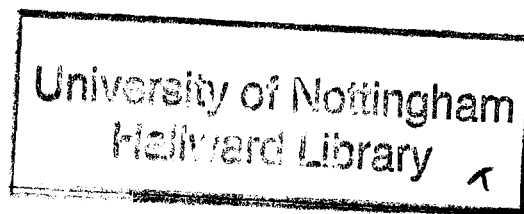


China's Post-WTO Intellectual Property System: Assessing Compliance with the TRIPS Agreement

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Abstract

This thesis examines the system of intellectual property (IP) protection in contemporary China. The IP system has undergone a series of dramatic reforms in recent years, particularly as a result of China's accession to the World Trade Organisation. From December 2001, China is now committed to comply with the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). However, despite implementing TRIPS provisions into domestic legislation, infringements are still prevalent and criticism of the IP system continues.

Therefore, this study aims to analyse China's compliance with the TRIPS Agreement in more detail using theories of compliance originating in international law and international relations, in order to understand this gap between implementation and compliance. Specifically, this study applies a comprehensive model of compliance previously applied to international environmental accords. This model incorporates consideration of the international IP environment and the TRIPS Agreement itself, as well as China-specific factors affecting TRIPS compliance.

The model was tested using a combination of qualitative techniques, including an initial bilingual questionnaire, detailed follow-up interviews and analysis of a wide range of primary documents such as WTO papers, laws and regulations and case reports. Respondents participating in the study included legal and business professionals, both international and Chinese, with experience of the IP system in China. The qualitative data was coded and analysed using NVivo software and a model of TRIPS compliance in China created.

The study concludes that previous studies of compliance with international obligations have been too narrow in scope and that a more inclusive approach to relevant factors is necessary. In terms of policy implications, this thesis will also suggest that external pressure alone will not achieve long-term changes in the IP system and that more cooperative initiatives are necessary in order to increase China's capacity, as well as intention, to fully comply with the TRIPS Agreement.

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List of Abbreviations

AIC	Administration of Industry and Commerce
CAQDAS	Computer-assisted Qualitative Data Analysis Software
DSB	WTO Dispute Settlement Body
ESRC	Economic & Social Research Council
FIE	Foreign-invested Enterprise
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade (1947 or 1994)
IIPA	International Intellectual Property Alliance
IMF	International Monetary Fund
IP	Intellectual Property
IPC	Intellectual Property Committee
IPO	Intellectual Property Owners Association
IPR	Intellectual Property Rights
KMT	Kuomintang (Nationalist Party)
LDC	Least-Developed Country
MNC	Multinational Corporation
MOU	Memorandum of Understanding
NPC	National People's Congress
NGO	Non-governmental Organisation
PRC	People's Republic of China
PSB	Public Security Bureau
QBPC	Quality Brands Protection Committee
REF	Research Ethics Framework used by the ESRC
ROC	Republic of China
SAIC	State Administration of Industry and Commerce
SIPO	State Intellectual Property Office of China
SOE	State-owned Enterprise
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TSB	Technical Supervision Bureau
UK	United Kingdom
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
US	United States

USAID	US Agency for International Development
USTR	United States Trade Representative
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation

1 Introduction

This chapter aims to justify the focus of my research on the assessment of China's compliance with the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and, in order to do so, will first outline the nature of intellectual property rights in general and explain the definition used in this study. Then, the background of the development of intellectual property rights will be briefly described in order to illustrate the significance of the establishment of the TRIPS Agreement in the context of international IP protection. Thirdly, a brief overview of the role of the law and the relationship between the law and the state in China will be provided and then, the development of intellectual property protection in China and China's engagement with the GATT/WTO international trading system will be summarised in order to evaluate the importance of the TRIPS Agreement for IP protection in China specifically. Finally, key research questions and the overall structure of the remaining chapters will be introduced.

1.1 Intellectual Property: Definitions and Context

According to the World Intellectual Property Organisation (WIPO), intellectual property "refers to creations of the mind: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce."¹ This is similar to the definition used by the World Trade Organisation (WTO), which states that: "Intellectual property rights are the rights given to persons over the creations of their minds. They usually give the creator an exclusive right over the use of his/her creation for a certain

¹ WIPO, "What is Intellectual Property?" <http://www.wipo.int/about-ip/en/>, accessed May 15th 2005.

period of time.”² These definitions emphasise the origins of intellectual property in the mind of the creator or inventor.

It is clear that intellectual property can include various categories of rights, apart from the traditional protection for copyright, trademark and patent. Indeed the TRIPS Agreement is exhaustive in its approach to the IP rights covered by the Agreement. TRIPS Article 1(2) provides that “for the purposes of this Agreement, the term ‘intellectual property’ refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II.”³ Therefore, the TRIPS Agreement covers a total of seven areas of intellectual property:

- Copyright and related rights (Part II(1));
- Trademarks (Part II(2));
- Geographical Indications (Part II(3));
- Industrial Designs (Part II(4));
- Patents (Part II(5));
- Layout-designs (Topographies) of Integrated Circuits (Part II(6));
- Protection of Undisclosed Information (Part II (7)).

Consequently, for the sake of brevity, intellectual property or IP shall be referred to throughout this study, but it should be borne in mind that the definition of intellectual property that is used is the broad definition above, as used in the TRIPS Agreement.

1.1.1 The Origins of Intellectual Property Rights

In order to appreciate the significance of the TRIPS Agreement in terms of international intellectual property protection, it is necessary to first understand the origins

² World Trade Organisation, "What are Intellectual Property Rights?" http://www.wto.org/english/tratop_e/trips_e/intell_e.htm, accessed May 13th 2005.

³ World Trade Organisation, "Agreement on Trade-Related Aspects of Intellectual Property Rights", http://www.wto.org/english/docs_e/legal_e/27-trips.pdf, accessed May 30th 2004.

of intellectual property rights. Intellectual property protection began around the time of widespread industrialisation across Europe, although the recognition of marks of ownership clearly existed long before this period. Indeed, one of the first known references to intellectual property protection dates from 500 BC when chefs were granted year-long monopolies for creating culinary delights in the Greek colony of Sybaris.⁴ However, a recognized system of intellectual property protection was not formally introduced until much later. Patents came into existence in Venice around 1500 and had spread to most of the main European powers by 1550.⁵ The first formal patent system in Venice was highly significant as “for the first time a legal and institutional form of intellectual property rights established the ownership of knowledge and was explicitly utilized to promote innovation.”⁶

The origins of copyright, on the other hand, trace to the establishment of printing; copyright emerged from a concern to control this new technology. This concern led to the world’s first copyright act, the Statute of Anne in 1710, entitled “An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned.”⁷ Furthermore, early legislative developments in Britain in the seventeenth and eighteenth centuries covering intellectual property are frequently seen as the dawn of modern intellectual property law.⁸

⁴ Adam D. Moore, *Intellectual Property and Information Control: Philosophic Foundations and Contemporary Issues*, (New Brunswick, New Jersey: Transaction Publishers, 2001): 9.

⁵ Robert L. Ostergard, *The Development Dilemma: The Political Economy of Intellectual Property Rights in the International System*, (New York: LFB Scholarly Publishing LLC, 2003): 12.

⁶ Christopher May and Susan K. Sell, *Intellectual Property Rights: A Critical History*, (London: Lynne Rienner Publishers, 2006): 58.

⁷ Paul Goldstein, *International Copyright: Principles, Law and Practice*, (Oxford: Oxford University Press, 2001): 5.

⁸ May and Sell, *Intellectual Property Rights: A Critical History*, 73.

Various countries enacted intellectual property laws over the next century, but it was not until the late nineteenth century that international intellectual property protection was considered necessary. This need “became evident when foreign exhibitors refused to attend the International Exhibition of Inventions in Vienna in 1873 because they were afraid their ideas would be stolen and exploited commercially in other countries.”⁹ This led to the Paris Convention for the Protection of Industrial Property in 1883, which was the first international agreement to deal with IP rights. This was followed by the Berne Convention for the Protection of Literary and Artistic Works of 1886, which dealt specifically with creative works such as books, plays and music.¹⁰

These two international conventions originally had few signatories, but included a secretariat from the outset. The Paris Convention had 14 initial member countries when it came into force in 1884¹¹ and the Berne Convention had 8 original members in 1887. The respective secretariats merged in 1893 and eventually became the World Intellectual Property Organisation (WIPO) in 1967, which then became part of the UN system of specialized agencies in 1974.¹² Hence, intellectual property has a long history of protection at an international level, but the WIPO-administered system was widely criticised as insufficient as IP began to grow in importance in the 1970s and 1980s. Thus, it was proposed that intellectual property protection be incorporated into the existing

⁹ WIPO, "WIPO Treaties- General Information", <http://www.wipo.int/treaties/en/general/>, accessed January 5th 2006.

¹⁰ "Paris Convention for the Protection of Industrial Property", http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html, accessed January 25th 2005, "Berne Convention for the Protection of Artistic and Literary Works", http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html, accessed January 25th 2005. Other relevant international intellectual property conventions are also available via the World Intellectual Property Organisation website at <http://www.wipo.int/>

¹¹ WIPO, "WIPO Intellectual Property Handbook: Policy, Law and Use", available at <http://www.wipo.int/about-ip/en/iprm/index.htm>, accessed January 14th 2007, 241.

¹² Ibid. 5.

multilateral trading system under the General Agreement on Tariffs and Trade (GATT) 1947.

Therefore, the development of intellectual property protection could be said to have three distinct phases: national, from the fifteenth to the late nineteenth century; international, from the passing of the Paris and Berne Conventions in the 1880s until the final decades of the twentieth century; and global, from the inclusion of IP in the multilateral trading system with the establishment of the TRIPS framework in 1994. Thus, the TRIPS Agreement can be seen as highly significant from the perspective of the historical evolution of IP protection as it began a new phase of development, that of global protection.

Although the Paris and Berne Conventions were significant at the time they were agreed for embodying the principles of non-discrimination and national treatment, they “neither created new substantive law nor imposed new laws on member states; rather, they reflected a consensus among member states that was legitimated by domestic laws already in place.”¹³ Accordingly, the Conventions allowed wide variation in the IP protection offered by signatories and recognised that different countries may require different levels of IP protection according to their different levels of economic development. As the TRIPS Agreement downplays this inherent flexibility in favour of the promotion of universality, it is indeed a significant step in the progression of IP protection and its inclusion in the GATT/WTO system will now be examined in more detail.

¹³ Susan K. Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights*, (Cambridge: Cambridge University Press, 2003): 10-11.

1.2 IP in the International Trading System

Although the General Agreement on Tariffs and Trade (GATT), the forerunner to the WTO, was not established until 1948, consideration of the benefits of multilateral trade agreements had begun as early as the 1930s. Due to the Great Depression, import tariffs and other discriminatory barriers were raised. However, as:

“many large economies became protectionist simultaneously or in retaliation, so more rather than less suffering resulted from these policies...Hence the belief that there must be gains from getting together to sign a multilateral trade agreement to prevent such destructive trade policy lapses in the future.”¹⁴

After the Second World War, the desire to establish an international trade organisation grew stronger. Although the primary aim of such an agreement was economic, there was also the issue of political stability to consider. Therefore, initially countries wanted to establish a trading organisation for reasons of political stability as well as economic gains.¹⁵ Subsequently, the General Agreement on Tariffs and Trade (GATT) came into being in January 1948, with 23 initial contracting parties, which included China.

In terms of intellectual property, the provisions of GATT were very limited with scant mention of IP protection, as the primary focus of GATT, at least initially, was tariff reduction. However, GATT Article XX(d) did allow contracting parties a general exception to the rules on trade barriers to allow signatories to adopt or enforce measures “necessary to secure compliance with laws or regulations which are not inconsistent with

¹⁴ Kym Anderson, "Why the World Needs the GATT/WTO", Anderson, *Strengthening the Global Trading System: From GATT to WTO*, (Adelaide, Australia: Centre for International Economic Studies, University of Adelaide, 1996).

¹⁵ Indeed, prevention of military conflict by channelling trade disputes into the WTO's dispute settlement process is still one of the stated aims of the WTO. World Trade Organisation, "The WTO... in Brief", http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm, accessed February 1st 2005.

the provisions of this Agreement, including... the protection of patents, trade marks and copyrights, and the prevention of deceptive practices.”¹⁶ This Article was invoked in two disputes under the GATT dispute settlement process; in the first from 1983, the panel held that patent protection was an area in which a contracting party could take action which did not otherwise conform to their GATT obligations. In the second case from 1989, the panel held that although domestic patent law could not be challenged, the contracting parties had an obligation to try to enforce their intellectual property legislation in accordance with their GATT commitments.¹⁷

Therefore, although GATT 1947 did mention intellectual property protection in brief, it was not a major concern of the multilateral trading system until the 1970s. The complex drafting history of the TRIPS Agreement and negotiations that took place during the Uruguay Round from 1986-1994 will be further detailed in Chapter 4 below, as the characteristics of the TRIPS Agreement are discussed in the context of their possible impact upon compliance. It is important to note that IP protection is now one of the major issues in the international trading system, particularly in the past few decades as the emphasis has shifted from tariff barriers to trade to non-tariff barriers, such as inappropriate IP protection. As a result, compliance with the TRIPS Agreement is a matter of great concern for many WTO Members.

1.3 An Overview of the Law and the State in China

In order to fully comprehend the current IP system in China, it is necessary to first grasp an appreciation for the complex interplay between the state and the law in China

¹⁶ "General Agreement on Tariffs and Trade (GATT)", http://www.wto.org/English/docs_e/legal_e/gatt47_01_e.htm accessed January 24th 2004.

¹⁷ Daniel Gervais, *The TRIPS Agreement: A Drafting History*, (London: Sweet & Maxwell, 2003): 7.

and how this relationship has developed. Firstly, China could be said to have only benefited from an independent legal system since 1912; in Imperial China, all power was vested in the emperor and the legal codes that did exist were aimed at protecting the state's interests rather than individual rights. Moreover, many legal matters were dealt with informally by local groups without recourse to formal legal structures.¹⁸

Furthermore, since the establishment of the PRC in 1949, the formal legal framework has also periodically been sidelined in favour of extrajudicial mechanisms, particularly during the Cultural Revolution.¹⁹ As the contemporary legal framework of courts and personnel has only been established for around thirty years, since the start of the reform period, the juvenile nature of the legal system still has its legacy in the current IP system, particularly in the lack of experience of key personnel, an issue compounded by the fact that specialised IP courts were only established in 1994. In addition, although the legal system has been subject to sweeping reforms in the past decades, these changes cannot be considered in isolation.

“Regardless of how much legislation is promulgated and how many judges are trained and installed in the courts, legality will not grow unless the Party-state fosters and maintains a commitment to it and alters the allocation of power between the courts and the rest of the Party-state.”²⁰

In other words, consideration of the legal system necessarily incorporates discussion of the political system in China as well. The legal system in China is also subject to lingering suspicions that, despite committing to establishing a rule of law state in a constitutional amendment of 1999, it is still subject to the policy whims of the

¹⁸ Jerome Cohen, “The Criminal Process in the People’s Republic of China: An Introduction”, *Harvard Law Review*, 79 (3), 470.

¹⁹ James C. F. Wang, *Contemporary Chinese Politics: An Introduction*. (Englewood Cliffs, New Jersey: Prentice-Hall International, 1995): 132.

²⁰ Stanley Lubman, *Bird in a Cage: Legal Reform in China after Mao*, (Stanford, California: Stanford University Press, 1999): 299.

Party.²¹ Indeed, China's legal system is frequently judged to be following an instrumentalist model of the law, whereby law is merely the vehicle by which policy goals are achieved, whether they be social control, class emancipation or economic development. This instrumentalist model could be seen as originating in the traditional Chinese legal system, but also as arising from adoption of a Marxist legal model.²²

The instrumentalist nature of the legal system in China has several implications for the current IP system. It is certainly true that legislation is often drafted to be "intentionally ambiguous,"²³ in order to allow for shifts in policy emphasis and with detailed regulations issued later to fill the gaps. This could also be a consequence of the traditional preference in China for bureaucratic discretion over legislative certainty. In addition, there is a traditional preference in China for informal dispute resolution mechanisms such as mediation which leads to a continued dominance of public enforcement mechanisms in the legal system generally.²⁴

The obvious corollary of this is the corresponding weakness in the judicial system. Although the principle of judicial independence (*shenpan duli*) is officially accepted, the interpretation of this principle refers to the elimination of direct interference in individual cases rather than a wider separation of powers recognised as central to judicial independence in other jurisdictions.²⁵ Finally, the decentralisation that has taken place in the reform era as China has moved away from a centrally planned command economy

²¹ Liu Peixue, "Tan tan <<yao fazhi bu yao renzhi>> de kouhao" (Discussing the slogan 'Rule of law not rule of man'), *Neibu Wengao (Internal Manuscripts)*, 7: 7-8.

