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Two Decades of TRIPS in China

PETER K. YU

I Introduction

When China became the 143rd member of the World Trade Organization on December 11, 2001, the country had been heavily criticized for more than a decade for providing inadequate protection and enforcement of intellectual property rights (Yu, 2000, 2006a, 2007a). Based on the statistics provided by the World Intellectual Property Organization (WIPO) (2002, p. 8), China at that time ranked just outside the top ten in the world in terms of international applications under the Patent Cooperation Treaty (PCT). With over 1,600 PCT applications, it was right behind Australia and slightly ahead of Finland, Italy, and Israel. Fast forward twenty years. China has now become the world's leader in the same category, overtaking the United States in 2019 and Japan two years before. The country also ranked 12th in the 2021 Global Innovation Index, moving up considerably from 29th when the index was launched in 2007.

Notwithstanding these rather impressive data points, China remains heavily criticized for its lack of intellectual property protection and enforcement and frequently also for its non-compliance with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). In 2011, a decade after China's WTO accession, the US International Trade Commission (2011, p. xiv) released a report, estimating that "firms in the U.S. IP [intellectual property]-intensive economy that conducted business in China in 2009 reported losses of approximately $48.2 billion in sales, royalties, or license fees due to [intellectual property] infringement in China." More recently, the Office of the US Trade Representative (USTR) (2018a, 2018b) released a lengthy report on its Section 301 investigation into Chinese laws, policies, and practices

https://doi.org/10.1017/9781009291804.008 Published online by Cambridge University Press

in the areas of intellectual property, innovation, and technology development, which was quickly followed by a substantial update. Among the identified problems were forced technology transfer, discriminatory licensing restrictions, computer hacking, trade secret theft, and industrial espionage. As if these documents had not made the United States' intellectual property concerns loud and clear, the USTR has placed China on the Priority Watch List in its *Special 301 Report* every year since 2005, after a brief four-year post-accession "honeymoon" (Yu, 2012b, p. 526, fn. 2).

At this critical juncture when we commemorate the 20th anniversary of China's accession to the WTO – which coincidentally is named the "china anniversary" with a small c – it will be instructive to revisit intellectual property developments in China, especially those involving the TRIPS Agreement. This chapter begins by highlighting TRIPS-related developments in the first decade of China's WTO membership. It then discusses the country's "innovative turn" in the mid-2000s and the ramifications of its changing policy positions. The chapter continues to examine the US–China trade war, in particular the second TRIPS complaint that the United States filed against China in March 2018. The chapter concludes with observations about the impact of the TRIPS Agreement on China, China's impact on that agreement, and how the changing Chinese intellectual property landscape has altered the developing countries' coalition dynamics within the WTO.

II The First Decade

In the run-up to the WTO accession, China completely revamped its copyright, patent, and trademark laws while introducing or updating a large volume of laws and regulations in other trade-related areas (Blustein, 2019, p. 73; Yu, 2006a, pp. 906–23, 2013b, pp. 127–9). After 15 years of exhaustive negotiations, China finally became the 143rd member of the international trading body on December 11, 2001. While the United States and its industries were initially patient during the transition, the mid-2000s saw US industries complaining again to the USTR about the lack of intellectual property protection and enforcement in China (Yu, 2006a, pp. 923–5).

Taking advantage of a new-found weapon in the trade arsenal – the mandatory WTO dispute settlement process – the USTR took major steps to prepare for its first TRIPS complaint against China. In anticipation of the highly information-intensive process, the agency solicited information from industries through the Section 301 submission procedures

(Yu, 2006a, pp. 929–31). In addition, the United States signals its willingness to take WTO actions to resolve the trade dispute through a request to China under Article 63.3 of the TRIPS Agreement. Released in October 2005 in collaboration with Japan and Switzerland, that request asked specifically for "clarifications regarding specific cases of IPR [intellectual property right] enforcement that China has identified for the years 2001 through 2004, and other relevant cases" (Yu, 2006a, p. 926). China politely declined this request.

