually nonexistent. *See id.*

¹⁴⁴ *See id.*

¹⁴⁵ *See id.* at 449. For example, there are 26 major compact disc manufacturers in China; all are semi-official state owned companies. This type of ownership decreases the possibility that they will be prosecuted for infringement. In essence, one branch of the government would be prosecuting another. In addition, many of these compact disc factories are joint ventures with Hong Kong or Taiwan firms that have taken on partners who are relatives of officials in the Communist Party. The Chinese Trade Minister has even acknowledged that one such factory is untouchable because of its owner's ties with the Chinese military, which is considerably more powerful than the Trade Ministry. *See id.*

¹⁴⁶ See Birden, *supra* note 2, at 477. With decentralization, local governments now possess a greater power to manage their local economies and have a greater stake in the development and economic return of local industries.

¹⁴⁷ *See id.*

¹⁴⁸ See Kolton, *supra* note 68, at 449. Traditionally, local Party officials reviewed and approved judicial outcomes. While this is no longer predominantly the case, it still continues to a lesser degree today. The salaries of Chinese judges and court officials are so low that it makes them susceptible to corruption and bribery. *See id.*

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without authorization; the regulations also allow for criminal prosecution of those officials who help an enterprise avoid infringement prosecution.¹⁴⁹ To demonstrate this new commitment to fighting corruption in the PRC, China executed the director of an electronics company in 1984 for corruption and the solicitation of bribes.¹⁵⁰

C. Intellectual Property Education

In addition to its crackdown on corruption, China has attempted to strengthen its enforcement of intellectual property rights through education. Due to the PRC's nascent system of intellectual property rights, coupled with the societal attitudes of its people, there is an urgent need to train enforcement personnel and to educate the public about the importance of the protection of intellectual property rights.¹⁵¹ There is only a limited number of qualified individuals in China who have the knowledge to be effective Intellectual Property Court judges.¹⁵² This lack of education is particularly devastating because the Chinese legal system is inquisitorial, rather than adversarial.¹⁵³ The PRC has established intellectual property departments at its major universities;¹⁵⁴ however, active involvement by U.S. companies and attorneys, through such means as seminars, assistance to the Chinese media and exchange programs, will help expedite the training process.¹⁵⁵

¹⁴⁹ See Birden, *supra* note 2, at 478-479. The participants of the conference turned their attention especially to government officials who took advantage of their power to obtain benefits for themselves or others. *See id.* at 479.

¹⁵⁰ *See id.* at 479. The following month, four officials were executed on charges of corruption and bribery. *See id.*

¹⁵¹ *See* Hu, *supra* note 20, at 110. To address this problem, the 1995 MOU between China and the U.S. called for nationwide intellectual property law training for governmental officials, including administrative and judicial enforcement personnel. The Chinese public will be educated through publicity. *See id.*

¹⁵² *See* Kolton, *supra* note 68, at 450. Because the intellectual property legal structure is so new, many of the people who do have the proper legal education are too young to serve as judges. Many Chinese judges, rather than being legal professionals, are retired army sergeants and have no formal legal training. *See id.*

¹⁵³ *See id.* at 450. Judges in many cases must find facts based on their own initiative. Additionally, there is no case reporter system comparable to that used in the U.S.; therefore, research of case law precedent is nearly impossible. *See id.*

¹⁵⁴ *See id.* at 457.

¹⁵⁵ *See* Hu, *supra* note 20, at 111.

D. *Alternative Dispute Resolution in the PRC*

In light of the flaws associated with the enforcement of intellectual property rights, and the shortcomings of the court system in the PRC, alternative dispute resolution (ADR) is an effective technique that American firms could turn to for relief. China, like many Asian nations, is adverse to litigation and only utilizes its court system as a last resort.¹⁵⁶ Under the Arbitration Law of the PRC, promulgated in 1994, two separate arbitration systems were established—one for domestic economic disputes and one for foreign-related economic disputes.¹⁵⁷ The China International Economic and Trade Arbitration Commission oversees arbitration in China.¹⁵⁸ The Commission's rules provide for streamlined arbitrations before multilingual arbitrators that may be conducted in any official language upon which the parties agree.¹⁵⁹ This system is primarily used for parties that have a contractual relationship with one another.¹⁶⁰ However, claims of intellectual property infringement often involve parties who have no contractual relationship.

In addition to administrative action, the Copyright Law permits consensual arbitration or mediation for settling copyright infringement lawsuits.¹⁶¹ The People's Courts are entitled to refuse enforcement of an arbitration award if it is deemed unlawful.¹⁶² Additionally, there are no guidelines as to who may qualify as a mediator for a copyright dispute.¹⁶³ While mediation has traditionally been the most common form of dispute settlement in the PRC, arbitration will likely become more prevalent as

¹⁵⁶ See Paul B. Birden, *Technology Transfers to China: An Outline of Chinese Law*, 16 LOY. L.A. INT'L & COMP. L.J. 413, 431 (1994).