²² Yu Xingzhong, "Legal Pragmatism in the People's Republic of China", Keller, *Chinese Law and Legal Theory*, (Aldershot: Ashgate Publishing Limited, 2001): 72.

²³ Pitman B. Potter, *The Chinese Legal System: Globalization and Local Legal Culture*, (London: Routledge, 2001): 11.

²⁴ As considered below at page 165.

²⁵ Ronald C. Keith, *China's Struggle for the Rule of Law*, (London: The Macmillan Press, 1994): 18.

has conversely led to problems in the legal system; as provinces are now more powerful, local protectionism cannot be easily confronted as local interests are deeply entrenched.²⁶

In terms of the IP system specifically, there are a number of official agencies charged with administering the current IP system in China, as represented in Figure 1-1. Apart from the Supreme People's Court, these organisations are directly responsible to the State Council. The Supreme People's Court is overseen by the National People's Congress (NPC) and its permanent Standing Committee. According to Article 67 of the PRC constitution,²⁷ it is also the role of the NPC's standing committee to oversee the work of the State Council. Thus, the main IP agencies are not subordinate to a particular ministry. However, as they are powerful bodies reporting directly to the State Council, they are highly resistant to any attempts to merge them or delegate their powers to other bodies. As a result, the IP system is often accused of lacking coordination between these multiple channels.²⁸

Therefore, the role of the law and of the state in China and the developing relationship between the two has a variety of implications for the current system of IP protection. These consequences will be discussed further in this thesis as analysis of the current IP system develops. The following section will now examine the development of IP in China.

²⁶ Discussed in more detail below at page 171.

²⁷ Full text of the Constitution available at: "Zhonghua renmin gongheguo xianfa" (Constitution of the PRC), available at: http://www.gov.cn/ziliao/flfg/2005-06/14/content_6310.htm accessed August 30th 2005.

²⁸ Andrew Mertha, *The Politics of Piracy: Intellectual Property in Contemporary China*, (Ithaca, New York: Cornell University Press, 2005): 111.

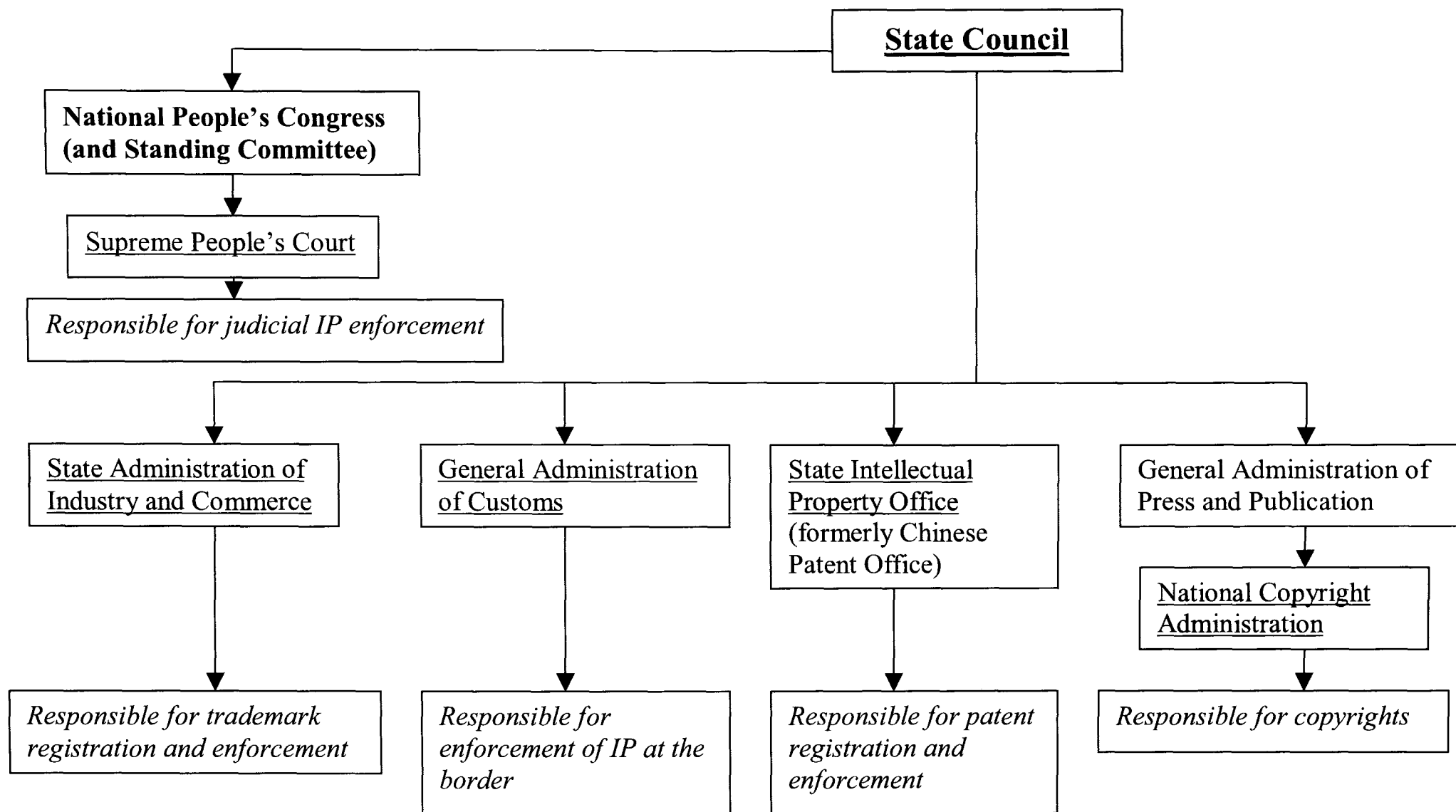


Figure 1-1 Bureaucratic Structure of China's Major IP Agencies

1.4 The Development of IP in China

China's WTO entry in December 2001 and associated obligations under the TRIPS Agreement had a significant impact on the IP system in China and, to appreciate this full impact, it is necessary to first understand the development of intellectual property protection from imperial China until the reform era. The development of intellectual property protection in China can be divided into four stages: firstly, the initial steps towards IP protection taken in the final years of the Qing Dynasty under pressure from Western powers; secondly, the early IP laws enacted by the Nationalist government in the period from 1912 to the 1940s to try to modernise the law; next, the preliminary Communist law reforms in the early years of the PRC; and finally, the extensive period of law reform which has taken place since the reform and opening up period began in the late 1970s. These four stages of development will be outlined below in order to place the significance of China's accession to the TRIPS regime in context.

1.4.1 IP Protection in Imperial China

It is widely accepted that there was "no comprehensive, centrally promulgated, formal legal protection for either proprietary symbols or inventions" in imperial China, despite some evidence of limited protection of brand names and controls regarding publications.²⁹ On the contrary, these feeble efforts made to protect intellectual property were regarded as solely aimed at maintaining the state's authority by controlling the dissemination of ideas.³⁰ It is also undeniable that several commentators have been

²⁹ William P. Alford, *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization*, (Stanford, California: Stanford University Press, 1996): 15.

³⁰ Peter Yu, "The Second Coming of Intellectual Property Rights in China", *Occasional Papers in Intellectual Property from Benjamin N. Cardozo School of Law, Yeshiva University*, Number 11: 5.

bemused by the lack of rudimentary intellectual property protection in imperial China, given China's advances in science and technology.³¹

Furthermore, despite some evidence suggesting that the concept of intellectual property was engrained in imperial society, the written legal codes do not reflect the private proprietary rights of intellectual property. In the Qing dynasty, the Code "dealt with almost all aspects of a citizen's and an official's life", but all "in penal form and China had no other (civil) code of law."³² In fact, "the law was only secondarily interested in defending the rights- especially the economic rights- of one individual or group against another individual or group and not at all in defending such rights against the state."³³ This concurs with the finding that the scant intellectual property protection that did exist in imperial China was not concerned "with the rights of individuals or their claims for their own sake, but with the social order and the interests of the State."³⁴ In other words, Qing legal codes did not cover individual rights such as IPR.

In the late Qing dynasty, international pressure to introduce protection for intellectual property in China began to gain momentum in the late nineteenth century following the Paris Convention on Industrial Property (1883) and the Berne Convention for the Protection of Literary and Artistic Works (1886), as discussed above at page 4. Pressure on China from Western powers to improve intellectual property protection also increased at this time as many Chinese traders used foreign trademarks in order to avoid

³¹ Joseph Needham, *Science and Civilization in China*, (London: Cambridge University Press, 1900): 38.

³² Alice Erh-Soon Tay, "Law in Communist China- Part I", *Sydney Law Review*, 6 (2), 160.

³³ Derk Bodde and Clarence Morris, *Law in Imperial China*, (Cambridge, Massachusetts: Harvard University Press, 1967): 4.

³⁴ Tay, "Law in Communist China- Part I", 161.

taxes to which Chinese, but not foreign, goods were subject.³⁵ By the turn of the twentieth century, there were some efforts within the treaty ports to register marks belonging to foreign nationals, but without effective enforcement powers, these efforts proved worthless.³⁶ Furthermore, treaties concluded with Britain, Japan and the U.S in the early twentieth century³⁷ included clauses on intellectual property, but these provisions were unclear and contradictory.

China did make some effort at this time to bring Chinese law into line with Western jurisprudence in order to escape from the extraterritorial regime, specifically by establishing a Law Codification Commission in 1904.³⁸ This process of westernization focused on Japan as a recommended model for reform.³⁹ China also attempted to introduce some basic intellectual property laws during the final years of the Qing Dynasty, such as the Law of Authorship of 1910, but the short life of this law meant that evidence of its implementation is absent.⁴⁰ Thus, despite this period of “unprecedented international attention to intellectual property,”⁴¹ no effective measures were instituted to protect intellectual property in imperial China.

³⁵ Gregory S. Feder, "Enforcement of Intellectual Property Rights in China: You Can Lead a Horse to Water But You Can't Make it Drink", *Virginia Journal of International Law*, 37 (1), (1996), 233.

³⁶ Alford, *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization*, 35.

³⁷ The texts of the Great Britain & China Treaty 1902, US-China Treaty 1903 and the Japan- China Treaty 1903 are all available in: John V. A. MacMurray, *Treaties and Agreements with and concerning China 1894-1919*, (New York: Oxford University Press, 1921), 342-352, 411-415, 423-432.

³⁸ Luke T. Lee, *China and International Agreements: A Study of Compliance*, (Leiden, The Netherlands: A. W. Sijthoff, 1969): Appendix 1, 136.

³⁹ Jianfu Chen, "Coming Full-Circle: Law-Making in the PRC from a Historical Perspective", Otto, Polak, Chen and Li, *Law-Making in the People's Republic of China*, (The Hague, The Netherlands: Kluwer Law International, 2000): 22.

⁴⁰ Sanqiang Qu, *Copyright in China*, (Beijing: Foreign Languages Press, 2002): 22.

⁴¹ Alford, *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization*, 34.

1.4.2 Reforms in IP Protection under the Kuomintang

Following the fall of the Qing Dynasty in 1912, China experienced several years of political upheaval before the country was largely united under the government of the Nationalist Kuomintang Party in 1927. When the Kuomintang (KMT) first came to power, efforts were made to stimulate invention and creativity. The Kuomintang carried out an extensive program of legislation both soon after the end of the Qing Dynasty and further, more extensive, reforms after 1927. For example, soon after the fall of the Qing dynasty, the KMT announced the Temporary Statute on Technology Reward of 1912. The Kuomintang also introduced a Trademark Law which saw 50,000 trademark registrations by 1948, a detailed Copyright Law and the first Patent Law in Chinese history.⁴²

The first Copyright Law was passed in 1928, which borrowed extensively from the German model via the Japanese version and was amended in 1944 to grant more equal treatment to both Chinese and foreign authors.⁴³ A comprehensive Trademark Law was passed in 1931 which was still in force when the Communists came to power in 1949; according to some sources, this law was again transplanted from the Continent via Japan.⁴⁴ The Patent Law drafted in 1944 formalised the system previously established by the Measures to Encourage Industrial Arts of 1932. These laws could be seen as the first introduction of formal IP protection to China.

Nevertheless, despite the promulgation of these landmark intellectual property laws, “these laws failed to achieve their stated objectives because they presumed a legal

⁴² Deli Yang, "The development of the intellectual property in China", *Working Paper Series, Bradford University School of Management*, Working Paper 02/24 (October 2002), 6.

⁴³ Qu, *Copyright in China*, 26.

⁴⁴ Connie Carter, *Fighting Fakes in China: The Legal Protection of Trade Marks and Brands in the People's Republic of China*, (London: The Intellectual Property Institute, 1996): 11, fn. 37.

structure, and indeed, a legal consciousness, that did not then exist in China and, most likely, could not have flourished there at that time.”⁴⁵ These IP laws called for administration through well-organised central agencies and modern courts, which simply weren’t present in China at this time. As a result, despite detailed legislation being adopted, there were very little changes in Chinese IP practice during KMT rule.

1.4.3 Development of IP Protection in the PRC

After the establishment of the People’s Republic of China in 1949, all Kuomintang laws and decrees were abolished as they were seen as tools for the repression of the masses.⁴⁶ Consequently, the preliminary intellectual property protection system that had been established by the Kuomintang was dismantled and the new PRC government began to consider a Communist alternative. The dismantling of the Kuomintang legal system and codes for ideological reasons clearly left a legal vacuum.⁴⁷ Therefore, the question became how could these inventions and outstanding works be encouraged and rewarded in a way which was consistent with Communist ideology?

The Provisional Regulations on the Guarantee of Invention Rights and Patent Rights which were promulgated on August 11th 1950 were the first regulations passed to fill this legal vacuum. These Provisional Regulations from 1950, “closely paralleled western patent laws in granting exclusive rights of exploitation of the patented device to the patentee.”⁴⁸ It is also significant that rights granted under these Regulations were

⁴⁵ Alford, *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization*, 53.

⁴⁶ Albert P. Blaustein, *Fundamental Legal Documents of Communist China*, (South Hackensack, New Jersey: Fred B. Rothman & Co., 1962), 41.

⁴⁷ Chen, "Coming Full-Circle: Law-Making in the PRC from a Historical Perspective", 30.

⁴⁸ Barden N. Gale, "The Concept of Intellectual Property in the People's Republic of China: Inventors and Inventions", *The China Quarterly*, 74 (June 1978), 336.

inheritable and transferable under Article 7, as these rights reflect Western notions of personal property rights.

However, the relatively liberal 1950 Provisional Regulations were amended by the Provisional Regulations on Awards for Inventions, Technical Improvements and Rationalization Proposals Concerning Production, approved on May 6th 1954.⁴⁹ These Regulations provided for monetary awards for improvements to the production process, calculated according to the money saved in the twelve months after the invention. However, in these revised regulations, “patents as such were ignored.”⁵⁰ The focus of these Regulations on monetary awards rather than the granting of property rights reinforces the notion that Communist legislation at this time was firmly aimed at promoting the states interests and not at promoting individual proprietary rights.

This supports the proposition that early intellectual property legislation was patterned on the Soviet model, with just a few modifications to allow for the gap in development between the Chinese and Soviet economies. The abandonment of personal property rights in the limited rewards offered to inventors also reflects classic Marxist thought.⁵¹ Thus, under Communist ideology, the notion of privately owned property rights effectively became meaningless.⁵²

The patent system was further amended by the 1963 Regulations on Awards for Inventions and the separately published Regulations on Awards for Technical Improvements, which permanently eliminated the certificate of ownership in favour of a

⁴⁹ Full text available from: Blaustein, *Fundamental Legal Documents of Communist China*, 523-533.

⁵⁰ Gale, "The Concept of Intellectual Property in the People's Republic of China: Inventors and Inventions", 337.

⁵¹ Karl Marx, *Early Writings*, (London: Watts & Co., 1963): 157.