On April 16, 2007, the United States finally filed a complaint against China over the failure to protect and enforce intellectual property rights pursuant to the TRIPS Agreement. This complaint comprised four specific claims: (1) the high thresholds for criminal procedures and penalties in the intellectual property area; (2) the failure of the Chinese customs authorities to properly dispose of infringing goods seized at the border; (3) the denial of copyright protection to works that have not been authorized for publication or dissemination within China; and (4) the unavailability of criminal procedures and penalties for infringing activities that involved either reproduction or distribution, but not both.

Because the Supreme People's Court and the Supreme People's Procuratorate released a joint interpretation shortly before this complaint, the last issue was resolved, and the WTO panel proceeded to address only the first three claims (World Trade Organization, 2009; Yu, 2011c, 2011e). While the panel found that China had violated Articles 9.1 and 41.1 of the TRIPS Agreement when it did not protect the copyright in works that had not been approved for publication (World Trade Organization, 2009, para. 8.1(a)), it rejected the United States' claim on criminal thresholds by noting its failure to provide sufficient evidence to demonstrate what constituted "a commercial scale" in China's marketplace (World Trade Organization, 2009, paras. 7.614, 8.1(c)). With respect to the claim on customs measures, the panel was split. Although it noted that China had exceeded TRIPS requirements by extending border measures to exports in addition to imports (World Trade Organization, 2009, paras. 7.227–8), it also identified inconsistencies between Article 27 of the Regulations on Customs Protection of Intellectual Property Rights (Customs Regulations) and Article 46 of the TRIPS Agreement (World Trade Organization, 2009, para. 8.1(b)).

Following the WTO panel report, China quickly amended both the Copyright Law and the Customs Regulations. For the former, China removed the challenged language in Article 4, which stipulated that "works the publication and/or dissemination of which are prohibited by

law shall not be protected by this Law." In its place, China added at the end of the provision a new sentence stating that "[t]he publication and dissemination of works shall be subject to the administration and supervision of the state." For the Customs Regulations, China incorporated verbatim the language in Article 46 of the TRIPS Agreement. The relevant treaty language states that "in regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in exceptional cases, to permit release of the goods into the channels of commerce."

In retrospect, the United States' WTO actions took up quite some effort and energy on the part of the USTR while greatly reducing, if not freezing, government-level collaborations for a couple of years. It also kept US businesses in a waiting mode. All of these delays and disruptions would have been worthwhile had the panel report significantly improved intellectual property protection and enforcement in China. Unfortunately, that report did not have such a positive impact.

Although the WTO panel found Article 4 of the Copyright Law to be inconsistent with the TRIPS Agreement, the report gave the United States and its right holders only a paper victory (Yu, 2011c, p. 1098). Publications that were banned for distribution or that had to undergo content review would still have no market access in China despite receiving copyright protection. Likewise, because imports "represented a mere 0.15 percent by value of the infringing goods disposed of or destroyed in China between 2005 and 2007" and Chinese authorities did not auction off any confiscated imports during this period (Yu, 2011c, p. 1091), it is questionable how much benefit the amended Customs Regulations would provide to US rights holders. After the USTR's very limited success with the WTO dispute settlement process in the intellectual property area, US businesses were understandably disillusioned with that process. It was not until the arrival of the Trump Administration that the USTR filed another WTO complaint to push again for intellectual property reforms in China.

III China's Innovative Turn

While China was waiting for the WTO panel to issue its report on the first US–China TRIPS dispute, which was eventually released in January 2009 after some initial delay, the State Council adopted a National Intellectual Property Strategy in June 2008. That strategy "provided a comprehensive plan to improve the creation, utilization, protection, and administration of intellectual property rights" (Yu, 2018a, pp. 1079–85).

Paragraph 7 specifically emphasized the need for the active development of independent or self-controlled intellectual property (*zizhu zhishi chanquan*). Although this term has been frequently translated as indigenous intellectual property – or, in the larger policy context, indigenous innovation – independent intellectual property can be developed through the acquisition of foreign intellectual property assets (Prud'homme, 2012, p. 79; Yu, 2013a, pp. 94–5). There is no requirement that the intellectual property or innovation involved has to be home-grown.