¹⁵⁷ See Yuan Cheng, *Legal Protection of Trade Secrets in the People's Republic of China*, 5 PAC. RIM L. & POL'Y J. 261, 291 (1996).

¹⁵⁸ See Birden, *supra* note 2, at 476.

¹⁵⁹ See *id.* at 477.

¹⁶⁰ See Cheng, *supra* note 157, at 291.

¹⁶¹ See Kolton, *supra* note 68, at 423.

¹⁶² See *id.*

¹⁶³ See Derek Dessler, Comment, *China's Intellectual Property Protection: Prospects for Achieving International Standards*, 19 FORDHAM INT'L L.J. 181, 226 (1995).

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China moves closer to a market economy.¹⁶⁴ Despite these provisions for resolution of intellectual property disputes in the PRC, an American firm would be wise to institute ADR proceedings in the WIPO, rather than test the uncharted waters of intellectual property dispute resolution in the PRC.¹⁶⁵

E. A Dispute Resolution Strategy for American Firms Negotiating with PRC Firms

Jeffrey Li has developed a negotiation strategy, based on Sun Tzu's *The Art of War*, that could be utilized by American firms engaged in alternative dispute resolution proceedings with a firm from the Far East.¹⁶⁶ The framework for the negotiation strategy is shaped around the two classic negotiation techniques: cooperative and adversarial negotiation.¹⁶⁷ It has been shown that there is relatively no difference in the effectiveness attributed to either technique.¹⁶⁸ To negotiate successfully in Asia, the ability to utilize either style is indispensable.¹⁶⁹

Li's framework for his negotiation strategy begins with an appraisal of the situation.¹⁷⁰ A negotiator must appraise her own standing with any given case before entering into negotiations for the settlement of the dispute.¹⁷¹ Next, the negotiator should take steps to evaluate her opponent

¹⁶⁴ See Kolton, *supra* note 68, at 423 n.44.

¹⁶⁵ The greatest advantage the WIPO has over Chinese arbitrators and mediators is a familiarity and expertise with the technical issues of an intellectual property dispute.

¹⁶⁶ See generally Jeffrey C. Y. Li, Comment, *Strategic Negotiation in the Greater Chinese Economic Area: A New American Perspective*, 59 ALB. L. REV. 1035 (1996).

¹⁶⁷ In cooperative negotiation, the individual believes that a win-win situation is viable. He believes that all the parties have interests in common, and that their synergy will produce a more advantageous outcome. Adversarial negotiators believe that if there is enough pressure exerted on the enemy, strategic negotiating will produce a result in which he is completely victorious. See *id.* at 1044-1046.

¹⁶⁸ See GERALD R. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT 41 (1983).

¹⁶⁹ See Li, *supra* note 166, at 1047. Bright line divisions of technique do not conform with real world negotiations, and it may be hard to pin down just which technique the other side is employing. See *id.*

¹⁷⁰ "To estimate the enemy situation . . . so as to control victory [is a] virtue of the superior general. He who fights with full knowledge of these factors is certain to win; he who does not will surely be defeated." SUN TZU, THE ART OF WAR 128 (Samuel B. Griffith ed. & trans., Clarendon Press 1963).

¹⁷¹ See Li, *supra* note 166, at 1049. Although settlement is in reality more

thoroughly through what is termed "competitor analysis."¹⁷² A detailed analysis of one's competitor will reveal the following: how he will defend himself, what his vulnerabilities are and what situations would strain his resources to the point where he is unable to risk retaliation.¹⁷³ The next step is for the negotiator to evaluate her own positions, goals, strategies, assumptions and weaknesses.¹⁷⁴

When all of the information gathering and analysis is complete, it is time to develop offensive and defensive tactics. "Invincibility lies in the defense; the possibility of victory in the attack."¹⁷⁵ Two passive defense mechanisms are helpful to negotiators who utilize the two traditional techniques. A cooperative negotiator should be sure to project self-confidence when involved in an ADR process.¹⁷⁶ The competitive negotiator must guard against his actions being too argumentative or demanding.¹⁷⁷ Confrontation can be an effective defense mechanism.¹⁷⁸ The application of the attributes of creativity, versatility and adaptability can be one of the most effective offensive techniques a negotiator may employ.¹⁷⁹ Also, the weapon of deceit can be quite effective in an ADR

prevalent than litigation, attorneys often put up a façade of invincibility to convey the impression that they would win their case at trial. However, the bluffing from both sides clouds the most important pre-trial decision: whether the case should be settled or proceed to trial. *See id.* at 1050.