⁵² Tao-Tai Hsia and Kathryn A. Haun, "Laws of the People's Republic of China on Individual and Intellectual Property", *Law and Contemporary Problems*, 38: 280.

lump-sum payment system. As a result, the 1963 Regulations were even more radical than the previous system in operation, with much fewer rewards and legal rights for inventors. This more radical approach is also reflected in a People's Daily editorial from 1963 which emphasised the position of inventions as collective property and added:

“This is totally different from the old society... it is not necessary for us to regard the inventions and technical improvements of a certain individual or a certain unit as personal property which deserves “protection.” This is different in nature from the so-called “patent rights” under the capitalistic system.”⁵³

The trademark system could also be considered to be fairly radical compared to that established in the Soviet Union. Trademarks were not retained in order to assist businesses, but rather to assist the consumer, individual or collective, to identify the quality of a product. Thus, they were predominantly used on products made for export.⁵⁴

In contrast to the Regulations passed to govern patents and trademarks, the PRC did not enact any statute on copyright following the abolition of the KMT Copyright Law from 1928, amended in 1944; indeed the only protection available to Chinese authors was in the form of model contracts from 1957.⁵⁵ This lack of copyright protection exemplifies attitudes to intellectual property in the early years of the PRC; patent law was codified in order to encourage industrial innovation, much needed to stimulate economic growth, trademark law was tolerated in order to promote consumer interests, but copyright law did not promote any public interest and thus was simply at odds with Communist ideology.

⁵³ Editorial, “Encourage Inventions and Technical Improvements by Rewards In Order to Promote Development of Our Production and Construction”, Renmin Ribao, 2 December 1963, in *Survey of China Mainland Press*, No. 3117, 11 December 1963, 15, cited by Gale, “The Concept of Intellectual Property in the People's Republic of China: Inventors and Inventions”, 341.

⁵⁴ Hsia and Haun, “Laws of the People's Republic of China on Individual and Intellectual Property”, 285-6.

⁵⁵ Ibid. 289.

Overall, the provisional IP regulations and reward systems put in place from 1949 to the 1970s did not succeed in promoting innovation and steadily moved away from the initial position of recognising an individual's IP rights to a more radical socialist approach that views IP as collective property. The Soviet intellectual property laws were also quite influential in the early IP regulations adopted in the 1950s, although the Soviet model was not always appropriate due to the differences in industrialisation between the Soviet Union and China. Furthermore, during the Cultural Revolution, even the system of lump sum bonuses was abolished in favour of a strict policy that all inventions and creations were national assets.⁵⁶ As a result, the research and development system was virtually paralysed throughout much of the pre-reform years of the PRC, with many individuals reluctant to acknowledge their role in a creation or invention, for fear of the stigma that would be attached to them. As China began to face the post-Mao era, it was clear that the existing intellectual property system was inadequate to stimulate the necessary economic development and foreign investment.

1.4.4 Development of IP Protection in the Reform Era

As the reform era began in 1978 and China began to open up to the outside world, intellectual property protection was in a parlous state. Despite the lack of formal functioning intellectual property laws, indeed the perceived lack of the entire concept of intellectual property, protection of intellectual property was soon prioritised in China's dealings with its trade partners. The China-US Agreement on Trade Relations of July 7th

⁵⁶ Gregory S. Kolton, "Copyright Law and the People's Courts in the People's Republic of China: A Review and Critique of China's Intellectual Property Courts", *University of Pennsylvania Journal of International Economic Law*, 17 (1), (Spring 1996), 416.

1979 committed China to implementing intellectual property protection.⁵⁷ In effect, this committed China to introducing laws and regulations that offered the same high level of protection as the equivalent laws in the US

Although intellectual property laws took several years to be drafted and promulgated, new regulations were passed in 1978 to encourage innovation,⁵⁸ which shows the early recognition of the importance of innovation to economic development. As a result, in the early 1980s, China did attempt to draft and adopt several intellectual property laws to replace the outdated provisional regulations passed in the 1950s. However, the introduction of such laws was no easy task, as they raised difficult questions about the future of Chinese socialism. For example, advocates of a new Patent Law argued that reform was necessary to stimulate industrial innovation and foreign investment. Conversely, opponents of the new Patent Law argued that rewarding inventors was contrary to key socialist principles and that a liberal patent system “would allow foreign enterprises to control and dominate Chinese technology.”⁵⁹

Consequently, the new statutes reflected the government’s unease with the introduction of private property rights and still had socialist principles at their core.⁶⁰ Notwithstanding these ideological difficulties, China did push ahead with intellectual property reform, joining the World Intellectual Property Organisation (WIPO) in 1980 and the Paris Convention on Industrial Property in 1984, as well as passing the Trademark Law 1982 and the aforementioned Patent Law in 1984. Copyright protection

⁵⁷ The full text of the Trade Agreement is available online "China- US Agreement on Trade Relations", <http://www.fas.usda.gov/itp/agreements/chintra.html>, accessed May 2004.

⁵⁸ Victor F. S. Sit, *Commercial Laws and Business Regulations of the People's Republic of China 1949-1983*, (Hong Kong: Tai Dao Publishing, 1983), 497.

⁵⁹ Bryan Bachner, "Intellectual Property Law", Wang and Zhang, *Introduction to Chinese Law*, (Hong Kong: Sweet & Maxwell, 1997): 449.

⁶⁰ Peter K. Yu, "From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century", *American University Law Review*, 50 (1), 36.

lagged behind protection for patents and trademarks, perhaps because industrial property was considered to be more commercially necessary. The Copyright Law was finally passed in 1990, although copyright had been mentioned in the 1986 General Principles of Civil Law.⁶¹

Despite establishing a comprehensive framework of statutory protection for intellectual property rights, China was still subject to heavy criticism from several trading partners, especially the US. Bilateral tensions concerning IP protection escalated in the 1990s and sanctions were threatened on several occasions before agreements were reached.⁶² Therefore, by the turn of the twenty-first century, there was a clear need for a new approach to intellectual property both within the international trading system and in China specifically to break the cycle of unilateral pressure and growing resentment. This alternative was provided by the accession of China to the WTO and the consequent obligation to comply with the TRIPS Agreement. China's path to WTO accession will be considered in more detail in the following section.

1.5 China in the International Trading System

The People's Republic of China (PRC) has a long and uneven history of interaction with the international trading system of GATT/WTO. Nationalist 'China' became an original contracting party to GATT on 30th October 1947, as the Republic of China (ROC). However, China's initial membership in GATT came to an end in 1950, when in March 1950, "the Taiwan authority informed the UN Secretary-General of its

⁶¹ Bachner, "Intellectual Property Law", 444.

⁶² This cycle of threatened sanctions and reluctantly agreed to Sino-US Accords is outlined further below in Section 6.3.4.1.

intention to withdraw from GATT.”⁶³ From 1950 until the early 1970s, Taiwan participated in GATT proceedings as an observer. However, following a thaw in relations between China and the US, the United Nations shifted diplomatic allegiance from Taiwan to the People’s Republic of China. In 1971, the UN General Assembly passed resolution 2758 (XXVI) that recognised the PRC government and expelled Taiwan. Subsequently, GATT followed suit and nullified Taiwan’s observer status.

As China commenced the process of opening-up to trade with the outside world from 1978 onwards, a greater interest began to be shown in the benefits and membership of various international financial organisations. In 1980, China became a member of the World Bank and IMF and started to show an interest in GATT. However, China did not immediately apply to resume its membership of GATT, although it began to participate in GATT as an observer from 1982.⁶⁴ It was not until July 1986 that this application to resume full membership was made.⁶⁵ Subsequently, GATT acted swiftly to consider China’s application with a working party established to negotiate for China’s full membership in June 1987.⁶⁶

Initially, the GATT working party made steady progress in the admission process. However, the events in Tiananmen Square in June 1989 halted further negotiations; “although the working party continued to meet periodically, its members developed a

⁶³ Yuwen Li, "Fade-away of Socialist Planned Economy: China's Participation in the WTO", Weiss, Deters and De Waart, *International Economic Law with a Human Face*, (London: Kluwer Law International, 1998).

⁶⁴ Margaret M. Pearson, "China's Integration into the International Trade and Investment Regime", Economy and Oksenberg, *China Joins the World: Progress and Prospects*, (New York: Council on Foreign Relations, 1999): 169.

⁶⁵ GATT, "Ministerial Declaration on the Uruguay Round", http://www.wto.org/gatt_docs/English/SULPDF/91240152.pdf, accessed February 6th 2007.

⁶⁶ GATT, "Document L/6191 Working Party on China's Status as a Contracting Party", <http://gatt.stanford.edu/bin/object.pdf?91280113>, accessed 20th April 2005.

more hardened attitude, despite their declaration of support for China's accession in principle."⁶⁷ China's application to GATT was further complicated by Taiwan's application to join GATT as a separate customs territory in January 1990. In effect, the accession process halted from 1989 to around 1992.

Nevertheless, as China had at that time applied to resume GATT membership, "China was permitted to participate fully in the Uruguay round of multilateral trade negotiations." As part of this participation, Chinese representatives had been included in TRIPS discussions "in 1991 and before that time."⁶⁸ Therefore, China attempted to follow TRIPS provisions in subsequent amendments to the intellectual property laws and the influence of TRIPS on the Chinese IP system should thus be considered as beginning much earlier than China's eventual formal WTO accession in 2001.

Although China failed to join GATT in time to become a member of the newly established World Trade Organisation in 1995, negotiations resumed soon after and good progress was made toward accession. Several factors did stymie this process, including the bombing of the Chinese embassy in Belgrade in May 1999.⁶⁹ However, after furious negotiations, China finally entered the WTO in December 2001 and from that date must formally comply with all the agreements that together make up the framework of the

⁶⁷ Pearson, "China's Integration into the International Trade and Investment Regime", 169.

⁶⁸ Chengsi Zheng, *Intellectual Property Enforcement in China: Leading Cases and Commentary*, (Hong Kong: Sweet & Maxwell Asia, 1997): 243.

⁶⁹ Koichi Hamada, "China's Entry into the WTO and Its Impact on the Global Economic System", Moore, *Doha and Beyond: The Future of the Multilateral Trading System*, (Cambridge: Cambridge University Press, 2004): 28.

WTO. In the case of the TRIPS Agreement, China agreed to comply with its TRIPS obligations immediately upon accession, with no transition period.⁷⁰

The issue of intellectual property protection in China was a key issue in China's WTO accession negotiations. The importance of IP protection can be witnessed in the final Working Party Report on China's WTO accession, which devoted 55 paragraphs out of a total of 343 paragraphs to China's commitments under the TRIPS regime.⁷¹ Furthermore, China's capacity to fully implement its TRIPS commitments was "one of the most frequently aired concerns" prior to entry in December 2001.⁷² These concerns arose from the recognition that "government commitment and a sound legal framework would not suffice to ensure enforcement, as IPRs involve millions of enterprises and hundreds of millions of individuals."⁷³

Therefore, China's compliance with the TRIPS Agreement is an area of interest for several of China's trading partners and given the level of concern regarding China's TRIPS implementation prior to accession; it is a topic worthy of further study. Furthermore, as more than five years have now passed since accession, now is an ideal time to research the impact of the TRIPS Agreement on China's IP system.

1.6 Key Research Questions and Structure

As this chapter has explained, protection of intellectual property rights by individual countries has evolved over many centuries and has emerged as worthy of

⁷⁰ World Trade Organisation, "Protocol on the Accession of the People's Republic of China", Document WT/L/432, 2001.

⁷¹ As noted by Yongtu Long, "Implications of China's Entry into the WTO in the Field of Intellectual Property Rights", Magarinos, Long and Sercovich, *China in the WTO: The Birth of a New Catching-up Strategy*, (New York: Palgrave Macmillan, 2003): 165.

⁷² Angela Gregory, "Chinese Trademark Law and the TRIPS Agreement- Confucius Meets the WTO", Cass, *China and the World Trading System: Entering the New Millennium*, (Cambridge: Cambridge University Press, 2003): 321.

⁷³ Long, "Implications of China's Entry into the WTO in the Field of Intellectual Property Rights", 169.

international consideration only in the past hundred years or so. Furthermore, the concept of intellectual property rights in China has also developed over the past hundred years and is now acknowledged to be an area of crucial importance for the modern Chinese legal system.

As intellectual property became more and more significant for the international trading system in the 1980s and 1990s, the TRIPS Agreement began to emerge from the Uruguay Round of trade negotiations that led to the establishment of the WTO. The TRIPS Agreement represented an important step in the development of international IP rights as the Agreement included provisions on enforcement previously neglected by international IP Conventions. Compliance with the TRIPS Agreement by individual WTO Members is thus significant as it affirms the legitimacy of the TRIPS Agreement and the WTO system of rules as a whole.

Accession to the WTO and the associated commitment to fully comply with the provisions of the TRIPS Agreement is also highly significant for China. Despite previous attempts to introduce a comprehensive system of protection for IP rights in China, the pre-WTO IP system was still subject to strong criticism from key trading partners such as the US. Thus, the impact of the TRIPS Agreement was hoped to not only assist with the continuing development of the IP system, but also to alleviate IP-related tensions with trading partners, as well as to contribute towards economic development in China. As a result, it can be seen that compliance with the TRIPS Agreement would signify an important step forward for the intellectual property system in China.

As WTO entry took place in December 2001, there has not yet been any systematic attempt to evaluate the post-WTO system of intellectual property protection in

China and thus, compliance theory can be a useful tool with which to examine the current system. Existing theories of compliance will be discussed in more detail in the next chapter. Previous studies of the legal system in China have relied on subjective judgments about the effectiveness of the system without any attempt to provide an overall model of the development of this system in response to external and internal stimuli and my study aims to rectify this deficit.

My key research questions for this study were thus as follows: what are the characteristics of the TRIPS Agreement that may affect a Member's compliance with it? What has the impact of WTO accession and related TRIPS obligations been on the IP system in China? How effective is the current system of IP protection in China? Is China fully complying with its obligations under the TRIPS Agreement? If there are areas of non-compliance, what are they and why is China not fully complying with TRIPS? How can any outstanding areas of non-compliance with TRIPS be resolved?

In order to address these questions, the remainder of the thesis will be structured as follows: The next chapter will outline the concept of compliance and key theories and models of compliance that have been proposed in the literature. Then, my methodology and research methods of combining a questionnaire, detailed interviews and document analysis will be explained and justified. The fourth chapter will discuss the TRIPS Agreement in more detail, analysing the drafting history of the Agreement, characteristics of the Agreement that may affect compliance, as well as the international environment surrounding IP rights. The fifth chapter will focus more specifically on China, addressing factors specific to China that may affect compliance with the TRIPS Agreement. Following the discussion of these factors, the sixth chapter will consider the

implementation of the TRIPS Agreement in China, compliance with the TRIPS Agreement and the overall effectiveness of the Agreement in transforming the IP system in China. Finally, the model of compliance will be revisited and a revised model of China's compliance with the TRIPS Agreement will be proposed. The thesis will close with a summary of my findings and some thoughts on the implications of these findings for China, for the WTO, for key trading partners such as the US and for individual rights holders.

2 Literature Review

2.1 Introduction

In order to evaluate China's current system of intellectual property protection and its compliance or otherwise with obligations under the TRIPS Agreement, it is important to first define the key terms, before attempting to outline the framework under which they will be analysed. Consequently, the first section of this chapter will introduce key theories that have previously been used to analyse the development of law in China. These concepts include legal transplants, legal legitimation and selective adaptation. However, these concepts alone will be shown to be insufficient to fully explain the current Chinese IP system and its relationship with the TRIPS system.

Consequently, the following section will introduce the concept and existing theories of *compliance*, which will be key to my analysis of China's conformity with TRIPS obligations. The third section will outline the specific comprehensive model of compliance that will be applied in this study and the chapter will conclude with an overview of previous studies of compliance in China.

2.2 Key Concepts

TRIPS is clearly not the first external legal system that China has been pressurised to comply with, as can be seen from the summary of the development of intellectual property in China in the previous chapter. As a result, China has often adopted and adapted foreign laws during various stages of legal reform. In fact, the attitude to foreign law in China has been consistently utilitarian and despite ideological differences, an instrumentalist approach to law has been taken at the various stages of law

reform in China.⁷⁴ These stages of law reform as outlined in the introduction above include: the late Qing efforts at law reform aimed at ending extraterritoriality; the early Republican period after 1911; attempts at modernization under the Kuomintang (KMT) Nationalist government particularly after 1927; following the victory of the Communists in 1949, there was a further reception of foreign law, in this case, the Socialist law of the Soviet Union; and finally, the post-Mao era of law reform, heavily influenced by international organisations and pressure from key trading partners, as well as the primary goal of economic development. Thus, reform-era legal reforms could actually be seen as the culmination of a century's long process of the adaptation of western laws to China.⁷⁵ Furthermore, the latest round of Chinese legal reforms taken in response to WTO accession could be seen as a further recent stage of legal development.