The origin of China's National Intellectual Property Strategy traced back to the mid-2000s when government leaders began to consider major changes to move the economy forward. These leaders were well aware of the need to develop a new overall economic strategy to "avoid what policymakers and commentators have described as the 'middle-income trap' – the proverbial state of development at which a country is stuck after it has attained a certain level of wealth, but has yet to catch up with its more developed counterparts" (Yu, 2016, p. 27).

In February 2006, the State Council released the National Long-term Scientific and Technological Development Program, formally declaring its commitment to turn China into an innovation-based economy within 15 years. Since then, top Chinese leaders increasingly recognized the economic and strategic significance of a well-functioning intellectual property system. As the State Intellectual Property Office recounted in the report entitled *China's Intellectual Property Protection in 2008*:

> During the Ninth Collective Study of the 17th [Chinese Communist Party] Politburo, General Secretary Hu Jintao stressed specifically the importance of sticking to innovation with Chinese characteristics, energetically implementing the strategy of making the country prosperous with science and technology, the strategy of capitalizing on talent to make the country strong, IP strategy, and accelerating the construction of innovative country. When addressing the Party's meeting mobilizing the study and practice of scientific outlook on development, Premier Wen Jiabao said, "One thing necessary to stress is to concretely strengthen IPR protection. In the new era, competition of world science and technology as well as economy is mainly competition of IPRs. Underscoring IP protection is underscoring and inspiring innovation." … Vice Premier Wang Qishan published an article in his own name entitled China no longer tolerates piracy, infringement on the Chinese version of the *Wall Street Journal* ….

A few months after the adoption of the National Intellectual Property Strategy, China undertook a complete overhaul of its Patent Law – the first revamp of a major intellectual property law following the WTO accession. Known officially as the Third Amendment to the Patent Law, the overhaul

allowed China to make substantial adjustments to the patent system based on internal needs, as opposed to external considerations (Guo, 2011, p. 28; Yu, 2016, pp. 27–8). As Guo He (2011, p. 28) recounted, "The impetus for the early amendments [in 1992 and 2000] came from outside, whilst the need for the third amendment originated from within China, that is to say, the majority of the third amendment was to meet the needs of the development of the domestic economy and technology originating in China."

In the next 12 years, China unleashed a flurry of legislative amendments in the intellectual property area. Immediately following the 2008 patent law amendment was the Third Amendment to the Trademark Law, which was adopted in August 2013 and led to a complete overhaul of the Chinese trademark system. Then came the First Amendment to the Law Against Unfair Competition in November 2017. The unfair competition law had not been revised since its adoption in September 1993, and the US government and its supportive business community had widely criticized the old statute for its ineffectiveness and obsolescence. The Trademark Law was again amended in April 2019 – this time addressing issues raised by bad-faith trademark filings. Finally, during the COVID-19 pandemic, China adopted the Fourth Amendment to the Patent Law in October 2020, which focused on changes related to pharmaceuticals and enforcement. The Third Amendment to the Copyright Law was also adopted in November 2020, ushering in a complete overhaul of the Chinese copyright system (Yu, 2022a, 2022c). The last time that system went through a major revamp was in October 2001, two months before China joined the WTO.

Taken together, all of these new laws and related regulations have transformed China into an emerging intellectual property power. Today, China is the world's leader in PCT applications. Based on WIPO statistics, Huawei, OPPO, and BOE ranked among the world's top seven corporate PCT applicants in 2021. Ping An, ZTE, Vivo, and DJI were not far behind in the top 20. In the same year, China also had the world's third-largest volume of international trademark applications under the Madrid Agreement Concerning the International Registration of Marks and its related protocol. In addition, the 2021 Global Innovation Index ranked China 12th in the world, moving up from 14th in the two years before. Given these developments, it is no surprise that the State Council, in its *Outline for Building a Powerful Intellectual Property Nation (2021–2035)*, set bold 2025 targets for the contributions of the Chinese patent and copyright industries to the country's gross domestic product at 13 and 7.5 percent, respectively.

