



Answers for Intellectual Property Enforcement in China: The Trade Right Enforcement Act

Azam Khan

Follow this and additional works at: <https://via.library.depaul.edu/jatip>

Recommended Citation

Azam Khan, *Answers for Intellectual Property Enforcement in China: The Trade Right Enforcement Act*, 16 DePaul J. Art, Tech. & Intell. Prop. L. 345 (2006)
Available at: <https://via.library.depaul.edu/jatip/vol16/iss2/5>

This Legislative Updates is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Journal of Art, Technology & Intellectual Property Law by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.

ANSWERS FOR INTELLECTUAL PROPERTY ENFORCEMENT IN CHINA: THE TRADE RIGHT ENFORCEMENT ACT

I. INTRODUCTION

American businesses estimate that global trade in pirated and counterfeited goods is a \$250 billion a year industry.¹ The International Intellectual Property Alliance (“IIPA”) estimated that global piracy cost the United States copyright industry \$13 billion in 2004.² The global piracy industry is centered largely in heavily populated, developing countries such as China, India, Russia, and Brazil.³ To reduce these extraordinary levels of piracy, the United States must work to reduce the ease with which foreign copyright infringement goes unpunished. In order to accomplish this task of protecting copyright rights abroad, two elements must be in place.⁴ First, a legal framework must set forth a copyright owner’s rights and the procedures by which those rights will be enforced.⁵ Second, the legal framework and procedural enforcement guidelines must be applied in a manner that assures copyright holders of their rights.⁶

While the world has seen tremendous growth in the adoption of legal frameworks by developing countries, the laws are only as good as their enforcement.⁷ Unfortunately, the enforcement of these frameworks is often extremely poor.⁸ What follows is an

1. Laurie J. Flynn, *U.S. Discloses Move to Stop Piracy of Intellectual Property*, N.Y. TIMES, Sept. 21, 2005, at 7.

2. *Piracy of Intellectual Property: Hearing Before the Subcomm. on Intellectual Property of the S. Comm. on the Judiciary*, 109th Cong. (2005) [hereinafter *Hearing on Piracy*] (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).

3. Flynn, *supra* note 1.

4. *Hearing on Piracy*, *supra* note 2.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

examination of the recently adopted legal frameworks as well as the identification of several obstacles that stand in the way of effective enforcement in China. This Article will focus on the relevant provisions of the Trade Right Enforcement Act (the TREA), currently before the Senate, which are designed to monitor China's compliance with its international obligations to protect intellectual property rights. According to the TREA, if the Executive Branch deems that China has failed to meet the goals set forth in the TREA, or has failed to take significant steps toward attaining those goals, the President may begin collecting evidence against China to be used in an action against it before the World Trade Organization's (WTO) Dispute Settlement Board (DSB).⁹

This article is a policy argument concerning an international intellectual property issue. The background section details several relevant topics: U.S.-China relations; China's political, legal, and economic environment; the TREA's provisions; and the history and structure of the WTO. The analysis will focus on the TREA's shortcomings and in particular, the economic and political realities that doom the plan from the outset. Further, the Article will analyze potential alternative methods of compelling Chinese compliance. Finally, it will suggest steps U.S. companies and artists can take to help ensure protection of their IP assets in China.

II. BACKGROUND

This Section will examine the relevant historical and political background necessary to understand U.S.-China relations. It is comprised of three parts which focus on U.S.-China trade, political and cultural relations. A final section paints the current political and legal climate within China in broad strokes.

A. U.S.-China Trade Relations

China, once an insignificant blip on the United States' trade radar, is now the U.S.'s third largest trading partner.¹⁰ In fact, over

9. Trade Rights Enforcement Act, H.R. 3282, 109th Cong. (2005).

10. 151 CONG. REC. H6658 (daily ed. July 27, 2005) (statement of Rep.

the past twenty-five years, trade between the U.S. and China has risen from \$5 billion to \$231 billion.¹¹ As U.S.-China trade has grown, so has the U.S. trade deficit with China.¹² In 2004, the trade gap with China was \$162 billion.¹³ This massive trade deficit is already the world's largest bilateral gap.¹⁴ The problem appears to be compounding at an alarming rate; some 2005 estimates projected that the gap could grow to as much as \$225 billion.¹⁵ To put this figure in perspective, consider that the total U.S. trade deficit is expected to approach \$700 billion for that same year.¹⁶ Several factors contribute to the deficit; major areas of concern have been identified.¹⁷ These include intellectual property rights, agricultural services, industrial policies, trading rights and distribution, and transparency of trade laws.¹⁸

China's economic growth rates are among the highest in the world.¹⁹ Many Americans have thus begun accusing China of stealing U.S. jobs, keeping their currency undervalued by pegging it to the dollar, dumping goods on foreign markets, and violating workers' rights to continue to keep labor costs down.²⁰ The debates have become heated; growing concerns about China's failure to revalue its currency against the dollar have tempted U.S. officials to formally label China a "currency manipulator."²¹ These words may not be toothless: they "could resurrect a

Putnam).

11. *Id.*

12. *Id.*

13. 151 CONG. REC. H6558, 6659 (daily ed. July 27, 2005) (statement of Rep. McGovern).

14. *Id.* at 6666 (statement of Rep. Putnam).

15. *Id.*

16. Edmund L. Andrews, *I.M.F. Warns of Imbalance in World Consumption*, N.Y. TIMES, Sept. 21, 2005, at 3.

17. *Id.* (citing Int'l Monetary Fund [IMF], *World Economic Outlook* (Sept. 14, 2005)).

18. *Id.* (citing Int'l Monetary Fund [IMF], *World Economic Outlook* (Sept. 14, 2005)).

19. Neil C. Hughes, *A Trade War With China?*, FOREIGN AFF., July-Aug. 2005, at 94.

20. *Id.* See *infra* part V(A) for an analysis of the merits of some of these claims.

21. *Looming Trade War*, BALT. SUN, Oct. 13, 2005, at 14A.

congressional move to impose a 27.5 percent tariff on all Chinese goods. . . [which] could well lead to a global recession.”²² At the same time, China’s purchases of U.S. treasury bonds have been instrumental in allowing the U.S. government and taxpayers to continue spending.²³ A sudden devaluation of China’s currency, coupled with a rapid flight of its reserves from the dollar, could send U.S. interest rates soaring and result in a “hard landing for many Americans.”²⁴

As a result of these complex economic issues, Congress is divided over policies regarding trade. The struggle over the Central American Free Trade Agreement (CAFTA), which is designed to relieve trade restrictions between the U.S. and six Central American countries, demonstrates the rift in Congress between free-traders and protectionists.²⁵ When CAFTA was before Congress, protectionists—also called trade skeptics—were fighting a battle to limit trade on two fronts.²⁶ First, they sought to raise barriers against China.²⁷ Second, they attempted to keep barriers against Central America in place.²⁸ Many protectionists blame China and its exchange rate for the U.S. trade deficit, and wish to impose trade barriers to prevent the growth of those deficits.²⁹ Additionally, if protectionists allowed CAFTA to pass, it might embolden trade liberals to further expand free trade at the next round of WTO negotiations; a goal clearly in opposition to protectionist interests.³⁰

Pushing CAFTA through Congress was high on the Bush Administration’s agenda in the spring and summer of 2005, and

22. *Id.*

23. *Id.*

24. *Id.*

25. Leon Hadar, *Cafta Vote Plays Chinese Bogey*, BUS. TIMES SING., Aug. 3, 2005. (noting the six Central American countries that are party to the Agreement: El Salvador, Guatemala, Honduras, Nicaragua, Costa Rica, and The Dominican Republic).

26. *China-bashing and Trade: Putting Up the Barricades*, THE ECONOMIST, Apr. 23, 2005 at 29.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

this was to China's detriment.³¹ In order to appease protectionists that were angry over CAFTA, the Administration imposed 'safeguard quotas' on seven categories of Chinese textiles.³² An article in the *Economist* summed up this move: "The Bush administration's decision to impose safeguards was taken both to placate a rising chorus of anti-Chinese fervor in Congress and to drum up legislative support for CAFTA."³³ The Administration claimed that failure to increase economic ties with Central America would allow China to expand its economic and political influence over the region.³⁴ This strategy eventually paid off for Bush; CAFTA passed through Congress in July of 2005.³⁵ But, it had other repercussions as well; in response, China scrapped export tariffs that were designed to limit the trade gap by stemming the flow of textiles into the U.S.³⁶ Indeed, the U.S. must be mindful of this delicate balance when it attempts to solve the problems of the piracy and counterfeiting of intellectual property. As is frequently the case in foreign relations, the issue is a single piece in the large, complicated puzzle of U.S.-China relations.

B. Political Relations Between the United States and China

Henry Kissinger once offered this prediction: "Once China becomes strong enough to stand alone, it might discard us. A little later it might even turn against us, if its perception of its interests requires it."³⁷ In the mid-1980's, the U.S. and China viewed each other as strategic partners, united by the common goal of preventing Soviet domination of the Asian continent.³⁸ Since the fall of the Soviet Empire and the end of the Cold War, the world

31. *Textile-trade Politics: A Knotty Problem*, THE ECONOMIST, June 4, 2005 at 72.

32. *Id.*

33. *Id.* See *infra* Part IV C for a discussion on safeguard measures.

34. Hadar, *supra* note 25.

35. *Trade Policy: Another Such Victory*, THE ECONOMIST, July 30, 2005 at 66.

36. *A Knotty Problem*, *supra* note 31.

37. RICHARD BERNSTEIN & ROSS H. MUNRO, THE COMING CONFLICT WITH CHINA 22 (1998) (quoting Henry Kissinger).

38. *Id.* at 3.

has entered a new era of international relations and world politics—that of globalization.³⁹ While the Cold War’s defining characteristic was division, the new system of globalization is defined by integration.⁴⁰ This integration has led to increasingly complicated relations between nation-states; the new system “is built around . . . balances, which overlap and affect one another.”⁴¹ To be sure, U.S. relations with China reflect these complexities.

The U.S. is a global leader in economics, culture, technology, and military power.⁴² China needs a close relationship with the U.S. if its modernization efforts are to succeed.⁴³ Similarly, U.S. interests require a close political relationship with China.⁴⁴ Noted economist Wang Jisi has explained: “The United States now needs China’s help on issues such as counterterrorism, nonproliferation, the reconstruction of Iraq, and the maintenance of stability in the Middle East.”⁴⁵ Wang concludes that Washington will be slow to regard Beijing as its primary security threat, and that China will continue to avoid antagonizing the U.S. for years to come.⁴⁶

The true picture of U.S.-China political relations, however, is decidedly more complex.⁴⁷ The issue of Taiwan, for example, remains a significant point of controversy between the two countries.⁴⁸ The issue of Taiwanese independence has been at the forefront of the political differences between the U.S. and China for more than half a century.⁴⁹ In 1949, when China’s nationalist party leader Chiang Kai-shek fled the mainland to escape the victorious communist party, he brought with him a million Nationalist troops and a large part of the Kuomintang

39. THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 7 (2000).

40. *Id.* at 8.