However, it is important to remember that the adoption or transplant of a foreign law is rarely a straightforward matter as, "to make the 'imported' legal institution work, one also needs a compatible political and economic environment as well as trained personnel." Thus, using Western institutions and theories out of context, "can bring about more theoretical problems and practical difficulties than it solves."⁷⁶ This is certainly true in the case of the adoption of international intellectual property laws such as those embodied in the TRIPS Agreement; without the necessary theoretical foundations and trained personnel to operate the law, the imported intellectual property laws may fail to operate effectively.

⁷⁴ Chen, "Coming Full-Circle: Law-Making in the PRC from a Historical Perspective", 39, 31.

⁷⁵ Anthony Dicks, "Reforms in the Balance", *The China Quarterly*, 119: 559 and fn. 96.

⁷⁶ Chen, "Coming Full-Circle: Law-Making in the PRC from a Historical Perspective", 39.

The General Principles of the Civil Law of the PRC passed in 1986 are a good example of the adoption of foreign legal codes into the Chinese legal system, as the General Principles are modelled on the German Civil Code. This “was the model chosen for the modernization of the Chinese legal system some 80 years ago, and indeed, virtually the whole technical and conceptual language of Chinese law is translated from European laws.”⁷⁷ This Chinese preference for the Continental model possibly received via Japan, rather than the Anglo-American legal tradition may even contribute to American hostility toward the Chinese implementation of the intellectual property system; Americans may feel some unfamiliarity with or distaste for essentially Continental legal concepts and values.

Therefore, it is clear that China, like many other countries undertaking a comprehensive program of law reform and modernisation, has relied on existing laws in other countries as models for reform. However, these ‘legal transplants’ can be problematic and raise issues about the effectiveness and appropriateness of adopting foreign laws to the Chinese context. The ‘borrowing’ of foreign laws can raise issues of how to achieve *legal legitimation*, which occurs when the law operates without the need for coercion; and *legal transplants*, whereby norms of imported law may conflict with the pre-existing system in the recipient country.⁷⁸ *Selective adaptation* of laws to implement and enforce may also be a key factor in a country’s legal development. These key concepts of legal development will now be considered.

⁷⁷ Dicks, "Reforms in the Balance", 560.

⁷⁸ Carter, *Fighting Fakes in China: The Legal Protection of Trade Marks and Brands in the People's Republic of China*, 35.

2.2.1 *Legal Transplants*

There has long been debate about the success of cross-cultural legal transplants in the legal literature. Optimists such as Watson hold that, “successful borrowing could be made from a very different legal system, even from one at a much higher level of development and of a different political complexion.”⁷⁹ From this perspective, it is proposed that law reformers should look for an idea in the foreign system which could then be transplanted into their own country, without any need for knowledge of the foreign law’s political or social context. Watson uses the example of the adoption of Roman law by much of Europe to illustrate this successful process of legal transplantation and claims that where the Roman legal rule was inimical to the adopting state, its chances of being borrowed were greatly diminished, but not where the rule was simply different from the existing circumstances.

Although he concedes that “a foreign legal rule will not easily be borrowed successfully if it does not fit into the domestic political context,” he maintains that foreign legal rules can be transplanted successfully to countries with very different traditions, such as the adoption of French and German law to Japan in the late nineteenth century.⁸⁰ Consequently, Watson would propose that China should be able to transplant foreign laws successfully, even if they are originally intended for different political systems or levels of economic development.

On the other hand, Kahn-Freund raises serious concerns about the use of comparative law as a fundamental tool of law reform.⁸¹ He looks back to the works of

⁷⁹ Alan Watson, “Legal Transplants and Law Reform”, *The Law Quarterly Review*, 92: 79.

⁸⁰ Ibid. 81-82.

⁸¹ Otto Kahn-Freund, “On Uses and Misuses of Comparative Law”, *The Modern Law Review*, 37 (1), (January 1974), 1.

Montesquieu who first considered the issue of legal transplantation and who claimed that only in the most exceptional cases could institutions of one country serve another. Furthermore, Montesquieu claimed that environmental, social and economic, and cultural factors; and purely political elements determined whether a law could be successfully transplanted.⁸²

Kahn-Freund submits that countries have gone through a process of economic, social and cultural assimilation since Montesquieu's writing, but accompanied by a process of political differentiation. Therefore, according to Kahn-Freund, political factors become the most important when considering legal transplantation⁸³ and political factors could act as obstacles to transplantation in three ways. First, the gulf between the communist and non-communist world and between dictatorships and democracies in the capitalist world; next, the evolution of variations on the democratic theme (e.g. presidential style or parliamentary type); and finally, the role played by organised interests in the making and the maintenance of legal institutions such as business organisations.⁸⁴

Applying these political factors to China, it is clear that China did differ significantly from the countries from which the new laws were adopted and from the Western legal systems on which the TRIPS Agreement was based. Not only did China's style of government differ in many cases (for example, where China used laws from Continental Europe), but even when China borrowed from the Soviet Union, another Communist country, China was at a different stage of economic development. Therefore,

⁸² Ibid. 6-7.

⁸³ Ibid. 8.

⁸⁴ Ibid. 11-12.

under Kahn-Freund's argument, these differences have made legal transplants into China problematic and indeed, would continue to make compliance with the TRIPS Agreement difficult. The issue of legal transplantation is certainly worthy of consideration as an issue affecting China's current TRIPS compliance.

2.2.2 Legal Legitimation

Legal legitimation is the second concept which is relevant to China's legal reforms through adoption of foreign laws. It is undeniable that "[t]he legitimacy of legal rules is, however, indirect or contingent in that it derives from the legitimacy of the political authority that promulgates or enforces the law."⁸⁵ Haley uses the example of the adoption of western legal norms into Japan in the nineteenth century to show how foreign laws may be transplanted into another country and how legitimacy affected the transplantation's success;

"The legitimacy of the new legal rules created by those in authority enabled dramatic social change despite conflict with pre-existing customary and legal norms. This is not to say that the new Western norms were in all instances overriding. However...in nearly all cases the failure of a new derivative norm to supplant a conflicting customary norm was a consequence of the enforcement process- such as judicial recognition of the customary norm as pre-eminent or a failure to enforce the new norm altogether."⁸⁶

This so-called 'contingent legitimacy' is an important concept as it means that China's lack of intellectual property enforcement may derive from a lack of legitimacy in the Chinese government rather than a lack of legitimacy in the laws themselves. In this case, it may be necessary to move beyond Watson and Kahn-Freund's debates about the effectiveness of legal transplants in terms of the substantive law and look toward the

⁸⁵ John Owen. Haley, *Authority without Power: Law and the Japanese Paradox*, (Oxford: Oxford University Press, 1991): 6.

⁸⁶ Ibid.

enforcement of the transplanted law to fully understand the complete process of transplantation.

Treating lawmaking and enforcement as two separate components, “we are able to explain both the fundamental dynamics of legal rules and the pivotal factors that determine the role and limits of law in a given society.”⁸⁷ This separation of lawmaking and enforcement is also a feature of theories of compliance discussed below which clearly differentiate between implementation of the new law into domestic legislation and full compliance and is thus an important distinction in the analysis of China’s TRIPS compliance.

2.2.3 Selective Adaptation

Selective adaptation is the third and final concept of legal development which may be relevant to the study of China’s implementation of the TRIPS Agreement and is “a process by which foreign ideas are received and assimilated into local conditions.”⁸⁸ Selective adaptation can be seen as a useful strategy which countries can use to comply with international norms, whilst balancing existing local legal norms and there is evidence of its previous use. Early in the twentieth century, powerful international players pressurised developing countries to adopt their legal standards, including intellectual property protection.

Japan is seen as an example of how ‘selective adaptation’ of Western laws was used to seek acceptance as an equal trading partner. As trading partners were satisfied with changes to the written laws, “[t]his gave Asian governments meanwhile the time to

⁸⁷ Ibid. 9.

⁸⁸ Pitman B. Potter, "Globalization and Economic Regulation in China: Selective Adaptation of Globalized Norms and Practices", *Washington University Global Studies Law Review*, 2: 119.

select and to focus on those among the new laws that they regarded as useful for their purpose of nation building and modernisation of the economy. Those laws would be enforced whereas others simply remained on the books.”⁸⁹ Thus, selective adaptation at a national level was seen as a useful strategy in fulfilling international commitments, whilst retaining the flexibility in implementation to fulfil national policies.

However, in the final decades of the twentieth century, it became clear that “the industrialised nations were by now aware of the policy of selective adaptation. No longer were they satisfied with their fetish of written legislation.”⁹⁰ In other words, there was a growing awareness of the use of selective adaptation by developing countries to appease international pressure without fully complying with global norms; indeed, it is clear that the recent focus on enforcement of domestic laws is the result of this awareness.

However, there is a certain amount of anecdotal evidence that selective adaptation policies are still used in the intellectual property context in Asia. For example, countries such as Indonesia and Vietnam use very generally worded legislation supplemented by implementing decrees to allow the specific law in force to be changed according to changes in policy.⁹¹ Therefore, it is interesting to consider the extent to which China can still employ the strategy of selective adaptation in the context of compliance with the TRIPS Agreement.

⁸⁹ Christoph Antons, "Harmonisation and Selective Adaptation in Intellectual Property Policies in Asia", Antons, Blakeney and Heath, *Intellectual Property Harmonisation within ASEAN and APEC*, (The Hague, The Netherlands: Kluwer Law International, 2004): 112.

⁹⁰ Ibid. 113.

⁹¹ Ibid. 114.

2.2.4 Compliance

Although the key concepts of legal transplants, legal legitimation and selective adaptation are all useful to analysis of China's compliance with the TRIPS Agreement, none of these concepts is complete enough to be able to use in isolation. Therefore, a broader concept is necessary to be able to fully evaluate China's interactions with the international IP system, as represented by the TRIPS Agreement. This may be provided by the concept of *compliance*.

'Compliance' is a key term which has its origins in international law.⁹² Compliance and law are "conceptually linked because law explicitly aims to produce compliance with its rules: legal rules set the standard by which compliance is gauged."⁹³ However, the concept of compliance has been increasingly used by political scientists since the 1980s. Compliance is desirable not only to tackle the problem that the rule was created for in the first place, but also "both to protect the rule and to protect the entire system of rules."⁹⁴ In other words:

"The rule of law requires compliance in order for law to be effective and makes compliance a matter of general international concern. Although any given state may be unaffected by non-compliance with a particular norm, all states are concerned to uphold the rule of law to ensure they are not affected by non-compliance in the future."⁹⁵

Thus, China's compliance with the TRIPS Agreement is sought-after not only to contend with the problem of intellectual property infringements, but also to protect the

⁹² Gerald Chan, *China's Compliance in Global Affairs: Trade, Arms Control, Environmental Protection, Human Rights*, (Singapore: World Scientific Publishing, 2006): 4.

⁹³ Kal Raustiala and Anne-Marie Slaughter, "International Law, International Relations and Compliance", Carlnaes, Risse and Simmons, *Handbook of International Relations*, (London: SAGE Publications, 2002): 538.

⁹⁴ Roger Fisher, *Improving Compliance with International Law*, (Charlottesville: University Press of Virginia, 1981): 21.

⁹⁵ Dinah Shelton, "Introduction: Law, Non-Law and the Problem of 'Soft Law'", Shelton, *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, (Oxford: Oxford University Press, 2000): 9.

TRIPS Agreement itself and the entire WTO system. As a result, China's compliance with the TRIPS Agreement is worthy of study for various reasons, not only to analyse the development of China's intellectual property system, but also to judge the effectiveness of imposing international IP standards through the framework of the WTO.

However, operationalising compliance as a variable is problematic. It is clear that "one cannot simply read domestic legislation to determine whether countries are complying."⁹⁶ These substantive measures that the state takes in order to make the specific international accords applicable to domestic law are more often referred to under the concept of *implementation*. However, it is clear that *compliance* goes beyond mere implementation of international commitments into domestic law; compliance "refers to whether countries in fact adhere to the provisions of the accord and to the implementing measures that they have instituted."⁹⁷ Compliance also needs to be differentiated from *effectiveness*, which is related to compliance but is not identical. Effectiveness can be seen from two perspectives, both in achieving the stated objectives of the treaty and in addressing the problems that led to the treaty. Effectiveness may be achieved without compliance and equally, compliance might be fully achieved without effectiveness. Furthermore, compliance is difficult to assess even with a clear definition of the concept. This is because it is clear that perfect compliance never occurs;

"In reality, there is a level of acceptable practical compliance in the light of regime norms and procedures. Moreover, this acceptable level is subject to

⁹⁶ Harold K. Jacobson and Edith Brown Weiss, "A Framework for Analysis", Brown Weiss and Jacobson, *Engaging Countries: Strengthening Compliance with International Environmental Accords*, (Cambridge, Massachusetts: The MIT Press, 1998): 2.

⁹⁷ Ibid. 4.

change across case studies, time and occasions. This level actually achieved by states is also subject to variation.”⁹⁸

Therefore, despite an abstract concept of full and complete compliance, something less than this is usually accepted in most international accords. Even within a specific international accord, there may not be a fixed judgment of what level of compliance is acceptable. “Consequently, what is compliance to some may not be regarded as such by others. Seen in this light, the nature of compliance and the standards for measuring compliance are by and large relative rather than absolute.”⁹⁹ These variations in the standard of acceptable compliance have implications for the study of China’s compliance with its TRIPS obligations as, “in the end, assessing the extent of compliance is a matter of judgment.”¹⁰⁰ However, despite these difficulties in objectively analysing compliance, it is still an important aim.

2.3 Theories of Compliance

As stated above, the question of compliance with international commitments has given rise to various theories of compliance in the past few decades. The main question behind these various theories, which have appeared in both international relations and international law literature in recent years, is simply: why do states comply with their international obligations? Clearly, “in general states are induced to do so because, in their overall strategic assessment, positive outcomes resulting from compliance outweigh

⁹⁸ Ann Kent, *China, the United Nations and Human Rights: The Limits of Compliance*, (Philadelphia: University of Pennsylvania, 1999): 232.

⁹⁹ Chan, *China's Compliance in Global Affairs: Trade, Arms Control, Environmental Protection, Human Rights*, 66.

¹⁰⁰ Jacobson and Brown Weiss, "A Framework for Analysis", 4.

negative ones.”¹⁰¹ However, there is no clear agreement on the exact processes that lead to compliance, or indeed that make compliance more likely.

Louis Henkin, in one of the earliest attempts to consider the issue of compliance, famously stated that “[i]t is probably the case that *almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.*”¹⁰² However, he was less clear on why nations comply and offered a “remarkably rich” list of factors to explain state compliance.¹⁰³ Henkin’s model of compliance seems to revolve around a simple cost-benefit analysis, whereby violation would offer more advantage than compliance, although he does acknowledge, “[t]hat nations act on the basis of cost and advantage may seem obvious, but the notions of cost and advantage are not simple and their calculation hardly precise.”¹⁰⁴

This straightforward cost-benefit analysis approach is also taken by neorealist compliance theorists such as Neuhold, whose analysis of state behaviour focused on strategic incentives at both international and domestic levels. Neuhold proposed that decision makers focus on three variables when deciding whether to comply: the magnitude and consequences of possible sanctions; the probability of the sanctions being imposed; and the likelihood of their non-compliance being detected.¹⁰⁵ However, neorealist theories such as Neuhold’s work best where nation-states remain the main players in global politics and in many areas of international law, this is no longer the case.

¹⁰¹ Chan., *China's Compliance in Global Affairs: Trade, Arms Control, Environmental Protection, Human Rights*, 66.

¹⁰² Emphasis in original, Louis Henkin, *How Nations Behave: Law and Foreign Policy*, (New York: Council on Foreign Relations, 1979): 47.

¹⁰³ Raustiala and Slaughter, "International Law, International Relations and Compliance", 540.

¹⁰⁴ Henkin, *How Nations Behave: Law and Foreign Policy*, 50.