IV Forced Technology Transfer Disputes

China's growing strength in the intellectual property area attracts increased international policy scrutiny. Two days after WIPO announced that China had overtaken Japan to become the country with the world's second-largest volume of PCT applications, the United States filed its second TRIPS complaint against China, drawing evidence from the USTR's then-recently completed Section 301 investigation. The complaint focused specifically on the challenging subject of forced technology transfer (Abbott, 2022; Lee, 2020; Prud'homme and von Zedtwitz, 2019; Prud'homme et al., 2018; Yu, 2022b). It alleged that "China deprive[d] foreign intellectual property rights holders of the ability to protect their intellectual property rights in China as well as freely negotiate market-based terms in licensing and other technology-related contracts" (World Trade Organization, 2018, p. 1). At issue were the inconsistencies between the Regulations on the Administration of the Import and Export of Technologies and the Regulations for the Implementation of the Law on Chinese-Foreign Equity Joint Ventures on the one hand and Articles 3 and 28 of the TRIPS Agreement on the other. Article 3, which provides for national treatment, prevents countries from discriminating against foreign authors and inventors. Article 28, which focuses on patent rights, states explicitly that "[p]atent owners shall … have the right to assign, or transfer by succession, the patent and to conclude licensing contracts."

In November 2018, the WTO established a panel to address this dispute. Although the length and scope of this chapter do not allow for a full analysis of the merits of this complaint, commentators, myself included, have questioned its likelihood of success (Yu, 2022b, pp. 1014–24). After all, China did not force US businesses to form equity joint ventures, although it did impose foreign ownership restrictions in select sectors, such as those involving high-speed rail, new energy vehicles, and other frontier technologies (Lau, 2019, p. 173; Lee, 2020, p. 335; Prud'homme and von Zedtwitz, 2019, p. 7; Prud'homme et al., 2018, p. 164). In the developing world, it is also not uncommon to find countries embracing "market for technology" policies (Lee, 2020, p. 340). In addition, the issues implicated in the WTO complaint, such as indemnification and improvements in patent law, are highly technical. The lack of specific textual language governing these issues suggests that the TRIPS negotiators had not deliberated or reached a consensus on these issues (Yu, 2022b, p. 1014).

Moreover, the technology transfer issues involved in this complaint were at the center of a rather controversial international policy debate in the 1970s and 1980s concerning the restrictive clauses in the transfer-of-technology contracts found in developing countries. This debate, which continues even today (Chapter 22), led to the negotiation of the International Code of Conduct on the Transfer of Technology under the auspices of the UN Conference on Trade and Development (Patel et al., 2001; Yu, 2009, pp. 493–505, 2017a). Although the negotiations ultimately failed, some of the draft language in the Code made its way to the TRIPS Agreement (Roffe, 1998, p. 266; Yu, 2011a, pp. 315–16; Yusuf, 2016, p. 10, fn. 19). For instance, Article 40.1 expressly recognizes that "some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology." Article 40.2 further provides: "Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market." Although no WTO panel has weighed in on these provisions, the textual language provides China with some strong defenses to the United States' complaint.

Notwithstanding these potential challenges to the US complaint, China adopted a new Foreign Investment Law in March 2019, replacing the Law on Chinese-Foreign Equity Joint Ventures whose implementing regulations were at issue in the WTO complaint. A few days later, the State Council also amended the two regulations implicated in the complaint. It is therefore no surprise that the United States requested the WTO panel to suspend its work in June 2019. A few months later, the two countries signed the United States–China Economic and Trade Agreement. Known widely as the Phase One Agreement, this instrument included over 40 provisions on either intellectual property or technology transfer measures. Because the United States did not request the WTO panel to resume its work within twelve months, the panel's authority lapsed in June 2021.

On June 6, 2018, more than two months after the United States filed the second TRIPS complaint against China, the European Union filed a similar but more extended complaint. *China – Certain Measures on the Transfer of Technology* marked the second TRIPS complaint that the European Union has filed against China, although the first complaint in *China – Measures Affecting Financial Information Services and Foreign Financial Information Suppliers* focused primarily on the General

Agreement on Trade in Services. That earlier complaint merely invoked Article 39.2 of the TRIPS Agreement when addressing the reduced ability of financial information services and suppliers to protect secret and commercially valuable information from unauthorized disclosure, acquisition, or use. At the time of writing, China and the European Union have not yet reached an agreement in relation to the forced technology transfer dispute.