41. *Id.*

42. Wang Jisi, *China’s Search for Stability With America*, FOREIGN AFF., Sept.-Oct. 2005, at 39.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 40.

47. *See generally id.*

48. Wang Jisi, *supra* note 42, at 46.

49. BERNSTEIN & MUNRO, *supra* note 37, at 22.

bureaucracy.⁵⁰ Chiang's new government reformed and stimulated the island's economy; today, Taiwan is one of Asia's greatest economic players.⁵¹ Taiwan remains something of a thorn in the side of the mainland Chinese government, which insists that Taiwan is part of China.⁵² The mainland government's position is that Taiwan is a part of China and its status is therefore an internal matter.⁵³ But Taiwan is a major trading partner and political ally of the United States.⁵⁴ The U.S. has stated its opposition to Taiwanese independence but has simultaneously asked the mainland government to talk directly with Taiwan's leader Chen Shui-bian.⁵⁵ While the majority of the Taiwanese people oppose a move for complete independence, powerful separatist groups in Taiwan continue to push for greater separation from the mainland.⁵⁶ The Taiwan issue is the critical controversy in U.S.-China political relations and a major confrontation over this issue would be a grave disaster for everyone involved.⁵⁷

C. U.S.-China Cultural Relations

A great divide exists between the United States and China with respect to the balance of cultural trade.⁵⁸ In the past decade, China's copyright imports have increased 57% annually, while their progress in copyright exports has been minimal.⁵⁹ According to the *Yearbook of China's Publishing Industry 2004*, China's import-to-export ratio with respect to copyrights was a dismal 10.3 to 1.⁶⁰ For example, in 2003, China imported 12,516 copyrighted

50. *Id.*

51. MARK BORTHWICK, *PACIFIC CENTURY: THE EMERGENCE OF MODERN PACIFIC ASIA*, 355 (2d ed. 1998).

52. *Id.* at 400.

53. Wang Jisi, *supra* note 42 at, 46.

54. BERNSTEIN & MUNRO, *supra* note 37, at 150.

55. Wang Jisi, *supra* note 42, at 46.

56. *Id.*

57. *Id.*

58. *China's Cultural Trade Deficit on the Rise*, (April 15, 2005), available at <http://www.beijingportal.com.cn> (last visited April 1, 2006).

59. *Id.*

60. *Id.*

books and exported only 81.⁶¹ Additionally, in areas where China does compete quantitatively, it still fails economically.⁶² While the China National Publication Import and Export Corporation (CNPIEC) imported and exported roughly the same number of audio and video products, the price of the imported products was significantly higher than the price of those exported.⁶³ This anomaly may be due in large part to the fact that Chinese audio and video exports “are old fashioned and poorly packaged by international standards.”⁶⁴

On one hand, it is difficult to cultivate an active intellectual property industry without proper protections in place.⁶⁵ On the other hand, because piracy provides jobs and is a major source of income in developing countries, there is little incentive to install the necessary protections.⁶⁶ This point was addressed in a June 2005 hearing on Capitol Hill concerning piracy in China:

[China has] a conundrum going on where they’re attempting to enforce their laws, but at the same time they’re attempting to enforce public policy of creating jobs. . . And the two are colliding in such a way that the reparations you can get through the legal system aren’t too spectacular. . . Even if [a monetary award] did occur, a new company could open up with the same people, perhaps the same address, manufacture the same [counterfeit] product.⁶⁷

61. *Id.*

62. *Id.*

63. *Id.*

64. *China’s Cultural Trade Deficit on the Rise*, *supra* note 58.

65. *Hearing on Piracy*, *supra* note 2.

66. *Id.*

67. *Finding and fighting Fakes Reviewing the Strategy Targeting Organized Piracy: Hearing Before the Subcomm. on Oversight of Government Management, the Fed Workforce and the District of Columbia of the S. Homeland Security and Governmental Affairs Comm.*, 109th Cong. (2005) (statement of Jeffrey Evans, President and CEO of the Will-Burt Company) (discussing counterfeiting as it relates to Patent and Trademark infringement).

Some developing countries believe that by paying for legitimate copies they are simply giving away money.⁶⁸ Current estimates suggest that as much as 90% of the music and movies sold in China are illegal copies.⁶⁹ This figure begs the question: what incentives are there for Chinese companies to get involved in the creative industries?

D. Inside China

China's rapid economic development over the past several decades has contributed directly to serious, domestic political failures.⁷⁰ Elizabeth Economy, a noted expert on China, has addressed this point: "[China has] ignored the political and institutional changes necessary to ensure that markets function smoothly and transparently and that the social challenges arising from economic reform are addressed effectively."⁷¹ These failures, coupled with the dramatic influx of capital, have contributed to widespread corruption and a weak social welfare system.⁷² A poll conducted by the Chinese Academy of Social Sciences (CASS) indicates that between 75% and 80% of Chinese citizens believe their local politicians are prone to corruption.⁷³ The Chinese people, however, are not willing to sit idly by and watch corruption take over.⁷⁴ So, the coming years may well be defined by dramatic changes in China's political system as well as cultural climate, as reform is pushed forward.⁷⁵

Major problems exist in China's domestic legal system that forestall the enforcement of intellectual property rights.⁷⁶ But to

68. *Id.*

69. Flynn, *supra* note 1.

70. Elizabeth Economy, *Don't Break the Engagement*, FOREIGN AFF., May-June 2004, at 96.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. Ying Tuo, Dragon Int'l Patent Office, Presentation at DePaul University College of Law: Protection and Enforcement of Intellectual Property in China from a Chinese Litigation Perspective (Oct. 20, 2005).

understand why, a basic understanding of the current Chinese intellectual property enforcement system is necessary. China uses a two-prong system to enforce intellectual property rights.⁷⁷ The first prong, or the administrative prong, focuses on evidence gathering.⁷⁸ The second prong involves the prosecution of the alleged pirates.⁷⁹ Although the two prongs are not mutually exclusive, they must be viewed separately in order to get a better understanding of the system.

The administrative system consists of local bureaus and offices assigned to the protection of trademark, copyright and patent rights respectively.⁸⁰ The principal purpose of the administrative branch is the gathering of evidence.⁸¹ Under Chinese law, there is no mandatory discovery in the litigation process.⁸² As a result, upon the receipt of a complaint or even informal notice that they will be prosecuted, a Chinese criminal piracy ring may simply destroy all the evidence of their crimes without the risk of facing penalties for such action.⁸³ The burden, therefore, is on the plaintiff to collect evidence *before* bringing a cause of action.⁸⁴ Because this burden is so heavy; administrative offices have the authority to act quickly to raid suspected piracy operations and seize crucial evidence.⁸⁵ The plaintiff may then use that evidence in court in support of an order comparable to a preliminary injunction to stop the piracy ring.⁸⁶ Any action that arises following this administrative action will be viewed by the court *de novo*, thereby increasing the burden on plaintiffs.⁸⁷

The Chinese legal system differs greatly from that of the U.S. and warrants some consideration. There are four hierarchical levels of courts in the Chinese Judiciary: Supreme People's Court,

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. Ying Tuo, *supra* note 74.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

High People's Court, Intermediate People's Court and Basic People's Court.⁸⁸ Unlike the U.S. court system, the Chinese system provides that certain types of cases may bypass lower level courts and be heard for the first time in higher courts.⁸⁹ The Chinese legal system quantitatively limits appeals; they allow for only one appeal following the first hearing of the case.⁹⁰ This appeal will be heard by the next highest level in the court system.⁹¹

At first glance, the Chinese system offers what appears to be a quite lucrative damage structure.⁹² Damages may include losses suffered by the owner, profits made by the infringer, royalty payments, attorney fees, and statutory damages up to \$60,000.⁹³ The system limits a plaintiff's ability to collect substantial damages by tying court's fees to the awards; the larger the damages awarded, the larger the fees the plaintiff must pay to the court.⁹⁴

The Chinese legal system has undergone significant reform in the 30 years since the death of Mao Zedong.⁹⁵ The reform has centered on establishing an accountable regulatory environment with better defined laws and better trained lawyers and judges.⁹⁶ Economy states that "[s]ince 1978, the number of lawyers in China has skyrocketed from 2,000 to 120,000, and more than 230 law schools are now training 80,000 future lawyers."⁹⁷ Additionally, Chinese judges are receiving more formal legal training and are no longer ordinary citizens and retired army officials.⁹⁸ The push

88. Ying Tuo, *supra* note 74.

89. *Id.* For example, IP cases begin in the Intermediate People's Courts, and patent cases may start in even higher courts. The justification here may be that the higher courts are better equipped to handle high level and complex legal issues, while lower courts may lack the requisite sophistication, especially those courts located in rural areas.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* Figures are given in U.S. dollars.

94. *Id.*

95. Economy, *supra* note 68.

96. *Id.*

97. *Id.*

98. *Id.*

toward better legal education may have great effect.⁹⁹ Indeed, the next phase of legal reform in China is expected to challenge basic assumptions about individual rights and the government's accountability in the court system, and it will be undoubtedly controversial.¹⁰⁰ It may nonetheless prove extremely successful in ushering in a new era of increased human rights and decreased political corruption.¹⁰¹

III. TRADE RIGHTS ENFORCEMENT ACT

In an attempt to bring members into the international legal framework for copyright protection, the WTO incorporated the Trade Related Aspects of Intellectual Property Rights (TRIPS) into its charter.¹⁰² The TRIPS agreement sets forth minimum protection standards by which each member country must abide.¹⁰³ TRIPS is essentially an amalgam of previous international agreements on intellectual property rights, including the agreements of the World Intellectual Property Organization (WIPO), the Paris Convention for the Protection of Intellectual Property (Paris Convention), and the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention).¹⁰⁴ Additionally, TRIPS added several provisions dictating obligations where the incorporated treaties were insufficient or silent.¹⁰⁵

TRIPS advances intellectual property rights by setting forth minimum standards of protection for which each country is

99. *Id.*

100. *Id.*

101. Economy, *supra* note 68.

102. PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION 51 (2005). (noting that developed countries advocated the inclusion of TRIPS in the WTO).

103. *A More Detailed Overview of the TRIPS Agreement*. Published by the World Trade Organization Available at http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last visited April 1, 2006).

104. *Id.* (noting that the Berne Convention's provision on Moral Rights are excluded from the TRIPS Agreement).