¹⁰⁵ Hanspeter Neuhold, "The Foreign Policy 'Cost-Benefit Analysis' Revisited", *German Yearbook of International Law*, 42 (1999), 88.

Certainly in the case of IP rights, companies and individual rights holders may have a significant role to play in ensuring compliance with international commitments.

Challengers to cost-benefit based theory have arguably proposed more precise models of a state's compliance. For example, Franck offered a detailed theory of compliance based on legitimacy and fairness, both substantive and procedural.¹⁰⁶ In this theory of compliance, legitimacy is the key factor; "the legitimacy of rules exerts a 'compliance pull' on governments that explains the high observed levels of compliance of international law."¹⁰⁷ However, although legitimacy is clearly an important factor in compliance, Franck's theory of compliance based on the legitimacy of the rules has been criticised as circular; that the rules are complied with because they are legitimate, but they derive their legitimacy from nations complying with them. Franck's theory has also been criticised as it "fails to explain why 'legitimacy' leads to compliance, why these factors are important, how they interact with other measures of a nation's self-interest, and why states violate laws with which they had previously complied."¹⁰⁸ Thus, although the issue of the perceived legitimacy of the rules, in this case of the TRIPS Agreement, may play a crucial role in compliance, ultimately Franck's theory does not go far enough to satisfactorily explain compliance with international law and other factors may also need to be included.

In recent decades, other theorists have attempted to bridge the divide between compliance theory in international relations and in international law, a case in point being

¹⁰⁶ Thomas Franck, *Fairness in International Law and Institutions*, (Oxford: Oxford University Press, 1995).

¹⁰⁷ Raustiala and Slaughter, "International Law, International Relations and Compliance", 541.

¹⁰⁸ Andrew T. Guzman, "A Compliance-Based Theory of International Law", *California Law Review*, 90 (6), 1835.

the managerial theory of compliance presented by Chayes and Chayes, which “rejected sanctions and other ‘hard’ forms of enforcement in favour of collective management of (non)-performance.”¹⁰⁹ Chayes and Chayes sought to offer an alternative to ‘enforcement’ models of compliance based on the possibility of sanctions. They contend that the reasons states do not fully comply are either ambiguity in the treaty language; limitations in capacity to carry out their undertakings; or “the temporal dimension of the social, economic, and political changes contemplated by regulatory treaties.”¹¹⁰ Therefore, “if we are correct that the principal source of non-compliance is not wilful disobedience but the lack of capability or clarity or priority, then coercive enforcement is as misguided as it is costly.”¹¹¹ Chayes and Chayes thus provide a powerful challenge to enforcement models of compliance based on realist theory that states make an active choice to comply or not based on an assessment of the associated costs and benefits, by shifting the emphasis of compliance to a state’s capacity to comply. However, the Chayes and Chayes approach has also been criticised as being incomplete:

“The managerial model... is a useful but incomplete model of compliance. As long as one is only interested in coordination games, it provides a good guide to compliance and national behaviour. If one seeks to understand situations where states make agreements that call upon them to act against their own interests in exchange for concessions from other states, a different model is needed.”¹¹²

¹⁰⁹ Raustiala and Slaughter, "International Law, International Relations and Compliance", 543.

¹¹⁰ Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements*, (Cambridge, Massachusetts: Harvard University Press, 1995): 10.

¹¹¹ Ibid. 22.

¹¹² Guzman, "A Compliance-Based Theory of International Law", 1832-1833.

Furthermore, Chayes and Chayes give the impression that there is a stark choice between the enforcement model and their own managerial model, whereas in fact, they may complement each other.¹¹³

In the 1990s, dissatisfaction with existing theories and “the rise of constructivist theory dovetailed with work by legal scholars long interested in the normative basis of compliance.”¹¹⁴ An example of this more normative approach can be seen in Koh’s theory of ‘obedience’ with international law. Koh claimed that, “obedience is compliance motivated not by anticipation of enforcement but via the incorporation of rules and norms into domestic legal systems.”¹¹⁵ This obedience theory has three sequential components, interaction, interpretation and internalization. According to Koh’s model, public and private actors first interact in a variety of fora to create the legal rule; these actors then interpret the rule and finally, through interaction, internalize the rule:

“It is through this repeated process of interaction and internalization that international law acquires its ‘stickiness’, that nation-states acquire their identity, and that nations define promoting the rule of international law as part of their national self-interest.”¹¹⁶

However, Koh provides no explanation of how these legal norms are eventually internalised and “without an understanding of why domestic actors internalize norms of compliance in the international arena, and a theory of why this internalization tends towards compliance, the theory lacks force.”¹¹⁷ In other words, it may be true that

¹¹³ Marcus Bergsteller, *Theories of Compliance with International Law*, (Leiden, The Netherlands: Martinus Nijhoff Publishers, 2005): 145.

¹¹⁴ Raustiala and Slaughter, "International Law, International Relations and Compliance", 544.

¹¹⁵ Ibid.

¹¹⁶ Harold Hongju Koh, "Transnational Legal Process (The 1994 Roscoe Pound Lecture)", *Nebraska Law Review*, 75 (1996), 204.

¹¹⁷ Guzman, "A Compliance-Based Theory of International Law", 1836.

international legal norms need to be internalised as a pre-condition for full compliance, but Koh does not offer a clear explanation of this process of internalisation.

Another competing theory of compliance which emerged in the late 1990s was proposed by Andrew Guzman. Guzman's theory of compliance relies on reputational factors to explain a state's compliance and instances of violation. In his model, when a state considers whether or not to comply with an international obligation, the possible sanctions it would face are paramount. These sanctions "include all costs associated with such a failure, including punishment or retaliation by other states, and reputational costs that affect a state's ability to make commitments in the future."¹¹⁸ Guzman cites several factors which affect the reputational impact of a violation, which include the severity of the violation; the reasons for the violation; the extent to which other states know of the violation; and the clarity of the commitment and the violation.¹¹⁹ This reputational theory is similar to the Chayes' managerial approach in that it places reputational concerns at the centre of a state's compliance. However, Guzman himself recognises the limitations of his reputational theory in applicability to areas where the stakes are high.

In the past few years, the scope of theories of compliance has moved beyond the traditional question of why states comply with international agreements. For example, recent theories of compliance have sought to diminish the distinction between 'hard' law, such as formal treaties, and 'soft' law, such as bilateral Memoranda of Understanding.¹²⁰ There is also a growing recognition in international relations theory that states are not the only relevant actor in international relations. Liberal theories of compliance such as

¹¹⁸ Ibid. 1845.

¹¹⁹ Ibid. 1861.

¹²⁰ Ibid. 1828.

those proposed by Slaughter and Moravcsik rest on a ‘bottom-up’ view of politics, in which the demands of domestic interest groups are crucial.¹²¹ “Liberal theory begins with the assumption that the key actors in international relations are individuals and private groups, rather than states,”¹²² and thus considers the dynamics of key interest group within each individual state. Although it is undeniably important to acknowledge the role of individual actors in the international arena, focusing on these interest groups can also lead to overly complex theories of compliance.

Therefore, over the past few decades, there have been various theories advanced to explain a state’s compliance or otherwise with its international obligations, but no single theory has yet achieved recognition as complete. There are still clear gaps in the theories, with some theories suiting some legal obligations better than others.

2.3.1 Categorising Theories of Compliance

It is important to recognise that although compliance is a significant area of study in contemporary international relations and legal study as outlined in discussion of the key theories above, “compliance remains a relatively young field. Many core concepts are debated and empirical testing of compliance theories is limited.”¹²³ Consequently, this study of China’s compliance with international intellectual property standards as embedded in the TRIPS Agreement can contribute to this ongoing development of compliance theory.

Furthermore, as there is not yet any agreement over a model of compliance for individual states with international obligations, it is difficult to decide exactly which

¹²¹ Bergsteller, *Theories of Compliance with International Law*, 166.

¹²² Guzman, "A Compliance-Based Theory of International Law", 1838.

¹²³ Raustiala and Slaughter, "International Law, International Relations and Compliance", 548.

model of compliance should be applied in this study. Before outlining the model of compliance which has been selected for use in this study, the competing theories of compliance will be considered under various categories in order to further distinguish their particular features.

It is clear that the study and theory of compliance has a relatively long and chequered history in both international law and international relations literature and that there is no clear agreement on why a state complies or not with its obligations. There are also clear differences between these theories based on the approach they have taken to compliance. Compliance theories have been clustered into six broad conceptual categories and it is useful to explore these categories in the context of China's compliance with international intellectual property standards.¹²⁴

The first category of compliance theories considers the *problem structure*. In the case of intellectual property, it is both a large problem and pervasive in all developing countries at a similar stage of economic development. The problem is further complicated because infringing behaviour is often hidden. The second category of compliance theory is that of *solution structure*, which focuses on the specific institutional design or framework of the agreement. In the case of the TRIPS Agreement, it is consequently important to consider whether the framework of the institutional structure of the TRIPS Agreement itself raises or lowers the cost of compliance.

The third category of compliance theory is that of *solution process*, which includes the methods and processes by which the institution operates. In other words, the rules themselves must be seen as inclusive, fair and legitimate to encourage compliance;

¹²⁴ Categorization taken from: Ibid. 545-548.

the TRIPS Agreement must be seen as fair by China and other Members for full compliance to follow. This echoes the approach taken by Franck.

The fourth category of compliance theory is *norms*. Through a process of socialization, new norms may be adopted by the country leading to changes in behaviour. Thus, it is important to not only consider the pre-existing legal and cultural norms in China, but also the norms associated with the TRIPS Agreement and the congruence between them. The fifth category is that of *domestic linkages* or “structural links between international institutions and domestic actors.”¹²⁵ Some theories have taken this category a stage further by proposing a general relationship between the type of domestic regime and its inclination to comply with international commitments. Under this general relationship, ‘liberal’ states are more likely to comply and under the definition often used, China is not a liberal state. These criteria include a government based on representative democracy, a market economy based on private property rights and a constitution which protects basic civil and political rights. China certainly does not meet the criteria for a representative democratic government and it is debatable to what extent the economy and constitution would meet these ‘liberal’ state standards. Thus, this type of compliance theory would hold that China is automatically less likely to comply given the nature of the Chinese state as non-liberal.

The final group of compliance theory is based on *international structure*. This considers the institutionalisation of the international system and suggests that “highly institutionalised systems may create positive spirals of compliance by embedding states

¹²⁵ Ibid. 546.

in regularized processes of cooperation that are mutually reinforcing.”¹²⁶ This kind of compliance theory would focus on the WTO as an international trading system and ask how the WTO institutions such as the dispute resolution body encourage compliance.

The significance of these categories is that these categories need to be included in order to broaden existing discussions of compliance in a Chinese context. Moreover, as an emerging field, it is also crucial not to discount important influences on China’s TRIPS compliance. Therefore, this study will seek to incorporate elements of all these different categories of compliance theory in a comprehensive model of compliance as outlined in the following section.

2.4 Towards a Comprehensive Model of Compliance

The theories of compliance related above attempt to explain a country’s compliance with international accords in general terms. It is clear from these various theories that “many factors may affect a country’s implementation of compliance with international accords,” including the characteristics of the activity involved, the characteristics of the accord to be complied with, the international environment (i.e. are other countries complying?) and factors involving the country itself.¹²⁷ It is crucial to apply the rather abstract theories of compliance gathered above to a more detailed model of specific factors which affect compliance. In the past few years, several attempts have been made to conceive an overall model of compliance within the areas of environmental, human rights, or arms control agreements.

¹²⁶ Ibid. 548.

¹²⁷ Jacobson and Brown Weiss, "A Framework for Analysis", 6-7.

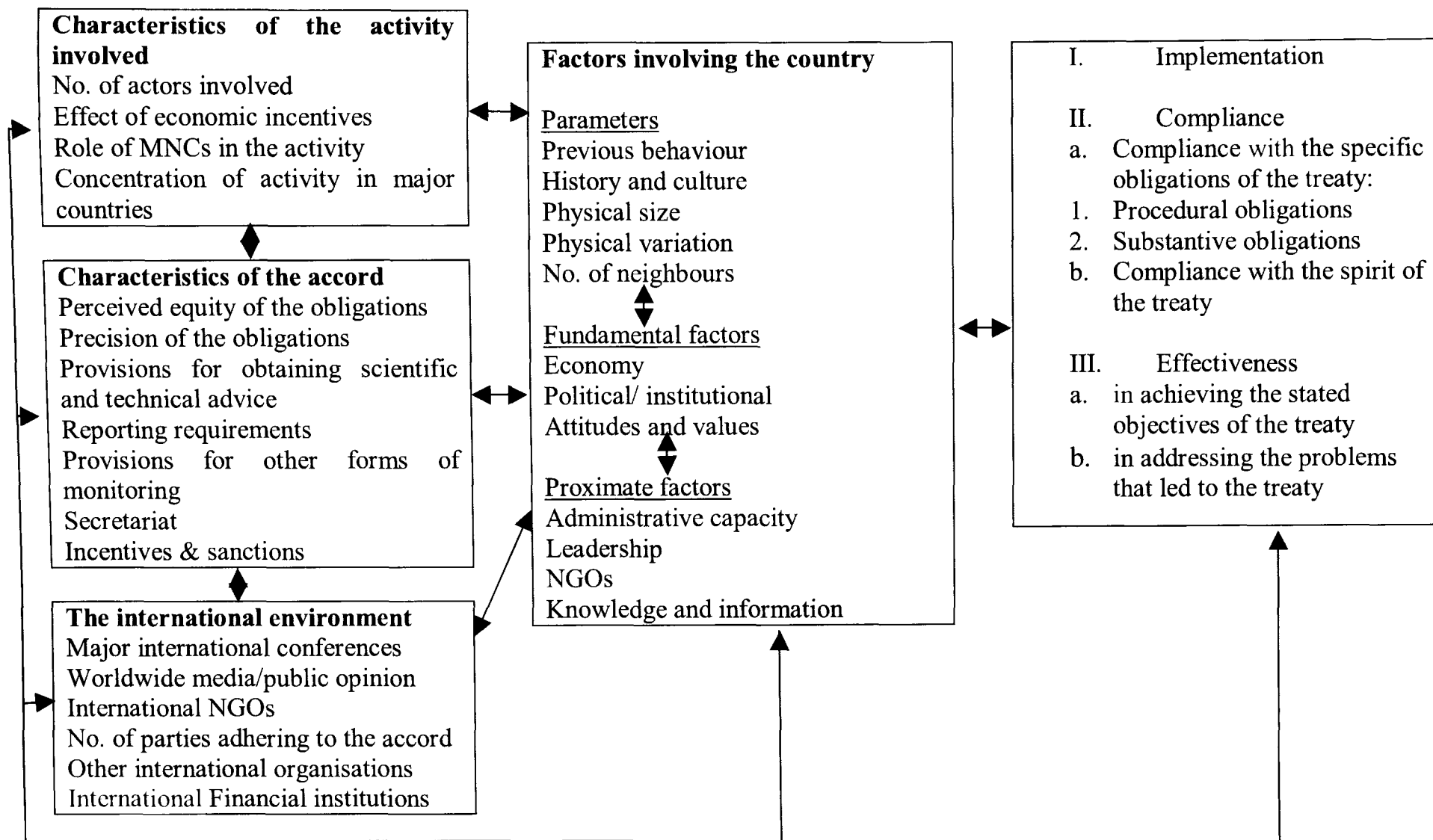


Figure 2-1- Jacobson and Brown Weiss' comprehensive model of factors that affect implementation, compliance and effectiveness

These factors can be combined into a comprehensive model of factors which affect implementation, compliance and effectiveness of international accords (as shown above in Figure 2-1¹²⁸). This model of specific factors initially developed to explain a state's (non-)compliance with environmental accords will be applied to the context of international intellectual property protection under the TRIPS Agreement in this study. The factors affecting compliance can thus be divided into country specific and non-country specific factors. The non-country specific factors relate to the specific activity involved, namely intellectual property infringements; the characteristics of the TRIPS Agreement, including the substantive and procedural provisions; and the international environment, including the number of countries already in compliance with TRIPS, international NGOs concerned with IP protection and coverage of IP issues in the media.

In terms of the characteristics of the activity involved, it is believed that the smaller number of actors involved in the activity, then the easier it is to regulate it. Furthermore, economic incentives may act towards compliance and the presence of multinational corporations (MNCs) may contribute towards compliance as they are easier to influence than smaller less-visible firms. Finally, the activity is more likely to be easily regulated if it is concentrated in a few major countries.¹²⁹ The specific activity involved in the TRIPS Agreement is intellectual property infringements and this activity may well be particularly problematic in ensuring compliance, as discussed below at page 130.