Although the two complaints on forced technology transfer are highly interesting from a trade law standpoint, especially in view of the split outcome in the WTO panel report on the earlier US–China TRIPS dispute, the more recent US complaint should not be viewed in isolation from the ongoing US–China trade war. That war began with the arrival of the Trump Administration in January 2017 and has continued into the Biden Administration. During the 2016 US presidential campaign, candidate Trump repeatedly blamed China for the United States' economic woes. Among his key grievances were trade imbalance, currency manipulation, intellectual property theft, market access restrictions, and unfair trade practices.

To address trade imbalance and to fulfill his campaign promises, the Administration announced its plan to impose trade tariffs on Chinese goods in the area of aerospace, information communication technology, and machinery in March 2018 (Wong and Koty, 2019). The country further imposed tariffs of 25 percent on all steel imports and 10 percent on all aluminum exports, except for those originating in select countries. Slightly more than a week later, China responded with tariffs of between 15 and 25 percent on US goods, including fruits, wine, seamless steel pipes, pork, and recycled aluminum. The next day, the USTR retaliated with a potential 25 percent tariff on a list of over a thousand Chinese products that were worth US$50 billion. China responded the day after with a potential 25 percent tariff on $50 billion worth of US goods, including soybeans, automobiles, and chemicals. With trade actions intensified on both sides in a tit-for-tat fashion (Zeng, 2004, p. 14), the trade war began to take shape.

At the end of the Trump Administration, the total amount for three rounds of trade tariffs that the United States imposed on Chinese goods exceeded $500 billion. The retaliatory tariffs China imposed on US goods also amounted to close to $200 billion. The permissibility of these tariffs, including the WTO panel report on *United States – Tariff Measures on Certain Goods*, is outside the scope of this chapter and will be addressed elsewhere in this volume (Chapters 2 and 16).

V Expected and Intriguing Impacts

Thus far, this chapter has documented the last two decades of TRIPS-based intellectual property developments in China. It is therefore logical to interrogate the impact of the TRIPS Agreement on China. Considering that influences are rarely unidirectional, it will also be instructive to evaluate China's impacts on the TRIPS Agreement and the WTO. This section will identify impacts in both directions, including those that are expected and that have been widely documented in the policy and scholarly literature and those that are more intriguing or, for some, somewhat unexpected. These impacts illustrate the "two-way socialization" described by the editors in their Introduction to this volume.

(i) TRIPS Impact on China

Based on a wide range of amendments to intellectual property laws that China had adopted in the run-up to the WTO accession, including the complete overhauls of its patent, copyright, and trademark laws at the turn of the millennium, there is no question that the WTO and its TRIPS Agreement have had a significant impact on China and its intellectual property regime. To a large extent, the accession-related amendments continued the longstanding history of transplanting foreign intellectual property laws onto Chinese soil (Yu, 2016). From the bilateral commercial treaties that China signed with colonial powers at the turn of the twentieth century, to the intellectual property laws it adopted in the Republican era, the 1980s, and the early 1990s, to the WTO-related amendments it introduced shortly before the WTO accession, all of these laws brought to China intellectual property norms that were established abroad, mostly in the developed world.

The influence of the TRIPS Agreement did not stop at the WTO accession, however. Even though China did not overhaul another major intellectual property law until the country began making an innovative turn in the mid-2000s (Yu, 2018a, pp. 1079–87, 2020a, pp. 599–608), the WTO and its TRIPS Agreement have continued to influence intellectual property reforms in China. There is no better example than the Second Amendment to the Chinese Copyright Law, which was adopted in the wake of the WTO panel report on *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*. In response to that report, China also incorporated TRIPS language into its Customs Regulations.