105. *Id.*

responsible.¹⁰⁶ WTO member countries are subject to the WTO's dispute settlement procedures for conflicts that arise from intellectual property disputes.¹⁰⁷ As a result of this framework, American creative industries have better opportunities to sell their products and services abroad because, as United States Register of Copyrights Marybeth Peters stated, "[the frameworks] generate incentive[s] to create and distribute new and better works for the benefit of Americans and the world. It also creates jobs both here, and abroad."¹⁰⁸

In 1983, the U.S. and China established the U.S.-China Joint Commission on Commerce and Trade (JCCT), a bilateral forum charged with the task of discussing and working to resolve problems with bilateral trade and investment policy and its implementation.¹⁰⁹ Through the JCCT, China has made a number of commitments to enforce foreign intellectual property rights.¹¹⁰ These commitments include, *inter alia*, an increase in domestic criminal prosecutions for piracy crimes, a reduction in the export of infringing goods, improvements in the coordination of China's national police force, and an increase in cooperation with foreign law enforcement authorities.¹¹¹ China also agreed to enhance its protection of pirated movies and audio-visual products by dedicating enforcement teams to pursue pirates and instruct national enforcement officers on the nature of pirated material.¹¹²

The TRIPS agreement is the first international intellectual property agreement to focus so much attention on enforcement.¹¹³

106. *Id.*

107. *Id.*

108. *Hearing on Piracy, supra* note 2.

109. Rui-Ruenn Chen, *U.S.-China Trade: Trends and Prospects; Includes Related Article on U.S.-China Joint Commission on Commerce and Trade*, BUS. AM., Jan. 25, 1993, at 6.

110. *The U.S. -China Joint Commission on Commerce and Trade (JCCT) Outcomes on Major U.S. Trade Concerns*, (2005) available at [http://www.ustr.gov/Document_Library/Fact_Sheets/2005/The_US_China_Joint_Commission_on_Commerce_Trade_\(JCCT\)_Outcomes_on_Major_US_Trade_Concerns.html?ht=](http://www.ustr.gov/Document_Library/Fact_Sheets/2005/The_US_China_Joint_Commission_on_Commerce_Trade_(JCCT)_Outcomes_on_Major_US_Trade_Concerns.html?ht=) (last visited April 15, 2006).

111. *Id.*

112. *Id.*

113. *Hearing on Piracy, supra* note 2.

In addition to setting forth enforcement obligations covering policing, customs, and judicial enforcement, the TRIPS agreement provides for the standard application of criminal penalties for willful copyright infringers.¹¹⁴ But even with the adoption of these standards, many problems of application remain.¹¹⁵

Problems with enforcement generally arise in two ways.¹¹⁶ First, a lack of domestic police and court competency prevents proper enforcement.¹¹⁷ Second, a lack of political will and economic incentive contribute to serious enforcement problems in developing countries.¹¹⁸

In an attempt to compel Chinese performance with respect to their international trade obligations under the WTO and the JCCT, Congress has added provisions to the TREA that set forth guidelines for Chinese compliance and provide for executive action if those guidelines are not met.¹¹⁹ The TREA passed in the House on July 27, 2005, and is currently pending in the Senate.¹²⁰ Section 5 of the act charges the United States Trade Representative and the Secretary of Commerce with the task of ensuring that China has implemented a number of measures toward complying with its obligations under TRIPS, the JCCT, and other agreements.¹²¹ The measures are specifically articulated in the statute and include provisions requiring an increase in the prosecution of violators, procedural reform designed to speed up

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. Trade Rights Enforcement Act, H.R. 3282, 109th Cong. §5(1) (2005).

120. Trade Rights Enforcement Act, H.R. 3282, 109th Cong. (2005).

121. *Id.* The Act states that:

In accordance with the terms of the Agreement of WTO Accession for the People's Republic of China, subsequent agreements by the Chinese authorities through the U.S.-China Joint Commission on Commerce and Trade (JCCT), and other obligations by Chinese officials related to its trade obligations, the United States Trade Representative and the Secretary of Commerce shall undertake to ensure that the Government of the People's Republic of China has taken the following steps.

Id.

the prosecution process, procedural reform to increase prosecutorial oversight by the government, and the improvement of bilateral communications with the U.S.¹²² The TREA provides for executive action if the goals are not met.¹²³ Specifically, it provides that if the President determines China has not complied with the measures provided in §§ A-N, or taken steps that result in “significant improvement” of intellectual property protection, the President may appoint a committee to collect evidence to be used against China in a WTO Dispute Settlement Proceeding.¹²⁴

The TREA was the subject of a lively debate in the House of Representatives before it was passed.¹²⁵ Proponents argued that it would establish an effective monitoring system to track China’s compliance with regard to intellectual property rights.¹²⁶ They argue that these reporting systems would provide the transparency that has been lacking in the area.¹²⁷

Opponents have argued, among other things, that the act was not been given proper consideration in the House.¹²⁸ Representative James P. McGovern stated, “[The] bill. . .has never gone before committee, never had a hearing, never had the benefit of expert testimony, never had a markup, and has never been open to

122. *Id.*

123. *Id.*

124. Trade Rights Enforcement Act, H.R. 3282, 109th Cong. §5(2) (2005)
The Act states that:

If the President determines that the People’s Republic of China has not met each of the obligations described in subparagraph (A) through (N) or taken steps that result in significant improvements in protection of intellectual property rights in accordance with its trade obligations, then the President shall assign such resources as are necessary to collect evidence of such trade agreement violations for use in dispute settlement proceedings against China in the World Trade Organization.

Id. For information on the WTO’s Dispute Settlement Body, See *infra* Section IV E.

125. 151 Cong. Rec. H6558, 6559 (daily ed. July 27, 2005).

126. *Id.* (statement of Rep. Putnam).

127. *Id.*

128. *Id.* (statement of Rep. McGovern).

amendment.”¹²⁹ McGovern did not end his criticism there: “[T]he Chinese Government,” he remarked, “must be laughing with glee at the Republican leadership’s blatant abuse of power in their lock-step rejection of democratic debate.”¹³⁰ The TREA’s opponents proposed a series of amendments but they were blocked from a vote by the majority.¹³¹

IV. INTERNATIONAL COPYRIGHT PROTECTION

The TREA allows the U.S. to bring an action against China in the WTO’s dispute settlement framework.¹³² Before it may be judged on its merits, it is essential to outline the basic history, structure and functioning of the WTO and its Dispute Settlement Body (DSB).

A. The Origins of the WTO

The history of the WTO provides keys to understanding its structure. Following World War II, there was a movement among world leaders to establish an international body charged with overseeing the expansion of free trade among nations.¹³³ The initial creation, the International Trade Organization, died a “still-birth” largely due to opposition in the U.S. Senate.¹³⁴ The failure of the organization paved the way for the General Agreement on Tariffs and Trade (GATT), which continues to play an

129. *Id.*

130. *Id.* Rep McGovern is referring to the lack of Congressional debate regarding the Act and the blockage of attempts by the minority to propose substantial amendments to the Act that would arguably give it more teeth. *Id.* Rep McGovern continued, “the Committee on Rules has become a place where democracy comes to die. Heaven forbid that this House might actually have a real debate on these matters and heaven forbid that the Republican Majority might actually allow votes on these serious unfair trade practices.” *Id.*

131. 151 Cong. Rec. H6558, 6559 (daily ed. July 27, 2005).

132. Trade Rights Enforcement Act, H.R. 3282, 109th Cong. §5(2) (2005).

133. VAN DEN BOSSCHE, *supra* note 100, at 78-9.

134. BARRY E. CARTER ET AL., INTERNATIONAL LAW 498 (Erwin Chemerinsky et al. eds. Aspen Publishers 4th ed. 2003).

instrumental role in building world trade.¹³⁵ The goal of GATT is, simply stated, to promote trade liberalization by eliminating tariffs and other forms of trade restrictions, including quotas and quantitative trade restrictions.¹³⁶ GATT assigned four principal obligations to its members:

On joining GATT [member-states] undertook to (1) apply trade barriers on a nondiscriminatory basis; (2) limit tariffs on items at the levels set forth in the GATT tariff schedule; (3) refrain from circumventing trade concessions through the use of other barriers to trade; and (4) settle trade conflicts via consultation and special dispute resolution process.¹³⁷

In order to facilitate the advancement of the first of these four obligations, GATT set forth two principles fundamental to the achievement of nondiscrimination.¹³⁸ The first, most favored nation treatment (MFN), prohibits discrimination between goods from different foreign states.¹³⁹ Professor Peter Van den Bossche, a former Counsellor to the Appellate Body of the WTO, stated that “[t]he principal purpose of MFN treatment obligations is to ensure *equality of opportunity* to import from, or to export to all WTO members.”¹⁴⁰ The second principle, national treatment obligation, prohibits discrimination against goods from foreign states.¹⁴¹ By contrast, MFN obligations prohibit discrimination *between* foreign states, while national treatment obligations prevent discrimination *against* a foreign state in favor of domestic producers.¹⁴²

Several exceptions to GATT’s nondiscrimination rules do

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. VAN DEN BOSSCHE, *supra* note 100, at 310. (citing Appellate Body Report, *EC – Bananas III*, ¶ 190, WT/DS27 (Sept. 25, 1997) stating that “like products should be treated alike, irrespective of their origin.”)

141. CARTER ET AL., *supra* note 133.

142. VAN DEN BOSSCHE, *supra* note 100, at 308.

apply.¹⁴³ For instance, GATT signatories may request waivers for obligations that are difficult or impossible for the state to fulfill.¹⁴⁴ Additionally, states may impose safeguard measures to protect domestic producers against serious injury.¹⁴⁵ Developing countries, as well as customs unions or free trade areas (such as NAFTA), may be exempt from certain GATT obligations.¹⁴⁶ The fundamental principles and exceptions first set forth in GATT remain at the forefront of the world's effort to liberalize trade.¹⁴⁷

The origin of the WTO lies in the GATT agreements.¹⁴⁸ Indeed, the decisions, procedures, and customary practices of the GATT remain at the core of the WTO.¹⁴⁹ While GATT enjoyed some success with respect to the reduction of tariffs, its ability to control the implementation of nontariff barriers was far less impressive.¹⁵⁰ As Professor John Jackson explained, "The world was becoming increasingly complex and interdependent, and it was becoming more and more obvious that the GATT rules were not satisfactorily providing the measure of discipline that was needed to prevent tensions and damaging national activity."¹⁵¹ Consequently, the United States and a few other countries pushed for a new round of trade negotiations with a broad agenda including discussion of new topics such as trade in services and protection of intellectual property.¹⁵² In September 1986, at Punta

143. CARTER ET AL., *supra* note 133.

144. VAN DEN BOSSCHE, *supra* note 100, at 116. "One of the most important waivers currently in force is a waiver of the MFN treatment obligation under Article 1:1 of the GATT 1994, granted to the European Communities, with respect to preferential tariff treatment given to products of African, Caribbean and Pacific countries...." *Id.*

145. CARTER ET AL., *supra* note 133. ("The other country retains a right to claim redress").

146. *Id.* See VAN DEN BOSSCHE, *supra* note 100, at 662-67 (describing in greater detail the exceptions relating to regional trading unions and developing countries).

147. *Id.*

148. VAN DEN BOSSCHE, *supra* note 100, at 78.

149. *Id.*

150. *Id.* at 82.

151. *Id.* (quoting JOHN JACKSON, THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE 24 (1998)).