¹⁷² "Know the enemy and know yourself, in a hundred battles you will never be in peril." SUN TZU, *supra* note 170, at 84. The negotiator should seek to ascertain the competition's future goals, the adversary's attitude toward risk, the competition's assumptions, the opponent's current negotiation strategy and the enemy's financial and resource capabilities. *See Li, supra* note 166, at 1053-1065.

¹⁷³ *See Li, supra* note 166, at 1065.

¹⁷⁴ *See id.* Sun Tzu regarded not knowing the enemy and not knowing yourself as a sure-fire formula for failure. *See id.*

¹⁷⁵ SUN TZU, *supra* note 170, at 85.

¹⁷⁶ *See Li, supra* note 166, at 1069.

¹⁷⁷ *See id.* Competitive negotiators are often perceived as obnoxious and quarrelsome. These attributes tend to hinder the adversary's perception of the negotiator as competent and generate a desire to break off negotiations altogether. *See id.*

¹⁷⁸ Confrontation aims to place the opposing side on the defensive; as a result, the pressure is eased upon the negotiation momentarily, giving an individual time to think clearly. Other defensive techniques include specific disciplinary retaliation, timing and specificity. *See id.* at 1070-1071.

¹⁷⁹ *See id.* at 1076.

setting.¹⁸⁰ Finally, knowing when the negotiations have concluded is the final step in the framework; knowing this is as important as knowing when to defend and when to attack.¹⁸¹

The disparity in cultural differences between the U.S. and the PRC is one of the most important factors facing a negotiator when he enters into ADR with a Chinese firm. Two of the most distinguishing characteristics of the Chinese negotiators are their patience and their brinkmanship.¹⁸² Much of the time spent in negotiations in Asia is devoted to building trust and a thorough understanding of mutual objectives.¹⁸³ The Chinese place a very high value on "saving face"; therefore, mudslinging and the damaging of reputations are viewed with disapproval.¹⁸⁴ The intent of the negotiator should be obtaining a settlement that attains their goals, while creating the appearance that her adversary has not suffered a loss.¹⁸⁵ Typically, a Chinese negotiator will not have the power to respond quickly to settlement offers.¹⁸⁶ Thus, responses to offensive moves will not be as quick; however, this could be an advantage to the negotiator who is able to adapt quickly to external events. Honesty, trust and the ability to observe customs and etiquette are particularly important to the negotiator who is engaged in settlements in China.¹⁸⁷ Self-control will demonstrate that the negotiator is able to understand the importance of patience and cultural differences when negotiating in China.¹⁸⁸ Finally, allowing enough time for the negotiations

¹⁸⁰ "When capable, feign incapacity; when active, inactivity." SUN TZU, *supra* note 170, at 66. An adversary who plans to win based on her large resource capabilities and staying power can be made to negotiate. This is accomplished through the negotiator employing a façade that creates the illusion that he has similar or superior resources. *See* Li, *supra* note 166, at 1076.

¹⁸¹ *See* Li, *supra* note 166, at 1079. The best indication of whether an offer is final is the reaction of the adverse party to continued negotiation. *See id.* at 1080.

¹⁸² *See id.* at 1058. Thus, a negotiator should not become enamored and choose one negotiating style or the other at the outset of the negotiations. He must be flexible throughout the entire process.

¹⁸³ *See id.*

¹⁸⁴ *See id.* at 1060.

¹⁸⁵ *See id.*

¹⁸⁶ *See id.* at 1064.

¹⁸⁷ *See id.* at 1066. As discussed *infra*, the Chinese place a high value on developing trust during the negotiation process. Placing a high value on ethics could lead to an increase in the chances of reaching a favorable settlement.

¹⁸⁸ *See id.* at 1066-1067.

to run their course is important in an environment where patience and brinkmanship are the essential strategies.¹⁸⁹

IV. CONCLUSION

As China continues to make strides toward greater protection for intellectual property rights, the number of U.S. firms wanting to exploit this immense market will likely increase. Therefore, an efficient means for the resolution of the inevitable infringement disputes that will arise is necessary. Presently, the WIPO Arbitration Center and its Arbitration Rules provide the most effective mechanism by which to achieve this result. The use of experienced and specialized mediators and arbitrators is indispensable. As China improves its enforcement of the Copyright, Patent and Trademark Laws it has promulgated, American firms will feel safer in allowing their products to remain in the PRC. However, the present state of enforcement is inadequate to protect the significant investments U.S. firms have made in the PRC. As the education of the public increases, the recognition of intellectual property rights and their enforcement of them through the People's Courts will increase to a level acceptable to U.S. firms. China must work expeditiously toward achieving an acceptable level of protection of U.S. products within the PRC. Until such time, reliance on the WIPO is essential to the protection of U.S. intellectual property rights in China.

¹⁸⁹ *See id.* at 1072.