Notwithstanding the TRIPS Agreement's undeniable impacts, many of the intellectual property laws that China adopted since the late 2000s have focused primarily on internal needs, as opposed to compliance with external norms, including those enshrined in the TRIPS Agreement. This change of direction has raised interesting questions about the Agreement's lingering impact. It also invites debates about the relationship between those legal reforms undertaken before and immediately after the WTO accession and those that were introduced more recently, following China's innovative turn.

To the extent that the early reforms have paved the way for later reforms, one could certainly question whether this innovative turn is attributed to the TRIPS Agreement or the WTO. The latter provides developing countries with concessions in other trade sectors, such as agriculture and textiles. Nevertheless, the WTO's "single undertaking" arrangement has made it very difficult, if not impossible, to separate TRIPS contributions from WTO contributions (Yu, 2018b, p. 12).

Moreover, China has been practicing what commentators have described as "selective adaptation" (Yu, 2020b, pp. 207–15) – or taking advantage of what Frederick Abbott (2005, p. 100) and other commentators have referred to as "benign neglect." Since joining the WTO, China has carefully selected international intellectual property norms that align more closely with its needs, interests, conditions, and priorities. Such an approach has also been deployed by other emerging countries. It will be interesting to see whether this approach will present a useful model for other developing countries to effectively adapt to the TRIPS-based international intellectual property regime.

(ii) China's Impact on TRIPS

It has been a longstanding practice for China scholars to focus on the Western impact on China (Cohen, 1984, pp. 12–16) – whether in relation to modern Chinese history, international trade, or Internet communication. Much of the literature examining the TRIPS Agreement in the Chinese context has therefore focused on the TRIPS impact on China. Nevertheless, as much as we should evaluate this impact, we should also explore how China has affected TRIPS developments both within the WTO and outside. Such exploration is particularly important considering that most TRIPS-related research in the run-up to China's accession has fixated on the TRIPS impact on China, not the impact in the opposite direction.

Although China was expected to play an important role in the WTO upon its accession, including at the Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS Council), it did not do so in the first few years in the international trading body. Instead, it kept a rather low profile (Gao, 2007, p. 69; Yu, 2011b, pp. 229–37, 2015, pp. 273–7). There are many reasons for such an approach. Among the oft-cited explanations are the Chinese leaders' priority focus on domestic matters, the country's need to cultivate goodwill from its neighbors, the complications created by changes within the Chinese leadership, the WTO-plus concessions China had made before joining the international trading body and the highly uneven developments within the country (Yu, 2012b, pp. 229–37, 2013b, pp. 129–31).

One of the editors of this volume has advanced a typology using "norm taker," "norm shaker," and "norm maker" to illustrate the different ways China could engage with international trade norms, in particular WTO standards (Gao, 2011). In the intellectual property area, China has been mostly a norm taker, even though it has become increasingly assertive in this area (Yu, 2011b, pp. 258–9, 2019b, pp. 438–9). In the first decade of its WTO membership, the only time China sought to take the role of a norm shaker in the TRIPS arena was when it joined a group of developing countries in July 2006 to co-sponsor a proposal for a new Article 29*bis* of the TRIPS Agreement. Consistent with what later became Article 26 of the 2008 Chinese Patent Law, this amendment sought to create a new obligation to disclose in patent applications the origin of the biological resources and traditional knowledge used in inventions (World Trade Organization, 2006a).

The other time when China advanced an intellectual property-related submission was before the Committee on Technical Barriers to Trade, which was technically outside the TRIPS arena. That paper warned that the inclusion of intellectual property rights into standards might have a "serious impact on the international standards setting efforts and the corresponding implementations" (World Trade Organization, 2006b, para. 13). This submission is historically important because it "marked the first time China made an intellectual property-related submission to a WTO body" (Yu, 2013b, p. 132). More importantly, it foretold the developments that were to emerge more than a decade later. In 2020, Chinese courts began issuing anti-suit injunctions to protect jurisdiction in litigation involving standards-essential patents (Yu et al., 2022, pp. 1578–88). In the past few years, Chinese policymakers have also paid growing attention to international intellectual property disputes involving these patents, due in

part to their tremendous importance to future economic and technological development and in part to the fact that a number of Chinese firms, including Huawei and ZTE, are now leading players in the international telecommunications market.