152. *Id.*

del Este, Uruguay, GATT contracting parties agreed to the start of a new, broader round of trade negotiations.¹⁵³ The resulting Uruguay Round would cover trade in services, including the protection of intellectual property rights.¹⁵⁴

Although the need for institutional reforms to the GATT was recognized at the outset of the Uruguay Round, ambitions toward this end were limited.¹⁵⁵ It was not until February 1990 that Renato Ruggiero, who would later become the Director-General of the WTO, “first floated the idea of establishing a new international organization for trade.”¹⁵⁶ Canada then “formally proposed the establishment of . . . a ‘World Trade Organization’, a fully-fledged international organization which was to administer the different legal instruments related to international trade, including the GATT. . . and other multilateral instruments which were being developed in the context of the ongoing negotiations.”¹⁵⁷ The United States, however, was opposed to the creation of such a powerful, centralized organization devoted to world trade.¹⁵⁸ Major trading nations were reluctant to submit to an organization that may “[t]ie their hands.”¹⁵⁹ The prospect of entering into a system of equal voting also discouraged powerful trading countries from supporting the development of an international trade organization.¹⁶⁰ Despite these challenges, in 1991, Canada, Mexico and the European Community drafted a proposal for the creation of an international trade organization.¹⁶¹ The U.S. remained opposed to such an organization: by 1993, it had become

153. *Id.*

154. VAN DEN BOSSCHE, *supra* note 100, at 83.

155. *Id.*

156. *Id.* (noting Mr. Ruggiero would later become the second Director-General of the WTO).

157. *Id.* (citing TERRENCE P. STEWART, *THE GATT URUGUAY ROUND* (Kluwer Law and Taxation 1933) (1944)).

158. *Id.* at 84.

159. *Id.* (citing John Jackson, *Strengthening the International Legal Framework of the GATT-MTN System: Reform Proposals for the New GATT Round 1991*, in *THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS: LEGAL AND ECONOMIC PROBLEMS* 21 (Ernst-Ulrich Petersmann & Meinhard Hilf eds., 1991)).

160. VAN DEN BOSSCHE, *supra* note 100, at 84.

161. *Id.*

“increasingly isolated on the issue.”¹⁶² Perhaps as a result of this isolation, on December 15, 1993, the United States formally agreed to the establishment of the new organization.¹⁶³ The Agreement Establishing the World Trade Organization was signed in April 1994 and entered into force on January 1, 1995.¹⁶⁴

B. The WTO Structure

The ultimate goals of the WTO are an increase in the standard of living for all of the world’s people, the attainment of full employment, the growth of real income, and the expansion of the production and trade of goods and services.¹⁶⁵ In addition to these broad and ambitious goals, the WTO sets forth, in its preamble, two important concepts missing from the GATT: “The preamble stresses the importance of *sustainable* economic development and of the *integration* of developing countries, and in particular least-developed countries, in the world trading system.”¹⁶⁶ Like GATT, however, the WTO focuses on the reduction of trade barriers and the elimination of discrimination as the means of attaining its goals.¹⁶⁷

Perhaps most importantly, unlike GATT, the WTO has an expansive infrastructure designed to implement and oversee the functions and tasks assigned to it.¹⁶⁸ The institutional structure of the WTO is a hierarchical system, consisting of various bodies and committees.¹⁶⁹ At the highest level is the Ministerial Conference, which enjoys general decision-making power, as well as a number of specifically enumerated powers.¹⁷⁰ The second level consists of

162. *Id.* at 85.

163. *Id.* (providing insight concerning the political posturing that led to the name change of the proposed organization from the Multilateral Trade Organization to the World Trade Organization).

164. *Id.*

165. *Id.* at 86.

166. VAN DEN BOSSCHE, *supra* note 100, at 84.

167. *Id.* at 87.

168. *Id.* at 119-20.

169. *Id.* at 120.

170. *See id.* at 123. (listing specific powers such as adopting authoritative interpretations of WTO agreements, granting waivers, adopting amendments,

the General Council, the DSB and the Trade Policy Review Board (TPRB).¹⁷¹ The lower levels are comprised of committees, working parties, and specialized councils.¹⁷² While the WTO's structure may at first glance appear to mirror that of many large multilateral organizations, important distinctions exist.¹⁷³ Notably, the WTO does not have any permanent body through which dialogue between the WTO, nongovernmental organizations (NGOs) and civil society may occur.¹⁷⁴ Further, the WTO lacks an executive branch consisting of core members, that could "facilitate the process of deliberation and decision making."¹⁷⁵ Despite these limitations, the WTO provides the political structure necessary for the negotiation of new policies, implementation of those policies and dispute resolution between member states.

C. China's Accession to the WTO

China joined the WTO in 2001.¹⁷⁶ The negotiations that led to China's accession were the most difficult and most important negotiations in the WTO's history.¹⁷⁷ The negotiations took almost fifteen years and spawned a legal agreement of some 900 pages.¹⁷⁸ China was determined to join the WTO and accepted terms, that, according to China expert, Nicholas Lardy, are "so onerous they violate the fundamental principles of the WTO."¹⁷⁹ In the decade leading up to its WTO accession, China reduced tariff barriers so dramatically that it had the least protection of any developing

decisions on accession and appointing Director-General and adopting staff regulations).

171. VAN DEN BOSSCHE, *supra* note 100, at 120; *see infra* Parts E-F (providing a more detailed examination of the role and function of the DSB).

172. *Id.*

173. *Id.*

174. *Id.*; *see also id.* at 154-62 (providing a more detailed treatment of these issues).

175. *Id.*

176. *Hearing on Piracy, supra* note 2.

177. VAN DEN BOSSCHE, *supra* note 100, at 113.

178. *Id.* at 114. (noting that China began negotiations to enter the GATT before the creation of the WTO).

179. Hughes, *supra* note 19. (quoting Nicholas Lardy, Institute for International Economics).

country in the world.¹⁸⁰ Incredibly, China abolished or amended some 2,600 domestic laws in order to better comply with WTO obligations.¹⁸¹

Most notably, China agreed to be considered a “nonmarket” economy by other WTO members.¹⁸² This label allows countries accusing China of dumping goods to use surrogate prices from WTO-designated market economies such as India, instead of actual market prices in China, to make their case that China is dumping goods.¹⁸³ Trade scholar Neil C. Hughes believes that “[t]he procedure is at best arbitrary and at worst grossly unfair to Chinese exporters.”¹⁸⁴ China has begun approaching trading partners, asking them to waive their “nonmarket” classification.¹⁸⁵ Although a dozen WTO members have agreed, the U.S. and the European Union (E.U.) have so far refused.¹⁸⁶

In addition to the nonmarket economy designation, China’s accession agreement allows the U.S. to impose “safeguards” against Chinese textile products.¹⁸⁷ China’s accession agreement permits safeguards to be implemented against its textile industry whenever imports create or threaten to create market disruptions.¹⁸⁸ Without such an agreement, a state that wishes to impose safeguard measures must demonstrate an increase in imports, a serious injury, and a causal link between the imports and the injury.¹⁸⁹ Safeguard measures are imposed in the form of customs duties or quotas, and are designed to protect domestic industries from the inflow of foreign goods.¹⁹⁰ The Agreement on Safeguards

180. *Id.*

181. *Id.* (noting that China also passed legislation on issues such as intellectual property).

182. *Id.*

183. *Id.* see *infra* Part V(A) (arguing that the ‘non-market’ classification is unwarranted).

184. *Id.* (citing the U.S.-China Business Council).

185. Hughes, *supra* note 19.

186. *Id.*

187. *A Knotty Problem*, *supra* note 31.

188. *Id.*

189. VAN DEN BOSSCHE, *supra* note 100, at 641.

190. *Id.* at 636.

clearly requires that safeguards be applied on an MFN basis.¹⁹¹ Accordingly, safeguards levied exclusively against Chinese goods are in opposition to the principal of MFN, which forbids restrictions against one country at the exclusion of others.¹⁹² They have, however, been employed against China's textile industry, and may prove an integral feature in future trade negotiations between the U.S. and China.¹⁹³

D. The Formation of the G20

In 2003, during the lead-up to the WTO's Ministerial Conference in Cancun, Mexico, a new and powerful group of developing countries banded together to demand the dismantling of protectionist agriculture policies of the United States and the European Community.¹⁹⁴ The group, known as the G20, includes powerful developing nations such as China, India, Brazil, Egypt and South Africa.¹⁹⁵ This alliance represents over half the world's population and two-thirds of its farmers.¹⁹⁶ The G20 is powerful and ambitious and it frames the debate in terms of rich versus poor.¹⁹⁷ G20 countries want an elimination of export subsidies, substantially reduced domestic subsidies, and bigger tariff cuts by rich countries.¹⁹⁸

E. An Overview of the WTO's Dispute Settlement Body

The dispute settlement system under GATT was not elaborate and far from effective.¹⁹⁹ Reform of the GATT system was a high

191. *Id.* at 638. (noting that there are exceptions to this rule, including if the defendant member's exports are increasing disproportionately to the total increase in imports of the complaining country).

192. *Id.*

193. *Textile Trade Politics: A Knotty Problem*, *supra* note 31.

194. VAN DEN BOSSCHE, *supra* note 100, at 106-07.

195. *Id.* at 106.

196. *Posturing in Cancun*, *ECONOMIST*, Sept. 13, 2003, at 67.

197. *Id.*

198. *Id.*

199. VAN DEN BOSSCHE, *supra* note 100, at 180.

priority at the Uruguay Round.²⁰⁰ The result of negotiations at the Uruguay Round was the adoption of the Dispute Settlement Understanding (DSU), which provides for an elaborate judicial system governing world trade.²⁰¹ The DSU created an administrative organization, called the Dispute Settlement Body (DSB), to implement the system.²⁰² The system is charged with the effective resolution of disputes between WTO members with regard to their respective rights and obligations under WTO treaties.²⁰³ The jurisdiction of the DSU is both compulsory and exclusive.²⁰⁴ Compulsory jurisdiction provides that any complaining member must bring any dispute arising from an alleged breach of WTO treaties to the WTO dispute settlement system, and that any responding member must accept the jurisdiction of the WTO.²⁰⁵ Exclusive jurisdiction prevents unilateral action from being taken without the complaining country bringing an action before the DSB.²⁰⁶ In other words, exclusive jurisdiction prevents any country from acting independently to redress a grievance.²⁰⁷

Once an action is initiated and jurisdiction is established, four major steps may be required before the action is complete.²⁰⁸ The first phase of dispute settlement in the WTO is known as consultation.²⁰⁹ The main goal of the WTO dispute settlement mechanism is to achieve settlements agreed upon by both parties through negotiation; this is known as consultation.²¹⁰ The DSU itself states, “The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually

200. *Id.*

201. *Id.* at 181-82.

202. *Id.* at 228. (noting that the DSB has broad authority to implement the system established in the DSU).

203. *Id.* at 181-82.

204. *Id.* at 189.

205. VAN DEN BOSSCHE, *supra* note 100, at 189.

206. *Id.* at 190.

207. *Id.*

208. *Id.* at 203-04.

209. *Id.* at 203. (noting that consultation refers to the emphasis placed on negotiation as a way of dispute resolution).