¹²⁸ Source: Harold K. Jacobson and Edith Brown Weiss, "Assessing the Record and Designing Strategies to Engage Countries", Brown Weiss and Jacobson, *Engaging Countries: Strengthening Compliance with International Environmental Accords*, (Cambridge, Massachusetts: The MIT Press, 1998): 535.

¹²⁹ Ibid. 522.

Turning to the characteristics of the accord, the eight characteristics identified as possibly affecting implementation of that accord can be divided into substantive provisions and procedural provisions of the accord.¹³⁰ The accord under consideration in the international IP arena is the TRIPS Agreement and thus, the substantive provisions to consider include the perceived equity of the obligations and the precision of the obligations. The procedural provisions of the TRIPS Agreement include the role of the secretariat (the Council for TRIPS) and monitoring provisions. The TRIPS Agreement does contain several relevant substantive and procedural provisions that may affect WTO Members' compliance and these will be considered in more detail below at page 115.

The final aspect of non-country specific factors to consider is the international environment which can also play a role in strengthening compliance with an international agreement. In fact, the greater media pressure and increased public awareness in the environmental field "may well have been the most important factor explaining the acceleration in the secular trend toward improved implementation and compliance that we observed in the late 1980s and early 1990s."¹³¹ Consequently, it is also important to consider the presence of international NGOs concerned with intellectual property and media pressure in this field, as well as the number of WTO Members already complying with TRIPS obligations. The international environment is considered below in chapter 4 at page 135.

Turning to the specific context of compliance in China, specific factors involving the country are some of the most important factors determining a country's compliance with its international obligations. These factors may be divided into parameters, fundamental factors and proximate factors. Parameters comprise essential

¹³⁰ Ibid. 528.

¹³¹ Ibid. 528-529.

characteristics of the country which may affect its tendency to comply. The relevance of the history and culture of a country cannot be denied. For example, “Japan found it easy to comply with the obligations of the World Heritage Convention because it had traditionally cherished its cultural and natural sites; protection of them was deeply embedded in Japanese culture.”¹³² In contrast, China has struggled to preserve historical sites. Other parameters to consider include the physical size and variation of the country, the number of neighbours and the country’s previous behaviour in this field which are all considered below in chapter 5 at page 141.

The second category of China-specific influences to consider is fundamental factors. In general, fundamental factors affecting a country’s compliance include political and institutional factors, as well as economic considerations. Economic factors seem to be indirectly relevant and the level of government ownership of production seems to be particularly important as, “governments seem to be better at regulating the activities of nongovernmental entities than they are at regulating activities under their own control.”¹³³ Thus, economic factors may affect compliance more in countries where the government and government ownership play a more important role in the economy.

In terms of political and institutional factors, there is mixed evidence about the difference that a democratic government can make to a country’s likelihood of complying with international agreements. It has been proposed that democratic governments are more likely to comply based on their greater transparency and greater responsiveness to public pressure or pressure from NGOs, but the idea that non-democratic governments do not comply with their international obligations has

¹³² Ibid. 530.

¹³³ Ibid. 532.

also been challenged. Both economic and political fundamental factors will be considered below at page 156.

The final category of country-specific factors which may influence China's TRIPS compliance are proximate factors. These may include administrative capacity, the attitude of the leadership and the influence of NGOs. It is undeniable that, "a crucial factor contributing to the variance among the performance of countries is administrative capacity,"¹³⁴ which includes funding for administrative agencies, powers assigned to these agencies and having sufficient numbers of trained personnel. Proximate factors such as administrative capacity will be discussed in chapter 5 at page 175.

In addition to consideration of both non-country specific and country specific factors, this comprehensive model of compliance represented in Figure 2-1 also distinguishes between implementation of the specific obligations, compliance, both substantive and procedural, and effectiveness of the resultant system. This distinction may be particularly pertinent to China's TRIPS compliance as China's implementation of TRIPS obligations is widely praised, yet compliance is sometimes doubted and the effectiveness of the current IP system is certainly criticised on a frequent basis. As a result, implementation, compliance and effectiveness will be detailed further in chapter 6.

Overall, the model above suggests which factors may be important in affecting a country's compliance with international agreements, but does not describe how the dynamic process of change in a country's compliance may occur. Changes within countries can be explained within two dimensions, the intention to comply and capacity to comply. Factors endogenous to the country concerned are important, such

¹³⁴ Ibid.

as changes in the government or major changes in the domestic economy. Exogenous factors such as financial and technical assistance can also play a role. However, intention to comply is meaningless without the capacity to comply. Therefore, “external pressure may contribute to a country’s resolve to comply, but its role is limited.”¹³⁵ In the end, “[t]he level of a country’s compliance... depends crucially on the leaders and citizens of the country understanding that it is in their self-interest to comply, and then acting on this belief.”¹³⁶ It is also important to recognise that even if less than full compliance is confirmed, there is no straightforward explanation for this lack of compliance. “A lack of reach of the law could be a sign of government impotence, a reservation of government discretion, or a way for the government to conserve its resources, or any or all of these.”¹³⁷ Therefore, the dynamic processes of change will be considered in chapter 7 when this comprehensive model of compliance will be revisited and modified for the specific context of China’s TRIPS compliance.

This comprehensive model of compliance has striking similarities to the conclusions of other recent studies of compliance. For example, a recent major study of factors which may influence compliance with non-binding, or so-called ‘soft’ norms, in the international legal system examined the role of four commonly cited factors: the institutional setting, regional differences, the type of obligation involved; and the generality and specificity of the obligations.¹³⁸ This study concluded that “the circumstances that led to the negotiation of a non-binding obligation affect compliance.”¹³⁹ Furthermore, regional consensus about the norm increased the likelihood of compliance, whereas costs associated with compliance, either economic

¹³⁵ Ibid. 540.

¹³⁶ Ibid. 541.

¹³⁷ Tahirah V. Lee, *Law, the State, and Society in China*, (New York: Garland Publishing Inc., 1997), xiv.

¹³⁸ Shelton, "Introduction: Law, Non-Law and the Problem of 'Soft Law'", 3-4.:

¹³⁹ Edith Brown Weiss, "Conclusions: Understanding Compliance with Soft Law", 536.

or in terms of lack of capacity, made compliance less likely. Overall, “compliance with both hard and soft law is affected by two important factors... These are the intent of a state (or non-state actor) to comply; and the state’s (or non-state actor’s) capacity to comply.”¹⁴⁰

This study of compliance with soft law norms concurs with Jacobson and Brown Weiss’ model of compliance that there are various specific factors which affect compliance. The regional differences/consensus factor highlighted by Shelton *et al* equates to the international environment category of factor in Jacobson and Brown Weiss’ model. In addition, the institutional setting, type of obligation involved and the generality or specificity of the obligation are all related to the category of the characteristics of the accord. Finally, the emphasis in Shelton *et al*’s conclusion on the capacity of the state to comply falls under the category of the factors involving the country. Therefore, it appears that the comprehensive model of factors which affect compliance as proposed by Jacobson and Brown Weiss can also be applied to ‘soft’ law agreements and thus may be of general application. As a result, it seems that this model, with the categories of characteristics of the activity involved, characteristics of the accord, the international environment, and factors involving the country, could be applicable to China’s compliance with the TRIPS Agreement and will thus be the model of compliance applied in this study.

2.5 Previous Studies of Compliance in the Chinese Context

Detailed studies into China’s compliance with international commitments are limited, but are beginning to emerge in various areas of international law, not only

¹⁴⁰ Ibid. 550-1.

intellectual property. Existing studies of China's compliance have focused mainly on the areas of arms control, trade, environmental protection and human rights.

2.5.1 Early Studies of China's Compliance

One of the earliest studies of compliance in China is an early study of China's compliance with international treaty agreements from the 1960s which found that overall, "with respect to trade agreements, except for difficulties in connection with the Great Leap Forward and the Cultural Revolution, the PRC has enjoyed an excellent reputation for meeting its obligations."¹⁴¹ Due to China's lack of diplomatic recognition at this time, trade agreements were concluded at the Associational level, for example, between the Canadian Wheat Board and the China Resources Corporation regarding grain imports and exports. China's compliance with these early trade agreements could be seen as an indication of the PRC's willingness to comply with its obligations on the global stage and indeed the approach taken by Beijing to international agreements at that time mirrors the experience of China's accession to the WTO.

In Lee's study, he concluded that, "the consensus appears to be that, while negotiation with Peking is not always an easy matter, once an unambiguous agreement is reached, compliance likely will follow."¹⁴² Applying this finding to China's compliance with WTO obligations, it must not be forgotten that China actively negotiated the trade agreements of the 1960s and furthermore, these agreements were bilateral. Conversely, China's commitment to the WTO, specifically in the field of intellectual property protection was based on a multilateral agreement (the TRIPS Agreement), the terms of which had already been fully negotiated prior to

¹⁴¹ Lee, *China and International Agreements: A Study of Compliance*, 119.

¹⁴² Ibid.

China's entry. It is conceivable that China's problems in fully complying with the TRIPS Agreement were created by the nature of China's accession to the WTO Agreements on a 'take it or leave it' basis.

Therefore, the main findings of this early study of China's compliance with international obligations may still be applicable to contemporary China, although the political and institutional framework of acceding to international agreements in China today is very different.

2.5.2 China's Compliance with Environmental Agreements

China's pattern of entry to and implementation of international accords has also been studied in the context of environmental agreements. Oksenberg & Economy found that China acceded to international accords only after careful consideration of the costs, benefits and responsibilities involved.¹⁴³ This corresponds with the impression given from the historical research on China's compliance with international agreements discussed above, that China takes a long time to commit to an international accord, but once China has committed, then compliance should follow as China has already weighed up the costs and benefits of the agreement.

This study of China's implementation of and compliance with environmental accords also found several factors which determine the success of implementation. These range from the status of the implementing agency and the level of support from high-level political leaders, to the visible nature of the agreement and whether the requirements "are congruent and converge with the path China was pursuing prior to

¹⁴³ Michel Oksenberg and Elizabeth Economy, "China: Implementation under Economic Growth and Market Reform", Brown Weiss and Jacobson, *Engaging Countries: Strengthening Compliance with International Environmental Accords*, (Cambridge, Massachusetts: The MIT Press, 1998): 356.

signing the agreement.”¹⁴⁴ However, in terms of codification of these environmental agreements, Oksenberg and Economy found that China was often ahead of the necessary timescale for commitments and the real problem lay in the enforcement of these domestic laws and regulations:

“The key problem is effective implementation of existing regulations, not the absence of regulations. The Chinese have proved adept at drafting laws to implement the treaties they have signed. Often, in fact, they have attempted to build up a legal infrastructure based on the treaty prior to ratification of the treaty... For the most part, the Chinese have developed a strong legal system on paper.”¹⁴⁵

China’s efforts to comply before accession to these accords thus mirrors the experience of compliance with the TRIPS Agreement, whereby China began to amend the relevant intellectual property laws in the late 1990s, prior to WTO accession in December 2001. However, Oksenberg and Economy fail to consider the characteristics of the specific international agreement involved.

2.5.3 China’s Compliance with Human Rights Agreements

China’s international obligations have also been studied in the context of interactions with the United Nations human rights system. Kent proposes five levels of international and domestic compliance in the context of China’s compliance with its human rights commitments, which could also be applied to China’s compliance with its intellectual property commitments: first, accession to (human rights) treaties; second, procedural compliance with reporting and other requirements; third, substantive compliance with requests of the (UN) body; fourth, *de jure* compliance-

¹⁴⁴ Ibid. 358.

¹⁴⁵ Ibid. 392.

the implementation of international norms in domestic legislative provisions; and finally, *de facto* compliance- or compliance at the level of domestic practice.¹⁴⁶

The first three levels represent international compliance and could also be considered as ‘superficial’ compliance as the norms embodied in the international accord are not necessarily accepted and absorbed. The final two levels of compliance in this model represent domestic compliance and could also be considered as ‘deep’ compliance, as the norms are thus internalised into domestic practice. Thus, this model is useful for further considering compliance which falls short of full compliance; problems with compliance can be identified at a specific level of acceptance. Kent’s model also reflects the distinction in compliance theory between implementation, compliance and effectiveness.

Kent concludes that China has clearly experienced organizational learning in an instrumental or adaptive sense. She determines that:

“Whatever the external balance of power, China’s compliance with international human rights norms may still be obtained when national interests, prompted by domestic pressures, and external pressures converge... Conversely,... when the domestic interests of the regime did not coincide with external pressures, or when external pressures perceptibly weakened, external pressures on their own were unlikely to produce compliance, unless China’s bargaining power was weak.”¹⁴⁷

Consequently, Kent appears to concur with the Chayes and Chayes enforcement model of compliance that contrary to realist theory, external pressure alone is not enough to force compliance and also reflects elements of Koh’s normative theory of compliance, that internal adaptation of necessary to facilitate sustained changes.

¹⁴⁶ Kent, *China, the United Nations and Human Rights: The Limits of Compliance*, 7.

¹⁴⁷ Ibid. 249.

2.5.4 *China's Compliance with Arms Control Agreements*

China's arms control compliance has also been recently analysed. Frieman's recent study of China's compliance with international arms control agreements set up a framework of costs and benefits to understand how China responds to different arms control regimes.¹⁴⁸ The potential costs Frieman identified include: provision of data, prevention and limitation of exports, refraining from testing or use, making legal commitments, making verifiable commitments, submitting to inspection or other international verification and setting up monitoring stations. The potential benefits include: enhanced security, economic or financial gain, avoidance of censure, access to new technology or new information, and the ability to shape the international regime and gain prestige.¹⁴⁹ Many of these costs and benefits such as the desire to access the latest technology also apply to compliance with international intellectual property commitments.

However, Frieman's main conclusion was that, "despite the absence of compelling tangible benefits, China has been willing to bear substantial costs."¹⁵⁰ China has been willing to pay substantial costs for only marginal benefits because the international arms control regime is seen as inevitable and thus, China would rather play a role in shaping the future regime from the inside. This desire to be able to influence the system could also apply to China's implementation of the obligations associated with the TRIPS Agreement.

Frieman also concluded that China will try hard to avoid international isolation; that China's compliance is directly related to the regime's universal acceptance; if the regime does not relate to China's immediate concerns, then China is reluctant to

¹⁴⁸ Wendy Frieman, *China, Arms Control and Nonproliferation*, (London: RoutledgeCurzon, 2004).

¹⁴⁹ Ibid. 149.

¹⁵⁰ Ibid. 171.

comply; and finally, that China might join an existing regime, but will not take extraordinary measures to protect the regime.¹⁵¹ Frieman's main conclusion about China's concern for its international reputation chimes with Guzman's reputational theory above. Equally, the relationship between compliance and China's policy goals is also emphasised by Frieman which echoes Kent's conclusion that national interests and external pressure need to converge for compliance to follow.

2.5.5 China's Compliance with Intellectual Property Agreements

Compliance theory has also been directly applied to the protection of intellectual property rights in China. One study which focuses more specifically on China's compliance with international intellectual property norms is Carter's study of trademark enforcement in China in the 1990s. Carter's model of trademark enforcement is based on "four factors, inherent in the Chinese brand of Socialist legality, [that] could prevent the Western-style trademark law from gaining the acceptance of people in the PRC,"¹⁵² and five factors inherent in Chinese culture which operate against the acceptance of trademark law.¹⁵³

The four factors inherent to the Chinese legal system are: firstly, "as a rule, PRC laws and regulations are enacted to achieve specific, immediate policy objectives", but these objectives may be the appeasement of international pressure, rather than the effective protection of intellectual property rights; secondly, "some PRC laws remain secret" and this lack of transparency does not allow for widespread public familiarity with the law which would be the first step to acceptance of the law as legitimate; thirdly, "many PRC laws are intentionally vague in order that policy-

¹⁵¹ Ibid. 173-4.

¹⁵² Carter, *Fighting Fakes in China: The Legal Protection of Trade Marks and Brands in the People's Republic of China*, 41-2.

¹⁵³ Ibid. 43-4.

makers and implementing officers may have flexibility in interpretation.” This vagueness can also operate against the acceptance of the law as legitimate. The fourth and final characteristic of the Chinese legal system that Carter identifies is that, “many PRC laws are programmatic, that is, they present ideals or goals rather than implementation details.” In other words, the lack of transparency and precision in the substantive law prevent effective trademark enforcement in China. It may be interesting to see whether this is equally applicable to other areas of the IP system.