Apart from activities within the TRIPS Council, one may also wonder whether the piracy and counterfeiting problems in China have undermined the performance of the TRIPS Agreement by ignoring or overburdening the WTO dispute settlement process – the fear of many policymakers and commentators for more than two decades (Cass, 2003, p. 45). Interestingly, despite their fears and widespread concerns that China would flout international trade norms, the country has been quite willing to amend its intellectual property laws when the WTO panels have found inconsistencies between those laws and existing WTO norms (Blustein, 2019, p. 6; Yu, 2011a, pp. 336–7, 2011b, pp. 210–11). For instance, after the WTO panel released its report on *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, China quickly implemented the decision by amending the Copyright Law and the Customs Regulations. In the wake of the United States' second TRIPS complaint, China also introduced a new Foreign Investment Law to replace the Law on Chinese-Foreign Equity Joint Ventures while amending the Regulations on the Administration of the Import and Export of Technologies.

Although China's low profile at the WTO and its willingness to amend laws and regulations in response to complaints and panel reports suggest its very limited footprint on the TRIPS Agreement, China has had at least three major impacts. First, its success in economic and technological developments has shown the viability of the TRIPS model (Yu, 2018b, p. 14). Since its inception, policymakers and commentators have heavily criticized the Agreement for ignoring local needs, national interests, technological capabilities, institutional capacities, and public health conditions (Yu, 2007b, p. 828). Many have also characterized the Agreement as "coercive" (Deere, 2009, p. 2; Dinwoodie and Dreyfuss, 2012, pp. 33–4; Yu, 2006b, pp. 373–5). Yet, the success in China has suggested that the TRIPS Agreement can benefit developing countries just as they have provided value to developed countries. The Agreement becomes even more appealing when compared with other new international trade and intellectual property agreements that call for protections and enforcement beyond TRIPS requirements. To some extent, China has made the TRIPS Agreement more acceptable for the developing world.

Second, the limited success that the United States and other developed countries had in using the WTO dispute settlement process to induce more intellectual property reforms in China has caused these countries to look outside the WTO for ways to raise international intellectual property enforcement standards (Yu, 2011d, p. 511). A key US strategy was the negotiation of regional or plurilateral agreements with developed countries and like-minded partners. These negotiations included the Anti-Counterfeiting Trade Agreement (ACTA), the Trans-Pacific Partnership Agreement (which has been incorporated into the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) following the United States' withdrawal), and the United States–Mexico–Canada Agreement. Such negotiations, to a large extent, have slowed down TRIPS-based international intellectual property norm-setting at the WTO.

Third, and related to the first two, China has begun to slowly defend the multilateral intellectual property system, now that it has found TRIPS standards consistent with its national ambitions and local conditions. During the ACTA negotiations, for example, China joined India in mounting a high-profile intervention at the TRIPS Council, registering their concern about the development of TRIPS-plus enforcement standards (Council for Trade-Related Aspects of Intellectual Property Rights, 2010, paras. 248–63; Yu, 2011d, pp. 518–19). China has also advanced similar arguments to counter TRIPS-plus efforts both within the WTO and outside.

(iii) Impact of China's Intellectual Property Developments on the WTO

The last set of impacts concerns how the TRIPS-related intellectual property developments in China affect the WTO, in particular its developing country members. When the country joined the international trading body, it was expected to become a primary leader in the developing world. Although China has remained the so-called "elephant in the room," it has assumed a rather low profile at the TRIPS Council and in the larger international trading body. As a result, it has not been as vocal as other traditional leaders in the developing world, such as Brazil and India.

Nevertheless, because of its fast-evolving economic and technological developments, China has impacted the developing countries' coalition dynamics at the WTO in two ways. First, as noted earlier, because of its innovative turn, China is now taking positions that align more closely with those of developed countries than those of developing countries (Yu, 2016, p. 38, 2017b, p. 726; Chapters 9 and 10). To be certain, China has not given

up its leadership role in the developing world. In 2018, the State Council released a white paper entitled *China and the World Trade Organization*, stating that the country "[v]igorously support[s] the integration of developing members into the multilateral trading system." Nevertheless, in the intellectual property area, China is more likely to take middle-of-the-road positions than those embraced by other developing country members.