210. VAN DEN BOSSCHE, *supra* note 100, at 183.

acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred.”²¹¹ Additionally, the DSU emphasizes the quick resolution of disputes.²¹²

If negotiations fail, a complaining party may then bring their dispute before a panel for a panel proceeding.²¹³ Panels are comprised of three individuals, although the disputing members may agree to amend that number to five.²¹⁴ Panelists are usually retired government trade officials with a background in law.²¹⁵ Panel participants are selected by the disputing parties and generally may not include nationals of any of those parties.²¹⁶ If a party to the dispute is a developing country, the panel must include at least one panelist from another developing country, if that party so requests.²¹⁷ Generally, panelists are proposed by the WTO Secretariat and may then be opposed by the parties.²¹⁸ If the parties are not capable of reaching an agreement on the panel’s composition, the Director-General may be called upon to appoint the panelists.²¹⁹ The panel, once comprised, is charged with reviewing the panel request (the complaint) and rendering a decision.²²⁰ The panel’s scope of review is limited to the “terms of

211. *Id.* (quoting Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, Article 3.7 (1994) [hereinafter DSU Agreement]).

212. *Id.* (quoting, Article 3.3 of the DSU Agreement, which states, “[Prompt settlement is] essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and the obligations of Members.”).

213. *Id.* at 204.

214. *Id.* at 235. (noting that no panel of five has yet been established).

215. VAN DEN BOSSCHE, *supra* note 100, at 235.

216. *Id.* (noting that parties may agree to such appointments and that they occasionally do).

217. *Id.*

218. *Id.* at 236. (noting that although parties are only supposed to challenge potential panelists for compelling reasons, in practice parties often reject panelists with little justification.).

219. *Id.*

220. *Id.* at 238.

reference” set forth in the panel request.²²¹ This limitation to the terms of reference is important for two reasons.²²²

First, terms of reference fulfill [sic] an important due process objective—they give the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant’s case. Second, they establish the jurisdiction of the panel by defining the precise claims at issue in the claim.²²³

It is relevant here to note that an agreement outside the WTO may not be added to the terms of reference.²²⁴ Once the panel has been established and the terms of reference set, the panel is called upon to determine the legality of the challenged measure with respect to WTO law.²²⁵

The panel will then publish its findings in a panel report.²²⁶ If the panel has determined that a party to the dispute is in violation of its commitments under a WTO agreement, the panel recommends in the panel report that the offending member bring themselves into conformity with the agreement.²²⁷ These recommendations are not

221. VAN DEN BOSSCHE, *supra* note 100, at 237.

222. *Id.*

223. *Id.* (quoting Appellate Body Report, *Brazil – Desiccated Coconut*, 186, WT/DS30 (Mar. 20, 1997)).

224. AMRITA NARLIKAR, *THE WORLD TRADE ORGANIZATION: A VERY SHORT INTRODUCTION*, 90 (2005).

There are three kinds of complaints that may be brought before the DSB. The first is for a breach of rules relating to a WTO agreement. The second is a ‘non-violation’ complaint, which alleges that the complaining member’s benefit *under a WTO agreement* is being impaired by measures taken by another member. The third type of allowable complaint is where a member’s benefit *under a WTO agreement* is being impaired by any other situation.

Id. [emphasis added].

225. VAN DEN BOSSCHE, *supra* note 100, at 237.

226. *Id.* at 242.

227. *Id.* at 243.

automatically binding.²²⁸ They become binding only after they are adopted by the DSB.²²⁹ All that is required for adoption, however, is the reverse consensus of its members.²³⁰ The reverse consensus requirement dictates that a panel report will be adopted unless *all* members agree *not* to accept the decision.²³¹ Panels may also make suggestions about how to implement the necessary measures.²³² Although these suggestions are not binding, they may have considerable impact because the panel may later be called upon to determine the success of the implementation.²³³

The losing party to a dispute may appeal the panel's finding in the appellate mechanism of the DSB.²³⁴ The appellate body is a permanent body charged with the review of panel decisions.²³⁵ After the appellate body receives and reviews an appeal, it has the discretion to uphold, modify or reverse the panel report.²³⁶ Appellate body inquiries are limited in scope to questions of law.²³⁷ Incentives to an appealing party, however, may be great.²³⁸ An appeal that proves unsuccessful allows the offending party to continue its violations during the course of the appeal process.²³⁹ Additionally, an appeal may have domestic political impact because it can prove to domestic interests that the government has exhausted all possible measures to protect domestic industry.²⁴⁰

F. Remedies Under the DSB

There are three potential remedies available following a panel

228. *Id.*

229. *Id.*

230. *Id.* at 229.

231. VAN DEN BOSSCHE, *supra* note 100, at 229 (noting that in order for the report not to be adopted, the winning country would have to vote against the judgment).

232. *Id.* at 243.

233. *Id.*

234. *Id.* at 244.

235. *Id.*

236. *Id.* at 252.

237. VAN DEN BOSSCHE, *supra* note 100, at 250.

238. *Id.*

239. *Id.*

240. *Id.*

decision.²⁴¹ The first of these remedies is the withdrawal of the measure that violates WTO law.²⁴² This remedy may also be achieved by amending the offensive measure.²⁴³ If these measures prove difficult to reform; the party has a reasonable period of time to make the changes.²⁴⁴ This reasonable time period will be negotiated or created through binding arbitration.²⁴⁵ The arbitration may be influenced by considerations such as whether the state is a developing country and whether the changes may be implemented in a practical and efficient manner.²⁴⁶ Removal or repair of the inconsistent measure is the only final solution to a WTO dispute.²⁴⁷

International law has generally struggled to induce compliance with legal obligations.²⁴⁸ Indeed, the enforcement of panel and appellate reports has been problematic as well.²⁴⁹ Scholar Judith Bello has suggested why:

The WTO rules are simply not ‘binding’ in the traditional sense. When a panel established under the WTO Dispute Settlement Understanding issues

241. *Id.* at 217.

242. *Id.*

243. VAN DEN BOSSCHE, *supra* note 100, at 217.

244. *Id.* at 218.

245. *Id.*

246. *Id.* at 218-19.

247. *Id.* at 220.

248. John H. Jackson, *International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to ‘Buy Out’?*, 98 A.J.I.L. 117, (2004) (providing an excellent summary of the lengthy scholarly debate over whether WTO panel and appellate reports create international legal obligations). Although Jackson notes that the remedies may be “deeply flawed”, he argues that the function of “a panel or...appellate report that rules that the laws or other measures of a respondent nation are inconsistent with its WTO obligations is to create an international law obligation to comply with that report...”. *Id. cf.* Judith Hippler Bello, *The WTO Dispute Settlement Understanding: Less Is More*, 90 A.J.I.L. 416, 416-17 (1996);

249. *Id.* For a markedly different perspective on this debate, critiqued by Jackson, see Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. LEGAL STUD. S179 (2002) (arguing that the dispute settlement system encourages “efficient breaches” of panel and appellate reports).

a ruling adverse to a member, there is no prospect of incarceration, injunctive relief, damages for harm inflicted or police enforcement. The WTO has no jailhouse, no bail bondsman, no blue helmets, no truncheons or tear gas. Rather the WTO—essentially a confederation of sovereign national governments—relies upon voluntary compliance.²⁵⁰

If the losing party fails to voluntarily remove its measure, two temporary remedies may be invoked.²⁵¹ Compensation is available but it must be agreed on by both parties, and thus, it is rarely achieved.²⁵² The suspension of concessions or other obligations by the winning party, or the implementation of barriers, also known as retaliation, is more common.²⁵³ If the reasonable period of implementation lapses, the injured party may employ retaliatory measures against the violating party.²⁵⁴ This measure of last resort may well prove injurious to both parties and should be avoided if possible.

V. LEGAL ANALYSIS

The TREA seeks to compel Chinese enforcement of intellectual property rights through a list of demands, with a provision authorizing a WTO dispute settlement action if those demands are not met.²⁵⁵ The answer to the problem of intellectual property protection in China is negotiation, but not negotiation through

250. *Id.* (quoting, Judith Hippler Bello, *The WTO Dispute Settlement Understanding: Less Is More*, 90 A.J.I.L. 416, 416-17 (1996)). Jackson points out that Bello, in a subsequent article, clarified this argument stating that “the WTO establishes binding obligations, although I continue to regard favorably the [WTO]’s realistic recognition that it cannot enforce specific compliance.” *Id.* (quoting, Judith Hippler Bello, Book Review, 95 A.J.I.L. 984, 986-987 (2001)) (reviewing John H. Jackson, *The Jurisprudence of GATT & the WTO*).

251. VAN DEN BOSSCHE, *supra* note 100, at 220.

252. *Id.* at 221.

253. *Id.* Retaliation may be the only way of compelling enforcement in many cases. *See generally*, Jackson *supra* note 248.

254. *Id.* at 220.

255. Trade Rights Enforcement Act, H.R. 3282, 109th Cong. §5 (2005).

legislation. This part will illustrate the flaws in the Act's treatment of the issues. Next, it will demonstrate that if the Executive Branch does utilize the legislation, it will be to the detriment of the U.S. Finally, the analysis will suggest that the way to protect U.S. intellectual property rights in China is through negotiation and teamwork.

A. The Act's Shortcomings

The TREA (1) fails to recognize the issues that prevent China from enforcing its IP obligations. It does not set out goals and guidelines with requisite specificity. It declines to compel action, suggesting that the legislature wishes to use the TREA as a bargaining chip not as authorization to bring in action in the WTO.

1. The TREA Does Not Address the Real Issues

Many of the TREA's provisions ignore the larger problems if intellectual property enforcement and demand action that will yield little or no actual results. The first measure on the TREA's list of actions that China must implement provides a relevant example. It reads in part, "[t]he Chinese Government has increased the number of civil and criminal prosecutions of intellectual property rights violators by the end of 2005 to a level that significantly decreases the current amount of infringing products for sale within China."²⁵⁶ This demand is predicated on the false assumption that an increase in the number of prosecutions of intellectual property pirates will lead to a decrease in the amount of infringing products. This assumption is incorrect. As noted above, a Chinese piracy operation may simply re-open following prosecution, and it is very difficult to acquire the evidence necessary for legal action.²⁵⁷

Further, the TREA does not address the major evidentiary obstacles that prevent effective litigation against Chinese pirating rings, namely, that the burden is on the plaintiff to amass all

256. Trade Rights Enforcement Act, H.R. 3282, 109th Cong. §5(J) (2005).

257. *See supra* Part I(C).

evidence necessary at trial before commencing an action.²⁵⁸ Additionally, there are no substantial penalties to prevent criminal infringers from destroying evidence once they learn of a suit.²⁵⁹ The TREA simply ignores these issues. Effective enforcement of U.S. intellectual property rights in China will never be realized if these evidentiary burdens are not reduced.