The five cultural factors which Carter identified as operating against the acceptance of intellectual property law are: firstly, “traders might think that ‘copying’ is not wrong because emulation was seen as an exercise in deference and socialisation in Chinese society”; secondly, there is no tradition of individual property ownership; thirdly, under Marxist thought, intellectual property is seen “as products of the society from which they emerge”; next, Chinese consumers are used to relying on brands to guide their choices; and finally, *guanxi* and networks “override formal law-based obligations.”¹⁵⁴

Carter places equal emphasis on both cultural factors and systemic factors in the legal system as responsible for the current condition of the trademark system in China. According to Carter, these nine legal and cultural factors operate together to prevent the successful legal transplant of international standards of trademark law by inhibiting the legitimization of trademark protection in Chinese society. Carter’s emphasis on factors based on China’s legal system and cultural traditions appears to highlight the importance of factors specific to China under the Jacobson and Brown Weiss comprehensive model of compliance outlined above.

¹⁵⁴ The influence of *guanxi* is discussed further below at page 160.

It is indeed necessary to acknowledge the role of cultural values in any legal system. “The nature and role of law are delineated in any society within its particular cultural and institutional matrix.”¹⁵⁵ Thus, cultural factors are indeed significant in analysing compliance with international legal norms. Furthermore, recent analyses of intellectual property and its role in international relations have also focused on moving beyond a formalist concept of international law to a more normative approach. This is in line with the Rawlsian approach which “maintains that international relations are not solely about states, but are also about people and peoples.”¹⁵⁶ This corresponds with Ryan’s study of the politics of international intellectual property described as ‘knowledge diplomacy’, which agrees that “state power offers only a superficial explanation of the multilateral diplomacy concerning intellectual property rights that has been conducted in the 1980s and 1990s.”¹⁵⁷

For example, “US patent and copyright business interest groups drove trade-related intellectual property policy in the 1980s and 1990s, although the diplomacy was conducted on their behalf by the US executive branch.”¹⁵⁸ Accordingly, it is no longer sufficient to solely examine the law and government policy in order to analyse intellectual property law; it is crucial to also examine the many interest groups also involved in intellectual property lawmaking and enforcement. This shift of emphasis from the state as the sole actor in IP to other groups and individuals reflects the emergence of liberal theory in international relations literature which also focuses on the role of the individual. Thus, previous studies of China’s compliance may be outdated if they ignore the role of actors below the level of the state.

¹⁵⁵ Haley, *Authority without Power: Law and the Japanese Paradox*, : 4.

¹⁵⁶ Discussion of Rawls, *The Law of Peoples*, 1999 in: Graham Mayeda, "A Normative Perspective on Legal Harmonization: China's Accession to the WTO", *U.B.C. Law Review*, 38 (1), 86.

¹⁵⁷ Michael P. Ryan, *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property*, (Washington D.C.: Brookings Institution Press, 1998): Washington D.C.: Brookings Institution Press, 1998): 3.

¹⁵⁸ *Ibid.* 8.

Finally, a recent study of China's compliance in global affairs by Chan considered China's compliance with international trade agreements such as those mentioned above, as well as the previously discussed areas of arms control, environmental protection and human rights. His overall conclusion is that,

“It can be concluded that China's overall compliance record in global affairs is satisfactory to good, given the difficulties that it faces in its economic, social and political transitions, and given the fact that compliance measurement is difficult to make.”¹⁵⁹

Chan further concluded that China's compliance with its global trade commitments is judged as ‘satisfactory’ overall, but highlighted intellectual property as an area in which China has had problems fully meeting its international obligations. Chan also considered the impact of different theories in China's interactions in global trade, including neo-realism, liberal institutionalism and social constructivism, but overall takes a fairly neo-realist approach to compliance, for example stating that “nation-states are still the main actors in international affairs”.¹⁶⁰ Considering this tension between commentators who hold that, at least in China's case, the state is the most important player, and those commentators who insist that the role of other interest groups is also significant, it may be interesting to consider who exactly are the main actors in China's developing IP system.

In terms of research into China's intellectual property system specifically, there is a persistent idea that intellectual property “has always evolved in response to economic and political necessity.”¹⁶¹ Some observers have used this idea as a basis

¹⁵⁹ Chan, *China's Compliance in Global Affairs: Trade, Arms Control, Environmental Protection, Human Rights*, 204.

¹⁶⁰ Ibid. 210.

¹⁶¹ Assafa Endeshaw, *Intellectual Property in China: The Roots of the Problem of Enforcement*, (Singapore: Acumen Publishing, 1996): 79.

for explaining why China lacks effective intellectual property protection. The dominant theory is outlined below.

The experience of Taiwan and Korea has been used to argue that a combination of *external* and *internal* pressure is truly necessary to bring about genuine change in IPR protection.¹⁶² Based on the development of intellectual property protection elsewhere in Asia (such as Korea, Japan and Taiwan), a three-phase model has therefore been proposed for the development of an effective IP regime. These three stages are: first, external trade pressure leads to legal formalities such as adequate laws and regulations; then, a stop-gap form of enforcement by government edict emerges following US pressure; finally, IP agreements become self-sustaining and a genuine rule of law begins to emerge due to the development of indigenous technologies.¹⁶³

In China, the first two stages can clearly be witnessed in the US-Sino Agreements of the 1990s,¹⁶⁴ which first emphasised the substantive legislation on intellectual property and then focused on the enforcement of intellectual property. Therefore, if this model also applies to China; in the final stage of the model, intellectual property needs to be developed by Chinese rights holders in order to become self-sustaining. This theory is supported by many observers who believe that if Chinese private companies possessed more intellectual property, protection would be sought and obtained for these rights.¹⁶⁵

This three-stage theory of China's development of intellectual property protection and moves towards global IP norms also reflects some aspects of the

¹⁶² Warren H. Maruyama, "US-China IPR Negotiations: Trade, Intellectual Property and the Rule of Law in a Global Economy", Cohen, Bang and Mitchell, *Chinese Intellectual Property Law and Practice*, (London: Kluwer Law International, 1999): 167.

¹⁶³ Ibid. 207.

¹⁶⁴ Discussed in more detail below at page 228.

¹⁶⁵ Endeshaw, *Intellectual Property in China: The Roots of the Problem of Enforcement*, 79.

compliance theories outlined above. It is clear that codifying international obligations into domestic legislation is insufficient for full compliance. Furthermore, this model seems to reflect Koh's theory of transnational legal process that it is only once imported norms have been internalised that full compliance can be observed. Finally, this model is similar to the five stages of compliance identified by Kent in the context of compliance with human rights agreements, in that procedural compliance is distinguished from *de jure* and *de facto* compliance. *De jure* compliance could be seen as equating to implementation under the Jacobson and Brown Weiss model of compliance and *de facto* compliance means enforcement of these laws in practice.

However, this theory of intellectual property development has been criticised as a form of 'historical determinism' that, "developing countries mount a deterministic development ladder, from light assembly to heavy manufacturing and on to high-tech products, and, having achieved this degree of industrialization, they begin to create, and protect IP."¹⁶⁶ This reflects the criticism levelled at many compliance theories that they do not adequately explain the *process* of change.

Furthermore, China often does not follow conventional models of development. For example,

"Advocates of rule of law and neoclassical economists alike have argued that sustainable economic development requires rule of law and in particular clear and enforceable property rights. Yet at first blush China seems to have had tremendous economic growth without either, leaving economists, political scientists, and legal scholars to puzzle over the success of China's economy despite market and legal imperfections."¹⁶⁷

Consequently, although strong intellectual property rights may have necessarily developed elsewhere in Asia in order to maintain economic growth, "an

¹⁶⁶ Anne Stevenson-Yang and Ken DeWoskin, "China Destroys the IP Paradigm", *Far Eastern Economic Review*, 168 (3), (March 2005).

¹⁶⁷ Randall Peerenboom, *China's Long March toward Rule of Law*, (Cambridge: Cambridge University Press, 2002): 19.

examination of the present situation in China indicates that this historical lesson may be inapplicable to China, at least for the present.”¹⁶⁸ Additionally, there may be key differences between China and other Asian countries which mean that the path of IP development is different. For example, Korea, Japan and Taiwan developed effective IP systems in response to pressure from domestic rights holders. However, as China is such a diverse country, whilst some innovative companies are already clamouring for stronger IPR, others are still promoting economic development through imitation.

Overall, these previous studies of intellectual property in China are simplistic and rely on emphasising one factor such as economic development or the role of individual rights holders to the exclusion of all others. Clearly, this issue of trying to rationalize non-enforcement of intellectual property rights needs further analysis before a conclusive model can be agreed upon.

2.6 Summary and Conclusion

This chapter first outlined key concepts of legal development which have previously been used to discuss China’s legal system and then discussed the main theories of compliance which have emerged from international law and international relations literature in recent decades. Previous studies of compliance in China, particularly in relation to IP commitments, were also considered. Overall, previous studies into China’s compliance with international commitments, including research focusing on intellectual property protection, have tended to mostly focus on factors specific to China without fully considering the nature of the obligations involved. Equally, existing theories of compliance often focus on characteristics of the specific agreement without allowance for the individual country.

¹⁶⁸ Daniel Chow, "Counterfeiting in the People's Republic of China", *Washington University Law Quarterly*, 78 (1), (Spring 2000): 53.

Therefore, this thesis will apply a comprehensive model of compliance to China's intellectual property protection under the TRIPS Agreement. This model will allow for consideration of factors both specific to China, as well as considering the nature of the TRIPS Agreement itself and the nature of the intellectual property protection problem. Firstly, the methodology used in this study will be fully explained and justified in chapter 3. Then, this comprehensive model of compliance will be applied to China's compliance with the TRIPS Agreement in three stages: firstly in chapter 4, the background context of the TRIPS Agreement itself will be examined, to evaluate if there are factors which are not specific to China which generally affect compliance with its provisions. Secondly in chapter 5, factors specific to China will be evaluated to assess their impact on China's compliance with the TRIPS Agreement. Thirdly in chapter 6, the post-WTO IP system in China will be assessed not only in terms of compliance with the TRIPS Agreement, but also the implementation of the TRIPS Agreement and the subsequent effectiveness of the system as the separation of these components is also a key feature of this compliance model.

These three stages correspond to the three levels in the compliance model, namely general factors (comprising characteristics of the activity (intellectual property infringement), characteristics of the accord (the TRIPS Agreement), and the international environment); factors specific to China (parameters, proximate factors and fundamental factors); and the compliance with and implementation of the agreement and overall effectiveness. Once these three stages have been outlined, various solutions will be offered and the model will be appraised and refined for its applicability to the context of China's compliance with international intellectual property norms in chapter 7.

The final model of compliance should not only describe China's compliance with the TRIPS Agreement, but also attempt to understand any remaining non-compliance with these international obligations. These functions are key to any compliance theory and will show that the proposed compliance model is not only descriptive of China's compliance with the TRIPS Agreement, but may also be applied to China's compliance with other areas of international law or other countries' compliance with the TRIPS Agreement.

3 Methodology and Methods

3.1 Introduction

This study used a combination of research methods to address the research questions concerning the compliance of China's intellectual property system with the TRIPS Agreement outlined in the literature review chapter above. These methods included the use of a questionnaire as an initial contact with respondents, with follow-up interviews taking place face-to-face, via the telephone or via email. Qualitative data was also gathered from key texts such as the primary legislation to further aid a deeper understanding of the operation of China's current intellectual property system.

This chapter will first outline the theoretical foundations of this research before explaining the specific methods used in more detail. Ethical considerations as well as key practical issues that were faced during this research will also be considered. These practical issues included the issue of translation and the use of computer software to assist me in the data analysis process.

3.2 The Use of Qualitative Research Methods

Qualitative research is difficult to define as it can include a broad range of theoretical standpoints and methodologies. A generic definition of qualitative research is that "qualitative research is a situated activity that locates the observer in the world. It consists of a set of interpretive, material practices that make the world visible."¹⁶⁹ The use of qualitative research methods is often perceived as providing 'richer' data than purely quantitative methods may allow. This is because the data

¹⁶⁹ Norman K. Denzin and Yvonne S. Lincoln, "Introduction: The Discipline and Practice of Qualitative Research", Denzin and Lincoln, *The SAGE Handbook of Qualitative Research*, (London: SAGE Publications, 2005): 3.

collection methods do not place the same restraints on the data collected and also, the range of valid data sources under consideration can be wider.¹⁷⁰

There are traditionally stated to be a number of significant differences between qualitative and quantitative research, such as the tendency for qualitative research to use words, while quantitative research uses numbers; the former to focus on meaning, while the latter focuses on behaviour; the former to rely on the inductive logic of inquiry, with the latter using hypothetic-deductive method; and finally, qualitative research's lack of quantitative research's power to generalise.¹⁷¹ However, it is clear that these oft-cited distinctions are too simplistic to be applied to much research design in practice.

Consequently, there is a growing recognition that the whole qualitative/quantitative dichotomy is open to question, as more and more qualitative researchers incorporate elements of quantitative research into their research design. Indeed, it has been claimed that qualitative research follows an inherently multi-method approach and further, that "[t]he combination of multiple methodological practices, empirical materials, perspectives, and observers in a single study is best understood, then, as a strategy that adds rigor, breadth, complexity, richness, and depth to any inquiry."¹⁷²

Furthermore, there is a growing movement advocating the use of mixed methods in research in order to "offset the weaknesses of both quantitative and qualitative research."¹⁷³ It has even been stated that the combination of quantitative and qualitative research methods can offer a more complete picture of a research

¹⁷⁰ Simeon J. Yates, *Doing Social Science Research*, (London: SAGE Publications, 2004): 139.

¹⁷¹ Julia Brannen, "Working Qualitatively and Quantitatively", Seale, Gobo, Gubrium and Silverman, *Qualitative Research Practice*, (London: SAGE Publications, 2004): 312-3.

¹⁷² Denzin and Lincoln, "Introduction: The Discipline and Practice of Qualitative Research", 5.

¹⁷³ John W. Creswell and Vicki L. Plano Clark, *Designing and Conducting Mixed Methods Research*, (London: SAGE Publications, 2007): 9.

problem “by noting trends and generalizations as well as in-depth knowledge of participants’ perspectives.”¹⁷⁴

The use of multiple methods may also be particularly pertinent in this subject area due to particular problems associated with research into intellectual property:

“There is no scientific method for determining the exact size of the counterfeiting problem and any efforts to do so can proceed only on the basis of partial and scattered information. Counterfeiters operate outside the reach of the law and public scrutiny; thus a great deal of information about counterfeiting is simply inaccessible and it becomes necessary to proceed based upon extrapolation from existing data.”¹⁷⁵

Given that the IP field is opaque as infringements cannot easily be observed, thus multiple methods can assist in this instance. However, a formal mixed methods approach will not be used; rather an initial quantitative approach will be embedded into an overall qualitative approach. Therefore, this study of the intellectual property system in post-WTO China will utilise a variety of methods in order to gain breadth and complexity, but without abandoning the richness and depth of solely qualitative methodologies.

Previous studies of the legal system in China have also followed a qualitative research approach. For example, an early study of China’s compliance with international treaty obligations used a combination of interviews with around fifty respondents and examination of primary source materials to see if they corroborated the respondents’ views.¹⁷⁶ A more recent study of China’s trademark protection in the 1990s also adopted interviews as the main research method used. A total of nineteen respondents are listed, from Europe, China and the US.¹⁷⁷

¹⁷⁴ Ibid. 33.

¹⁷⁵ Chow, “Counterfeiting in the People’s Republic of China”, 12.

¹⁷⁶ Lee, *China and International Agreements: A Study of Compliance*, 19.

¹⁷⁷ Carter, *Fighting Fakes in China: The Legal Protection of Trade Marks and Brands in the People’s Republic of China*, 74-76 (Appendix 2).

It is notable that a variety of nationalities were interviewed for the study, as this may reflect the idea that the analysis of various international perspectives is a useful method for studying IP protection in China and further, that these different perspectives may increase the reliability of the results. The interviewees also remained anonymous and this is an important factor to consider, that respondents may be more willing to contribute if they receive strong assurances of anonymity. Thus, this research study will draw upon the approach taken by previous studies and combine different methods to collect qualitative data from a variety of sources. Respondents from different nationalities will also be sought, as well as Chinese respondents.