For instance, during the global pandemic, India and South Africa submitted a proposal to the TRIPS Council, calling for a temporary waiver of Sections 1, 4, 5, and 7 of Part II of the TRIPS Agreement and related enforcement obligations to combat the global pandemic (Yu, 2023a). This waiver has subsequently attracted more than 60 cosponsors from the developing world, including both the African Group and the Least Developed Country Group. Nevertheless, China has only extended support to the proposal but has not assumed cosponsorship (Yu, 2023b) – a position that is quite different from its earlier approach toward the Article 29*bis* proposal on the disclosure requirement. As the Chinese delegation stated at the TRIPS Council when India and South Africa submitted the proposal in October 2020:

> China … supports the discussions on possible waiver or other emergency measures to respond to the pandemic, which are "targeted, proportional, transparent and temporary,", and which do not create unnecessary barriers to trade or disruption to global supply chains. (Council for Trade-Related Aspects of Intellectual Property Rights, 2021, para. 977)

Indeed, China did not become more assertive until toward the end of the waiver negotiations – when the draft Ministerial Decision proposed for adoption at the Twelfth WTO Ministerial Conference included a requirement that would de facto single out China as the only developing country ineligible for the negotiated arrangement (Yu, 2023b, 2023c).

The second impact concerns plurilateral negotiations. As noted earlier, the intellectual property enforcement problems in China and the United States' lack of success in utilizing the WTO dispute settlement process to address those problems have caused developed countries and their like-minded trading partners to shift the international intellectual property norm-setting activities to plurilateral fora. Such a shift has taken a valuable norm-setting forum away from developing countries, greatly increasing their negotiation costs while creating possibilities for inconsistencies, tensions, or even conflicts across multiple fora (Benvenisti and Downs, 2007, pp. 597–8; Yu, 2012a, pp. 1089–90, 2021, p. 52).

More importantly, China has been at the forefront of these negotiations, assuming a highly influential role. There is no better example than

the negotiations for the Regional Comprehensive Economic Partnership (RCEP) (Yu, 2017b, 2019a, pp. 103–05), which culminated in the adoption of the RCEP Agreement in November 2020. Included in this Agreement is an intellectual property chapter that contains 83 provisions, covering a wide variety of intellectual property rights as well as domestic, cross-border, and digital enforcement. In September 2021, China also made a formal request to join the CPTPP (Chapter 12).

China's active role in plurilateral negotiations will certainly undercut its efforts to fight off the developed countries' attempt to establish new international intellectual property norms outside the WTO. Nevertheless, the country seems to have made a conscious choice to negotiate in both multilateral and non-multilateral fora. As Martin Jacques (2009, p. 362) observed more than a decade ago:

> In the long term … China is likely to operate both within and outside the existing international system, seeking to transform that system while at the same time, in effect, sponsoring a new China-centric international system which will exist alongside the present system and probably slowly begin to usurp it.

With considerable human and economic resources, China is certainly in a good position to negotiate on multiple fronts.

VI Conclusion

China joined the WTO in December 2001. In the run-up to its accession, the country amended its intellectual property laws to promote compliance with the TRIPS-based international intellectual property norms. Although the recent decade has seen Chinese intellectual property reforms focusing more on internal needs, as opposed to external considerations, it is hard to overlook the many benefits provided by the TRIPS Agreement. Without these benefits, it is unclear whether China will make its innovative turn in less than a decade following its WTO accession. In return, China's success in making dramatic improvements in both the intellectual property and innovation areas has strengthened the appeal of the TRIPS Agreement, reinforcing its position as the predominant international intellectual property instrument. This chapter has shown that China and the WTO have affected each other in the intellectual property area. Just as the WTO and its TRIPS Agreement have had major impacts on China, the country also has had important impacts on both the TRIPS Agreement and the negotiation dynamics in the international trading body.

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