In addition to the massive evidentiary burden facing plaintiffs, there is a larger and perhaps more troubling issue at hand: the lack of cultural trade reciprocity between the U.S. and China. The backbone of international intellectual property rights enforcement is reciprocity. One perspective suggests that aggressively combating criminal infringers makes little sense for China. Because the Chinese do not export significant amounts of copyrightable goods, there is little incentive for them to protect foreign copyrightable goods.²⁶⁰ Estimates suggest as many as 750,000 U.S. jobs are lost to counterfeit products, mainly from China.²⁶¹ These jobs do not simply disappear. They are filled in China by Chinese infringers. The result is a strong disincentive for China to enforce U.S. intellectual property rights. The enforcement of these rights takes jobs and goods, however illegal, away from China. The TREA is unfortunately silent on this issue, when in fact, there may be several steps the U.S. can take to help mitigate this problem.

2. *The Act Lacks Adequate Detail*

Where the TREA manages to overcome these apparent oversights, it suffers from a striking lack of specificity, coupled with a lack of quantitative or qualitative measure of success. In Section 5(J), it calls for the improvement of intellectual property protection at trade shows and the issuance of new regulations towards this end.²⁶² It provides no measure of what may be

258. Ying Tuo, *supra* note 74.

259. *Id.*

260. *See supra* note 58.

261. 151 CONG. REC. H6658, 6660 (daily ed. July 27, 2005) (Statement of Rep. Rogers).

262. Trade Rights Enforcement Act, H.R. 3282, 109th Cong. §5(A) (2005).

considered a significant improvement in these rights, and it asks for the issuance of new regulations without regard to how or when those regulations are to be implemented.

The TREA provides for a bilateral law enforcement group to work on the problem of cross-border infringement, requiring that, “The Chinese Government has established a bilateral intellectual property rights law enforcement working group in cooperation with the United States whose members will cooperate on enforcement activities to reduce cross-border infringing activities.”²⁶³ This provision suffers from at least two flaws. First, the provision lacks specificity with regard to which U.S. offices will be charged with coordinating with the newly formed Chinese enforcement agency. Second, and more fundamentally, the provision primarily targets cross-border infringement; although this is significant, it ignores a critical phase of infringement—the actual manufacture of infringing goods.

3. *Negotiation Cannot Be Affected Through Legislation*

The TREA is toothless because it provides an escape clause. This shortcoming indicates the legislature’s desire not to implement the dispute settlement clause of the act. Instead, the TREA appears to be list of demands, better suited for a negotiating table than the floor of Congress.

The House’s Democratic minority astutely attacked the TREA for being long on rhetoric and short on substance: “It has no teeth,” said Representative Louise Slaughter.²⁶⁴ Slaughter’s statement cuts to the heart of the TREA’s shortcomings. The relevant provisions are aimed at *monitoring* China’s implementation of the legal framework discussed above. The legal framework, however, means nothing without effective enforcement and the act provides little in terms of compelling such enforcement. Representative James McGovern summarized this sentiment: “[The TREA] is largely symbolic. This bill is not tough. It is ineffective.”²⁶⁵

263. Trade Rights Enforcement Act, H.R. 3282, 109th Cong. §5(E) (2005).

264. *Id.*

265. *Id.* (statement of Rep. McGovern). Although Rep. McGovern’s remarks were directed generally toward the Act, they apply quite relevantly to the

McGovern's allegations are supported by an examination of the statutory language. It lists all the steps that should be monitored, and mandates that the President act if they are not fulfilled; it then provides a convenient backdoor for the Executive Branch to excuse a lack of compliance:

If the President determines that the People's Republic of China has not met each of the obligations described in subparagraphs (A) through (N) *or taken steps that result in significant improvements in protection of intellectual property right* then the President shall assign such resources as are necessary to collect evidence of such trade agreement violations for use in dispute settlement proceedings against China in the World Trade Organization.²⁶⁶

The TREA spells out fourteen affirmative steps that China must take in order to forestall executive action, and then abandons these requirements by providing the executive with an entirely subjective test as to whether or not to follow through with the action.

The TREA further states that China must comply with its obligations under the JCCT.²⁶⁷ The WTO's dispute settlement body however, may not here arguments based on China's alleged violations of the JCCT. The JCCT is a bilateral negotiating commission.²⁶⁸ Since benefits that should accrue to the U.S. under the JCCT are not benefits under a WTO agreement, no complaint based on the loss of those benefits may be brought to the DSB.²⁶⁹

Finally, the Constitution grants the President the authority to

intellectual property portions of the Act.

266. Trade Rights Enforcement Act, H.R. 3282, 109th Cong. §5 (2005).

267. *Id.*

268. The U.S. China Commission on China and Trade, available at http://www.ustr.gov/World_Regions/North_Asia/China/US-China_JCCT/Section_Index.html?ht= (last visited April 15, 2006).

269. *See supra* note 224.

serve as the Commander in Chief of the military, to make treaties, and to appoint and receive ambassadors.²⁷⁰ The President's power has been expanded beyond the explicit constitutional mandate to encompass the general right to conduct foreign relations.²⁷¹ Implicit in this power is the right to bring an action on behalf of the U.S. before the WTO. This right makes the TREA's grant of power entirely unnecessary, further suggesting that the Act is simply a list of demands, not an effective piece of legislation. These errors may only be an oversight, but such mistakes indicate lack of U.S. commitment to bring an action before the WTO. These sections provide evidence of the legislature's desire to use the TREA as a bargaining chip rather than a commitment to bring an action before the WTO.

B. Potential Results of a WTO Action

Regardless of whether Congress intends to use this legislation as a threat, or to actually bring China before the WTO for their intellectual property rights violations, it will be ineffective. A threat is only as influential as its possible effect and, put simply, a decision by the DSB in favor of the U.S. would hurt both the U.S. and China. Since China is in no position to immediately comply with its obligation to enforce foreign IP rights, the only available remedy would be a temporary one.²⁷² If China is granted a "reasonable period of time" to comply with the DSB's findings, that period may be quite long. Regardless of the length, however, it appears quite certain that the U.S. will end up in a position where temporary remedies are authorized. Scholars Susan Esserman and Robert Howse have noted this: "A losing state. . . might have understandable domestic political reasons why it is not able, for example, to overhaul a complex scheme of legislation in the short or medium term."²⁷³ Esserman and Howse conclude that,

270. U.S. CONST. art. II, § 2, cl. 2. Two-thirds of the present Senate must concur. *Id.*

271. CARTER ET AL., *supra* note 133, at 193.

272. *See supra* Part IV F.

273. Susan Esserman & Robert Howse, *The WTO on Trial*, FOREIGN AFF., Jan.-Feb. 2003, at 137.

if a losing party in such a situation fails to comply with a ruling, a panel may award the winner the right to retaliate.²⁷⁴

Temporary remedies come in two forms: compensation and the suspension of concessions.²⁷⁵ Since compensation requires both countries to agree on a number, it is rarely utilized.²⁷⁶ It would appear that any successful action by the U.S. would result in the WTO authorizing the U.S. to take retaliatory steps against China. Such an outcome is undesirable because (1) it will adversely effect both the U.S. and China, (2) it will not help to change China's inability to enforce IP rights, (3) it will increase tension in the already delicate trading and political relationships between the U.S. and China, and (4) it will lead directly to a decrease in the liberalization of trade, an outcome in direct opposition to the policy goals of the WTO.

1. For Every Action. . .

A threshold problem for the U.S., if granted authority to retaliate by the WTO, is that the U.S. must determine where to focus its retaliatory measures. Article 22.3 of the DSU provides that the retaliating country should seek to levy sanctions upon the same sector or industry whose domestic counterpart is being harmed.²⁷⁷ This will pose a substantial problem with respect to the creative industries harmed by piracy because the U.S. does not import substantial amounts of Chinese cultural goods.²⁷⁸ The DSU further provides that if it is “not practical or effective” to retaliate against the same sector, the retaliating party may retaliate against a sector covered by the same agreement—TRIPS in this case.²⁷⁹ Finally, if

274. *Id.*

275. *See supra* Part IV F.

276. *See supra* IV F.

277. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, available at http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm (last visited April 1, 2006).

278. *See supra* section I C.

279. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, available at http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm (last visited April 1,

a sanction against a sector under the same agreement is “not practical or effective”, the retaliating party may retaliate against a sector in any other WTO agreement.²⁸⁰ At the very least, the U.S. will have a serious domestic political struggle on its hands because, whatever Chinese sector the U.S. decides to target, the American companies with which it trades will inevitably object.

As far back as Adam Smith, economists have noted that retaliation, with respect to trade barriers, harms the retaliating country as well.²⁸¹ Indeed, Smith pointed out that where there is little hope of retaliation affecting a change: “[I]t seems a bad method of compensating the injury done to certain classes of our people, to do another injury ourselves, not only to those classes, but to almost all the other classes of them.”²⁸²

Examples of such harms pervade the history of trade sanctions. In the now-famous WTO cases, *Bananas* and *Hormones*, the U.S. imposed high tariff barriers on imports from the European Community (E.C.).²⁸³ As a result, the U.S. consumers of the targeted E.C. products suffered a loss of choice and had to pay higher prices for substitute products.²⁸⁴ Imposing high tariff barriers or quotas on Chinese goods or services would have similar effect: the injurious effect of trade sanctions on domestic consumers may well defeat any advantages gained from the pressure the sanctions exert on China.

In light of the U.S. trade deficit with China, it is clear that many U.S. companies rely on Chinese imports, and that those companies would suffer from the imposition of trade sanctions against China.²⁸⁵ U.S. consumers and importers might not be the only losers, Jeffrey A. Bader, director of the China Initiative at the Brookings institute explained the dilemma: “Suppose we imposed

2006).

280. *Id.*

281. Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 AM. J. INT’L L. 792, 815 (2001).

282. *Id.* (quoting ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 296 (Kathryn Sutherland ed., Oxford Univ. Press 1998) (1776)).

283. *Id.*

284. *Id.*

285. *See supra* Section I B.

some severe sanctions on Chinese goods. Well, the Chinese companies exporting to the United States are mostly foreign-owned, so you would be hurting those companies, and profoundly hurting the rest of Asia. . . .²⁸⁶ In fact, nearly 60% of U.S. imports from China are produced by foreign firms, many of which are American.²⁸⁷ Congress must be cautious when looking to impose trade sanctions on China as the consequences may be more far-reaching than anticipated.

2. *Creative Industries Create Enforcement*

If the U.S. is able to effectively target China's creative industries, those sanctions would do little to fix the real problems that prevent China from enforcing intellectual property rights; instead, they would contribute to the problems. China must continue to develop and improve its legal system over time in order to properly enforce intellectual property rights. China must also improve its infrastructure in order to effectively prosecute criminal infringers and keep those infringers from reopening after successful prosecution, as is often the case.²⁸⁸ The reform of these institutions requires the Chinese creative industry to be capable of lobbying for change from within China. Trade barriers related to cultural imports will inhibit the growth of China's cultural industries. Trade barriers would have a detrimental effect on emerging Chinese cultural industries as they would increase the price to Chinese exporters and deter foreign investment in China's creative industries. It is these very industries that, if allowed to prosper, will be at the heart of the solution to the problem.²⁸⁹

There is reason to be optimistic about the development of

286. Paul Blunstein, *Fighting Words Belie Trade Reality: U.S. Makes Demands on China but Lacks Power to Force Change*, WASH. POST, April 18, 2006, at D01 (quoting Jeffrey A. Brader, Director of the China Initiative at the Brookings Institute).

287. Hughes, *supra* note 19.

288. Ying Tuo, *supra* note 74.

289. Lawrence Van Gelder provides the relevant example of Hong Kong's film industry looking to the mainland government to increase protection of IP rights. Lawrence Van Gelder, *Hong Kong's Film Slump*, N.Y. TIMES., May 3, 2005, at E5.

China's creative industries. As China has shown its willingness to address problems of IP enforcement, investor confidence has grown.²⁹⁰ Lei Jun, the head of Beijing's Kingsoft Company, which develops software products, announced that the company will invest several million dollars in further product development.²⁹¹ Lei stated, "The amendment of the Copyright Law and China's accession to the [WTO] have enhanced our confidence in doing business."²⁹² Foreign investors are taking note as well. Indeed, a thread of irony runs through the fact that U.S. companies may well play a significant role in the development of China's creative industries. American entertainment companies are excited about the potential opening of China's market.²⁹³ A December 2005 article in the *Los Angeles Times* summarized the thought process of studio executives: "All those people (a fifth of humanity!). Ready to be entertained. Open to American culture. If just a fraction of them went to the movies—once a month, say, and maybe bought a spinoff toy or video game. . . well, do the math."²⁹⁴

As capital is invested in China's creative industry (whether through domestic or foreign channels) and that industry grows, so does its ability to promote intellectual property rights. The process is reciprocal; investment in creative industries leads to stronger intellectual property protection—stronger intellectual property protection leads to increased investment in those industries. The imposition of trade sanctions on China's creative industries, or industries related thereto, will only forestall the development of a necessary prerequisite to protecting intellectual property rights in China.

3. *The Balance Must Be Preserved*

WTO sanctions cannot be viewed in isolation from the problems

290. *Crack Down on Copyright Cheats*, CHINA DAILY, Nov. 22, 2004.

291. *Id.*

292. *Id.*

293. Bruce Wallace, *Crouching U.S. Studios, Hidden Chinese Markets*, L.A. TIMES, Dec. 30, 2005, at E1.

294. *Id.*

that pervade U.S.-China trade relations. Currently, disputes exist in areas including agricultural subsidies, currency manipulation, the flight of labor from the U.S., the textile industry, and human rights.

China is not without leverage. Peter Yeo, a top aide on the U.S. House of Representatives International Relations Committee sounded a note of caution: “There’s a real staying power to this relationship that wasn’t there before. We need [China] as much as they need us.”²⁹⁵ In fact, China’s consumption of U.S. treasury bonds has allowed the U.S. to continue to keep spending in times of economic hardship.²⁹⁶ A significant withdrawal of Chinese investment in the U.S. could send interest rates soaring and the U.S. economy reeling.²⁹⁷ Additionally, if the U.S. is not careful, they may well miss out on an unprecedented period of growth.

China has flexed its muscle before. In response to the imposition of safeguard quotas against Chinese textiles, China removed concessions in the form of export tariffs that were designed to stem the flow of textiles into the U.S.²⁹⁸ Although the removal of these tariffs may not fundamentally alter the structure of U.S.-China trade relations, “[t]he reason to worry. . . is that the textiles spat is part of a broader, more dangerous, rise in trade tension with China.”²⁹⁹ Any further trade restrictions imposed by the U.S. would undoubtedly have consequences, and those consequences may well be severe.

In addition to the troubled trade relation, the political issue of Taiwan looms large over the landscape of U.S.-China relations. As Wang Jisi states, “[w]ar between China and the United States over Taiwan would be a nightmare, and both sides will try hard to avoid it.”³⁰⁰ Separatists in Taiwan, who receive support from certain members of the U.S. defense establishment as well as certain members of Congress, continue to push for independence.³⁰¹ If a

295. Edward Alden et al., *Mistrust and Mutuality: Why U.S.-China Links are Now in Flux*, FIN. TIMES, Apr. 17, 2006, at 11 (quoting Peter Yeo).

296. *Looming Trade War*, *supra* note 21.

297. *Id.*

298. *A Knotty Problem*, *supra* note 31.

299. *Id.*

300. Wang Jisi, *supra* note 42, at 46.

301. *Id.*

conflict does occur, these parties will be to blame.³⁰² The solution to this conflict must come through dialogue: “Chinese and U.S. government agencies and their foreign policy think-tanks should launch a sustained and thorough dialogue on the issue and explore ways to prevent separatist forces from making a rash move. . . .”³⁰³ Any consideration of U.S.-China trade relations must take into account the delicate political balance over the issue of Taiwan, for a mistake on either front could destroy any progress on the other.

4. *The Push for Protectionism*

An April 2005 article in the *Economist* noted that “[t]he pressure toward protectionism in Washington is strong and could put in further danger not only trade with China but also the wider climate for trade liberalization in the Doha round of the World Trade Organization.”³⁰⁴ If the U.S. brings an action against China before the DSB, the result could be a standstill in negotiations at the next round of WTO negotiations. The main goal of the WTO is to lift trade barriers by removing discrimination and thereby increase the quality of life throughout the world.³⁰⁵ Unfortunately, as eminent trade lawyer Steve Charnovitz points out, “[a]nother problem with trade sanctions is that they foment the sort of domestic protectionist pressure that the WTO was set up to constrain.”³⁰⁶ Indeed, domestic protectionism is growing in the U.S.³⁰⁷ If the protectionists win and further sanctions are imposed, the result could be to halt negotiations on intellectual property rights altogether. It is negotiation, however, that is necessary to remedy the problem of intellectual property rights protection in China.

302. *Id.*

303. *Id.*

304. *The China Question; History, Riots and Trade Rows*, THE ECONOMIST, Apr. 23, 2005, at 12.

305. VAN DEN BOSSCHE, *supra* note 100, at 86.

306. Charnovitz, *supra* note 281.

307. *China-Bashing and Trade*, *supra* note 26.

C. Potential Solutions

As a threshold matter, the bilateral negotiations advocated in this analysis and WTO consultation must be distinguished. Since, January 1, 1995, 335 requests for consultations have been made in the DSB.³⁰⁸ Out of those 335 requests, only 50 have been resolved by “mutually agreed solution.”³⁰⁹ This 14.93% success rate cannot be considered a great success in the light of the fact that the WTO places such great emphasis on resolution through consultation.³¹⁰ Several reasons may explain why WTO consultation remains largely ineffective. First, the DSU provides that after only sixty days of consultation, a complaining party may ask for a panel to be established.³¹¹ Also, the parties may, by agreement, request the establishment of a panel before the expiration of the sixty-day term.³¹² Alternatively, bilateral negotiations have no set time frame offering more flexibility as new developments arise. Second, the threat of litigation in the DSB may forestall good faith negotiations as tensions rise and domestic political pressures lead to tough rhetoric and posturing. Bilateral negotiations, on the other hand, may be conducted more amicably without the imminent threat of litigation.³¹³ In the case of IP rights, the U.S. must focus on mutual advantages rather than differences.

Although one may argue sanctions will create incentives to enforce intellectual property rights where there were previously none, such incentives should be offered in the form of further trade

308. Update of WTO Dispute Settlement Cases, WT/DS/OV26, Mar. 1, 2006, available at <http://www.worldtradelaw.net/misc/ov.pdf> (last visited April 15, 2006).

309. *Id.*

310. DSU Agreement, *supra* note 211, Art. 3.7. (stating that “[a] solution mutually acceptable to the parties to a dispute...is clearly to be preferred [to litigation]”). This author calculated the 14.93 percent rate by dividing the 50 successful cases by the 335 total cases which yields approximately 0.01493 or 14.93 percent.

311. VAN DEN BOSSCHE, *supra* note 100, at 258.

312. *Id.*

313. This is not to suggest that countries that solve differences in a bilateral negotiation will not have recourse if the agreements made are breached. In practice, countries include provisions for binding arbitration in the event of a breach.

concessions for compliance, not trade sanctions for noncompliance. These incentives may only be attained through bilateral negotiation. Negotiated concessions, as opposed to sanctions will have a positive effect on domestic markets; concessions will further liberalize trade to the benefit of the U.S. economy. The U.S. must come to the conclusion that China is not working against it; specifically, it must realize that China is not a currency manipulator and does not intentionally dump goods on the U.S. market.

The U.S. must set a place at the negotiation table for China. China is not the only contributor to the bilateral trade gap, and its reputation for currency manipulation and the dumping of goods is unwarranted. China appears willing to work with the U.S. to improve enforcement. Finally, there may be potential solutions for U.S. companies whose products are exploited by criminal infringers and intellectual property pirates in China today.

1. The Trade Deficit Is Not the Result of China Dumping Goods Nor Manipulating Currency

Trade protectionists argue that the trade deficit between the U.S. and China is the result of China's trade policies.³¹⁴ While the accusation is not without merit, the trade deficit results from a number of factors, including U.S. practices. In 2005, the U.S. spent 57% more than it earned in international trade.³¹⁵ The problem is not necessarily how much the U.S. is spending, but why it is spending.³¹⁶ Foreign money is being used to build homes, purchase consumer goods, and finance the increasing federal budget deficit.³¹⁷ Domestic savings rates tell a similar tale. New

314. *China-Bashing and Trade*, *supra* note 26.

315. Paul Krugman, *Debt and Denial*, N.Y. TIMES, Feb. 13, 2006, at A23.

316. *Id.*

317. *Id.* Krugman explains that:

Sometimes large-scale foreign borrowing makes sense. In the 19th century the United States borrowed vast sums from Europe, using the funds to build railroads and other industrial infrastructure. The debt-financing left America stronger, not weaker. But this time overseas borrowing isn't financing an investment boom...business investment is actually low by

York Times columnist Paul Krugman astutely observed, “[p]eople [in the U.S.] who already own homes, are treating them like ATM’s, converting home equity into spending money; last year the personal savings rate fell below zero for the first time since 1933.”³¹⁸ Negative savings rates translate to domestic budget deficits, which in turn contribute to the trade gap. The United States must consider its role in the trade deficit before levying accusations against China.

Protectionists argue that China illegally dumps goods on foreign markets, leading to increased trade deficits.³¹⁹ Additionally, China is still considered a “non-market” economy by the U.S., which allows the U.S. to impose restrictions on Chinese imports by comparing the prices of Chinese goods to the prices charged in other developing country’s economies.³²⁰ A policy that allows countries to use surrogate prices to show dumping, effectively allows accusing countries to prove dumping where there is none. Actually, China’s low import prices are due in large part to the opening of its massive economy.³²¹ Neil C. Hughes provides a relevant example:

Under China’s planned economy, many provinces and large cities had their own TV manufacturers. When the economy opened up, overall capacity far exceeded demand and competition become cutthroat. The result: an all-out price war that has been going on for over a decade, reducing the price of a color TV in China by an astonishing 80 percent in the first five years alone. Now the

historical standards.

Id.

318. *Id.*

319. Hughes, *supra* note 19; The WTO states that dumping goods “occurs when goods are exported at a price less than their normal value, generally meaning they are exported for less than they are sold in the domestic market or third-country markets or at less than production costs.” WTO Glossary, available at http://www.wto.org/english/thewto_e/glossary_e/glossary_e.htm (last visited April 1, 2006).

320. Hughes, *supra* note 19.

321. *Id.*

winner of that race are penalized for their success: in early 2004, Washington decided to apply antidumping duties of up to 78.5 percent on import of Chinese color TVs with screens 21 inches or larger.³²²

The opening of China's economy has been accompanied by an unleashing of market forces that will disrupt the balance of trading power for many years to come. The U.S. cannot expect these forces to be channeled smoothly into world financial markets. China, on the other hand, must take responsibility and work to mitigate damages to its future partners as it grows.

The second major accusation protectionists have levied against China is that China is a currency manipulator.³²³ While there may be some truth to the accusations, several factors contribute to the problem, many of which are beyond China's control. Protectionists point to China's huge stockpiles of foreign reserves as proof of currency manipulation.³²⁴ A comparison of per capita foreign reserves suggests China does not hold reserves disproportionate to its population. China's per capita foreign reserve is \$606; comparatively, Taiwan's per capita foreign reserve is \$9,817 and Japan's is \$6,654.³²⁵ China's per capita foreign

322. *Id.*

323. *China-Bashing and Trade*, *supra* note 26. The GATT Agreement mandates that parties dealing with problems regarding "monetary reserves, balances of payments or foreign exchange arrangements" consult with the International Monetary Fund. GATT 1947 Article XV (2). IMF Article IV section I prohibits parties from manipulating exchange rates to gain unfair competitive advantages.

324. Hughes, *supra* note 19.

325. The CIA World Fact Book estimates that China's foreign reserve holdings are just over 795 billion dollars. Japan and Taiwan's foreign reserve holdings are estimated at 845 billion and 225.8 billion respectively. Population estimates for China, Japan and Taiwan are, rounded to the nearest million, 1,313 million, 127 million and 23 million respectively. This author then took those numbers and calculated, by dividing the population into the reserve holdings and rounding to the nearest dollar. All population estimates are from 2006. China and Taiwan foreign reserve estimates are from 2005 and Japan from 2004. All statistics used are available at <http://www.cia.gov/cia/publications/factbook/rankorder/2188rank.html> (last

reserve is dramatically less than those of its neighbors and U.S. trade allies, Taiwan and Japan. In light of this information it appears that China's large stockpiles of foreign reserves are due in large part to China's massive population.

China's capital inflows demonstrate that China is not intentionally using excess foreign reserves to manipulate exchange rates. In fact, much of China's growth has been funded by foreign direct investors who pour foreign currency into China. As much as 60% of all Chinese exports to the U.S. are made by foreign companies, many of which are American.³²⁶ Additionally, American companies are purchasing Chinese goods at an insatiable rate. Wal-mart, for example, purchased \$18 billion of Chinese goods in 2004.³²⁷ The investment of foreign currency and large-scale purchases of Chinese goods by American companies help keep China's foreign reserve stockpiles high. Put simply, China is the biggest national market in the world, and competitors want in on the ground floor.

Protectionists also argue that the reason for the increasing trade gap with China is China's policy of pegging the yuan to the dollar.³²⁸ The yuan, however, is not undervalued in world markets.³²⁹ The trade gap is not the result of currency manipulation, but instead results from the fact that China's economy can afford to import as many goods as it needs while continuing to out-compete all other countries in the world export market.³³⁰ Additionally, China's large purchases of U.S. treasury bonds require the conversion of yuan to dollars on world financial markets, which keep the price of the yuan down relative to the dollar.³³¹

So where does this controversy come from? One reason for the criticism is rooted in China's use of capital controls, which serve

visited April 1, 2006).

326. Hughes, *supra* note 19.

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.*

331. *Looming Trade War*, *supra* note 21. The U.S. must be especially careful here as China's purchase of U.S. Treasury Bonds contributes to the value of the dollar and keeps inflation in the U.S. down. *Id.*

to keep inflation down.³³² To its credit, China has begun to remove some of these controls. Recent steps by the Chinese government include allowing the use of foreign exchange to buy foreign assets, allowing insurance companies to invest their premiums overseas, and allowing individuals to take foreign currency out of the country.³³³ The transition of China into an open market economy will be one of trial and error. Like any new marriage, the U.S. and China must use their common goals and interests to overcome the obstacles before them. Accusations and name-calling should not be substituted for reason and respect.

2. *China and the U.S. Can Work Together*

The TREA focuses on monitoring and potentially bringing legal action against the Chinese for failure to comply with its standards.³³⁴ The U.S. must not ignore previous and potential future successes that result from working with the Chinese to better enforce intellectual property rights in China. To be sure, previous attempts at such bilateral cooperation have shown initial indications of success. This issue is, at least, preliminarily addressed in the act, which provides:

The Chinese Government has appointed an Intellectual Property Rights Ombudsman at the Chinese Embassy in Washington, D.C., to serve as the point of contact for United States companies, particularly small and medium-sized businesses, seeking to secure and enforce their intellectual property rights in China or experiencing intellectual property rights problems in China.³³⁵

Section 1, however, only addresses the need for the private

332. Hughes, *supra* note 19.

333. *Id.*

334. Trade Rights Enforcement Act, H.R. 3282, 109th Cong. §5(1) (2005).

335. Trade Rights Enforcement Act, H.R. 3282, 109th Cong. §5(1)(I) (2005).

sector to communicate with Chinese officials with regard to the protection of their rights in China. A provision providing for the appointment of a Chinese official charged with the responsibility of working with U.S. intellectual property officials would better serve the community as a whole. Such an appointment would provide U.S. officials with an avenue to communicate their ideas for better enforcement with China. Additionally, such an appointment may be influential in making China more accountable for violation of U.S. intellectual property rights.

U.S. authorities have enjoyed some success when working with developing countries in the past. The United States Copyright Office is a key player in compelling foreign performance with respect to the prevention of piracy.³³⁶ The Copyright Office works diligently in the training of foreign copyright officials to help address enforcement issues abroad.³³⁷ The Copyright Office has created a program for the training of foreign officials, known as the International Copyright Institute (ICI).³³⁸ The ICI offers week-long seminar courses to foreign copyright officers and makes its experts available for conferences and speeches worldwide.³³⁹ The ICI thus employs a two-pronged approach to aid in enforcement by educating foreign officers as well as working to strengthen relationships with foreign countries.³⁴⁰

Additionally, the Commerce Department began taking positive steps toward enforcing U.S. intellectual property rights in September 2005.³⁴¹ As part of the plan, the Commerce Department will send experts to several developing countries, including China, to monitor piracy and counterfeiting cases.³⁴² The plan also calls for seminars for American small businesses on how to protect their rights abroad, as well as training programs for foreign officials.³⁴³

The private sector has been quick to commend the government action. Lezler Westine, executive director of TechNet, a Silicone

336. *Hearing, supra* note 2.

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.*

341. Flynn, *supra* note 1.

342. *Id.*

343. *Id.*

Valley based lobbying group stated, “[p]rotecting IP rights is extremely important to our industry. . .The steps they are taking are very comprehensive.”³⁴⁴

The ICI and Commerce Department programs focus on working with foreign officials to combat piracy. Only time will tell if the programs will succeed or fail; but the move toward working together must be seen as positive in light of previous failures to enforce American intellectual property rights abroad. Indeed, the development of the programs may well reflect the need to encourage enforcement through education and teamwork, not strong-arm tactics.

U.S. agencies have worked with China successfully in the past. When China joined the WTO in 2001, the Copyright Office worked with a United States Trade Representative led team to provide advice and to urge the Chinese leadership to amend its laws to comply with TRIPS.³⁴⁵ Although the amendments to Chinese law cannot be called a terrific success, according to U.S. Registrar of Copyrights Marybeth Peters, the new laws “[are] more than sufficient to provide some meaningful protection to copyrighted works if it is properly enforced.”³⁴⁶ These successes apply primarily to the legal framework side of the problem. The fact that China was willing to accept U.S. help and incorporate these changes, however, opens the door, at least theoretically, to U.S. agencies working with China toward increased enforcement. For these reasons, the U.S. must focus on negotiation, not litigation to solve the problem of intellectual property rights enforcement in China.

CONCLUSION

What can U.S. intellectual property right holders do if they want to do business in China? To a large extent, they will be on their own. One technique, suggested by Yin Tuo of China’s Dragon Law Firm, is for the company to engage the infringers as a client. Acting as a client, a U.S. company can gain access to the

344. *Id.* (quoting Lezler Westine).

345. *Hearing on Piracy, supra* note 2.

346. *Id.*

infringer's techniques without the infringers realizing they are being investigated. The collection of evidence against infringers is the most critical step toward successful prosecution of those infringers.³⁴⁷ Therefore, U.S. companies are well advised to begin collecting evidence at the very first sign of infringement activities.³⁴⁸

Because of the strict evidentiary standards in Chinese courts, the maintenance of the evidentiary chain is of critical importance; companies should be sure to maintain all relevant data regarding transactions and operations of the infringers.³⁴⁹ During the collection of evidence, it is imperative for the U.S. company not to alert the Chinese infringers that the company is investigating.³⁵⁰ Such notice likely results in the destruction of evidence, most likely coupled with the moving and renaming of the counterfeiting or pirating operation, leaving the U.S. company back at square one.³⁵¹ When enough evidence has been gathered, effective counsel in China must be hired.

The problem of intellectual property enforcement in developing countries costs U.S. industries billions of dollars each year. The TREA provides a plan to deal with the problem. The plan is wholly inadequate and encourages negotiation through intimidation. After carefully analyzing its merits, its potential effect on Chinese intellectual property enforcement and the problems of U.S.-China trade relations generally, it is clear the TREA proposes an ineffective remedy. The Senate should vote it down and instead look to the USTR, the Copyright Office, and the Commerce Department to negotiate improvements in China's

347. Ying Tuo, *supra* note 74.

348. *Id.* (suggesting that when collecting electronic evidence, such as emails, U.S. companies do not download emails to their local server but instead use a third party server such as Yahoo.com, in order to preserve the authenticity of such evidence as well as to prevent the infringers from becoming wise to the collection of evidence).

349. *Id.* (suggesting that detailing who, when, where, and from whom all correspondence occurs, as well as keeping all letters, confirmations, shipping documents, shipping packages, invoices, etc. will help to preserve the necessary chain of evidence).

350. *Id.*

351. *Id.*

intellectual property enforcement. Further, Congress must recognize that trade liberalization—not protectionism—will provide the necessary incentives to compel better enforcement. The success or failure of U.S.-China trade may well steer the course for the future of world trade and politics for decades to come. A relationship based on trust and negotiation will not be fostered if a lack of understanding continues. Compromise must be the rule of the hour.