Although different methods will be used to collect relevant data, it is important to note that the aim of this is not formal 'triangulation'. Triangulation attempts to address the same question with a variety of data and it is well recognised that this is rarely successful as it is difficult to ensure that the same question will be addressed by each of the types of data or approaches.¹⁷⁸ Triangulation is also sometimes used as a method of validating the results obtained, but triangulation does not automatically convey validity on these results. As a result, this research will combine a variety of methods, including survey data, follow-up interviews and document review, but without attempting to use one method to 'prove' the truth of the results of another method.

There are three ways in which qualitative and quantitative data can be combined: triangulation, where one type is used to corroborate another; facilitation, where collecting one type facilitates the collection of another type; and complementarity, where different sets of data address different but complementary

¹⁷⁸ Lyn Richards, *Handling Qualitative Data: A Practical Guide*, (London: SAGE Publications, 2005): 21.

aspects of the research.¹⁷⁹ In this study, although the aim of using both qualitative and quantitative methods is not formal triangulation, elements of both facilitation and complementarity apply. The initial use of the survey facilitated follow-up interviews with a number of respondents. Document analysis was primarily used to evaluate the institutional setting of the TRIPS Agreement and thus, this data was complementary to other aspects of the research, focusing specifically on China. Therefore, the use of multiple methods had a number of advantages in this study.

Much of the relevant information regarding IPR in China is virtually unattainable due to the illegal nature of IP infringements, the confidential nature of strategies to tackle infringements and the opaque nature of the Chinese legal system in general. In order to overcome this problem, not only will a number of research methods be used, but also the issue will be examined from a variety of different viewpoints. These include lawyers, both international and domestic; multinational or foreign-invested enterprises in China; Chinese companies themselves; and the official government view. Therefore, although the use of mixed methods is not intended to be formal triangulation, it is hoped that the data obtained can provide a fuller picture of the IP system in China than the use of just one method alone.

3.3 Research Strategy and Design

A flexible research strategy was adopted throughout this research; consequently, as the research progressed, the overall research strategy evolved. This flexibility is a key feature of qualitative research methodology and as such can be seen as a key strength of this approach. The research strategy changed in response to both external and internal factors. For example, it was originally intended that a greater number of questionnaires would be analysed and rely less on follow-up

¹⁷⁹ Brannen, "Working Qualitatively and Quantitatively", 314.

interviews, but as the follow-up stage commenced, it was clear that the richness and depth of data emerging from these interviews merited greater emphasis.

In terms of the process of research, the approach followed was more deductive than inductive in nature. However, although I started out with a comprehensive model of compliance in mind, my ideas did develop throughout the research process and I remained open to new insights and data. Thus, this approach is similar to that described as a foreshadowed problems approach, in which the researcher is orientated by existing theories and ideas, but is still open to new research questions and data.¹⁸⁰

Throughout the research process, I tried to remain reflexive and sensitive to the historical and cultural context of my research. Specifically, there are recognised problems in attempting to study China through the legal system. “Law, of all disciplines that can be used in the West to study China, seems the most difficult for Westerners to use meaningfully because it is so rooted in Western values.”¹⁸¹ Therefore, it was important not to attempt to judge China through the application of Western legal norms and conclude that if China is lacking these norms, the legal system must be a failure. A clear example of this occurred during the 1990s when China was being pressured by the US to raise the level of intellectual property protection based on the American idea that the ideal intellectual property system should closely resemble their own.¹⁸²

On the other hand, it is nevertheless recognised that China can act as an important example in the study of compliance with international commitments. China can act as a ‘least likely case study’, which is especially useful for confirmation of a

¹⁸⁰ Martyn Hammersley and Paul Atkinson, *Ethnography: Principles in Practice*, (London: Routledge, 1995): 206.

¹⁸¹ Lubman, *Bird in a Cage: Legal Reform in China After Mao*: 12.

¹⁸² Ibid.

theory. As China is not considered likely to comply with many international obligations, due to its history and cultural traditions and the fact that it “lacks tradition of the rule of law and is powerful enough to ignore its international obligations,”¹⁸³ if China complies, then this compliance could be highly significant.

Below, the specific research methods used to collect my data are detailed, namely questionnaires, follow-up interviews and documentary data, and how this data was analysed.

3.3.1 Questionnaires

A short questionnaire was used to make initial contact with respondents. This questionnaire contained 18 questions, which combined open, closed and scale type questions. The main aim of the questionnaire was to elicit brief comments about the intellectual property system in China in order to direct the focus of the follow-up interviews and to provide an overview of opinions about the current IP system.

Questionnaires have several recognised advantages; they can “provide a cheap and effective way of collecting data in a structured and manageable form.”¹⁸⁴ In addition to being inexpensive to administer, the completed questionnaires can also be analysed quickly. However, the drafting of questionnaires is more problematic. Thus, although questionnaires may need less time to analyse if a clear coding frame is drafted; the preparation of questionnaires can be a long and hard process.

There are many key considerations when drafting a questionnaire. These include the need to draft questions in an unambiguous and clear way, considering the length of the questionnaire in total, the balance of questions between open and closed, the handling of any sensitive issues and the ordering of questions. A further

¹⁸³ Kent, *China, the United Nations and Human Rights: The Limits of Compliance*, 251, fn. 4.

¹⁸⁴ David Wilkinson and Peter Birmingham, *Using Research Instruments: A Guide for Researchers*, (London: RoutledgeFalmer, 2003): 7.

consideration in the drafting of a questionnaire is the maximisation of the possible response rate. The response rate can be improved by the use of a short clear cover letter, the inclusion of a pre-paid envelope and possibly attempting to offer the respondent something in return for their participation.¹⁸⁵

In the case of the preliminary questionnaire used in this study on intellectual property protection in China, all of these strategies were applied. A short cover letter was enclosed with every questionnaire explaining the purpose of the questionnaire. The cover letter also stated that all respondents would receive a summary of the final results, as this was thought to increase the likelihood of their responses. In addition, a stamped addressed envelope to return the questionnaire was also distributed to every respondent. Finally, the statement of anonymity was strengthened from the first draft, which stated that names of respondents or companies would only be revealed with their permission. The final draft stated that “no names or company names will be used under any circumstances.” (See Appendices 2 and 3 for a copy of the covering letter and initial survey used.) This strengthening of the assurances of anonymity was also intended to increase the response rate as the research instrument was dealing with the sensitive topic of IP protection and respondents may be reluctant to give honest responses if their identities could be used.

The length of the questionnaire was also considered; particularly observing the standard advice that a survey should take no more than twenty minutes to complete, otherwise respondents would lose interest.¹⁸⁶ In this study, as most of the target respondents were professionals working in business, the length of the survey was felt to be of even greater significance. Therefore, the number of questions included was limited from the first draft, in order to ensure that all respondents would be able to

¹⁸⁵ Ibid. 16.

¹⁸⁶ Ibid. 17.

complete the questionnaire within twenty minutes, and furthermore, that most respondents would be able to complete it within ten or fifteen minutes. Therefore, the questionnaire contained a mixture of closed and open questions, with a number of Likert-scale type questions included to gain further information about the respondents' opinions, whilst still being quick to complete.

The scale questions (questions 8, 11, 13 and 15 on the questionnaire) all included five or more possible responses. Offering several responses “provides more flexibility to the respondent and affords greater accuracy in recording their views on a given subject.”¹⁸⁷ Several of these scales do not include a mid-point. For example question 11 asks, “In your opinion, how effective is the current system of IP protection in China?” and offers a six-point scale for respondents to choose from. As there is no mid-point, respondents are forced to choose either a negative (1-3) or positive response (4-6). “This technique prevents ‘questionnaire drift’ setting in- the respondent is forced to provide either a positive or negative view of the statement posed.”¹⁸⁸

Although questionnaires do have a number of recognised benefits in terms of cost and speed of analysis, there are also a number of potential drawbacks that need to be considered. When drafting the questions, it was important to be aware of the difficulty of avoiding leading questions and avoiding ambiguous or unclear questions. To give respondents more opportunity to clarify their answer, an ‘other’ option was included for several questions in which the respondent was asked to choose from a list of responses.

¹⁸⁷ Ibid. 15.

¹⁸⁸ Ibid. 13.

The administering of the questionnaires was successful in its primary aim of establishing contact with respondents, and also provided a lot of rich data from the open questions for further analysis. Following the receipt of the completed questionnaires, respondents who had indicated they would be willing to participate in follow-up interviews were contacted and follow-up interviews arranged, either face-to-face, via telephone or via email, depending on the respondents' preferences.

3.3.2 Interviews

The follow-up interviews were carried out with a number of respondents and also provided a great deal of rich qualitative data to analyse. However, interviews are often seen to be problematic, as “the desire of many researchers to treat interview data as more or less straightforward ‘pictures’ of an external reality can fail to understand how that ‘reality’ is being represented in words”.¹⁸⁹ In fact, a tension is commonly thought to exist between being subjective and remaining objective in the interview process.¹⁹⁰ On the one hand, the interviewer and interviewee need to establish an understanding, but on the other hand, the researcher also needs to maintain a ‘distance’ to avoid bias.

Therefore, it is important for the interviewer to be aware of the so-called ‘outside’ and ‘inside’ of interview accounts. Interviews have been criticised as meaningless as the interviewer and interviewee construct a version of the social world exclusive to the interview; rather than a narrative that is representative of some wider truth.¹⁹¹ This effect may be exacerbated by differences, perceived or otherwise, between the interviewer and the interviewee in terms of age, gender, class and race.

¹⁸⁹ David Silverman, "Introducing Qualitative Research", Silverman, *Qualitative Research: Theory, Method and Practice*, (London: SAGE Publications, 2004): 4.

¹⁹⁰ Tim May, *Social Research: Issues, Methods and Process*, (Maidenhead: Open University Press, 2001): 127.

¹⁹¹ Jody Miller and Barry Glassner, "The 'Inside' and the 'Outside': Finding Realities in Interviews", Silverman, *Qualitative Research: Theory, Method and Practice*, (London: SAGE Publications, 2004): 125.

However, other commentators have held that interviews can still be a useful research tool as they can reveal knowledge about the world beyond the interview. Any interviewer must be cautious of 'romanticising' the interview data, but interviews can still provide useful data if the researcher focuses on exploring the subjective point of view of the interviewee.¹⁹²

Semi-structured interviews were the format chosen for follow-up interviews, rather than structured or open interviews. The structure of the interview tended to follow the topics of the survey (recent changes in the IP system, problems they had experienced, reasons for these problems, as well as possible solutions and predictions for the future development of the system), but with the flexibility to include follow-up questions depending on the interviewee's responses. This flexibility provided the opportunity to seek clarification and elaboration on any key points that were not clear in the respondent's answer or that were thought to be particularly interesting. This is one of the recognised advantages of this form of interviews.¹⁹³

Therefore, in the semi-structured interviews conducted, it was important to remain aware of the interaction between interviewer and the interviewee and this awareness of the interview as a social construct helped me to appreciate their opinions as 'true' for them. It was also important to remain aware of the 'active' nature of interviewing as opposed to the traditional view of interviews as a one-way flow of information from the interviewee to the interviewer.¹⁹⁴ This recognition of the nature of all interviews as active and as producing an interpretation of the social world also had implications for the analysis of the data produced by the interviews.

¹⁹² Ibid. 127.

¹⁹³ May, *Social Research: Issues, Methods and Process*, 123.

¹⁹⁴ James A. Holstein and Jaber F. Gubrium, "The Active Interview", Silverman, *Qualitative Research: Theory, Method & Practice*, (London: SAGE Publications, 2004): 143.

3.3.3 Documents

It is recognised that documentary analysis is often overlooked in qualitative research strategies and researchers “make too little of the potentialities of texts as rich data.”¹⁹⁵ Thus, documents can provide a further source of useful data. In this study, the use of documents was clearly necessary in order to assess the current IP system in China. Consequently, a variety of primary legal documents were collected to assist in assessing China’s implementation of the TRIPS Agreement and also proved invaluable in examining the drafting of the TRIPS Agreement and the perceived equity and precision of the resulting Agreement.

One advantage of the use of documentary data is that they are non-reactive, therefore the possibility that they have adapted due to the role of the researcher can be largely discounted as a limitation on the validity of the data.¹⁹⁶ This is in contrast to the questionnaire responses and interview data which were produced specifically for this research and thus may reflect the researcher’s intervention. Furthermore, “texts can be used alongside other forms of evidence so that the particular biases of each can be understood and compared.”¹⁹⁷ Therefore, including analysis of key relevant documents can increase the validity of the results obtained.

It may be important to distinguish between documents and records; documents are prepared for personal rather than official reasons and thus require more contextualised interpretation.¹⁹⁸ However, in practice, the terms are often used interchangeably and although in this study, the documentary data used came primarily from official records, the term ‘documents’ will also be used to refer to them. Official documents deriving from the state, such as used in this study, can provide “a great

¹⁹⁵ David Silverman, *Interpreting Qualitative Data: Methods for Analysing Talk, Text and Interaction*, (London: SAGE Publications, 1993): 89.

¹⁹⁶ Alan Bryman, *Social Research Methods*, (Oxford: Oxford University Press, 2004): 381.

¹⁹⁷ Ian Hodder, "The Interpretation of Documents and Material Culture", Weinberg, *Qualitative Research Methods*, (Oxford: Blackwell Publishers, 2002): 267.

¹⁹⁸ *Ibid.* 266.

deal of textual material of potential interest, such as Acts of Parliament and official reports.”¹⁹⁹

On the other hand, the use of documents is not wholly unproblematic. The quality of any documents used must be assessed in order to evaluate the reliability of those documents. Documents can be assessed using four criteria: authenticity, credibility, representativeness and meaning.²⁰⁰ In this study, documents analysed include laws and regulations concerning intellectual property in China and official documents from the WTO or its predecessor, GATT, such as minutes of key meetings or proposed drafts of the TRIPS Agreement.

Analysing these documents against these four criteria, it is clear that the authenticity of the documents is not in doubt as the documents all originate from official sources. In terms of meaning, there is also little cause for concern, as the content of the documents is clear. Credibility should not be an issue, except that some of the Chinese laws and regulations were considered in their translated form, which may give rise to errors or distortions from the originals. Finally, the representativeness of the documents may be slightly problematic as the documents analysed were subjectively chosen and thus may not be representative of all the documents available. However, a wide variety of documents were identified for inclusion, particularly concerning the drafting of the TRIPS Agreement, in order to fairly represent the relative positions of both the developed countries and developing nations. The documentary data was combined with the survey responses and interview transcripts and the data was then subject to detailed qualitative content analysis. This process of data analysis is described in more detail below at page 87.

¹⁹⁹ Bryman, *Social Research Methods*, 386.

²⁰⁰ John Scott, *A Matter of Record: Documentary Sources in Social Research*, (Cambridge: Polity Press, 1990): 6.

3.3.4 Sampling Strategy and Respondents

As highlighted by previous studies of China's legal system, a variety of perspectives are necessary to avoid judging the system by foreign norms. Consequently, a range of legal and business professionals were targeted, both foreign and Chinese, and predominantly based within China. The sampling strategy was purposive in that key companies were targeted for selection and the approach to sampling respondents evolved as the initial responses were received. For example, legal professionals were initially quicker to respond and responses were frequently more detailed than those from other respondents. As a result, an electronic version of my questionnaire was added to the university's web pages in order to give other respondents an alternative method of completion if time was a factor for them. This sampling strategy did also incorporate an element of snowball sampling as several respondents suggested people to contact and occasionally also facilitated the initial contact.

3.3.4.1 Making Contact with Respondents

The respondents in this study could be categorised into three groups: legal professionals working in IP in China, domestic Chinese enterprises concerned with IP rights and foreign enterprises with a presence in China. There may not also be a clear distinction between these groups; for instance, defining a 'foreign-invested enterprise' is difficult given the myriad of business structures existing in China. Consequently, in this study, a company was defined as 'foreign' if the respondent stated that the headquarters of the company was outside China.

The questionnaires were largely distributed between November 2005 and May 2006 to all three groups of respondents. The first group of respondents were legal professionals, to whom questionnaires were sent in November 2005 to a variety of

both international and local law firms. These firms were selected based on their inclusion in the *Legal500* list of recommended law firms in China.

The second group of respondents were Chinese companies with well-known trademarks, selected from the “Well-known Trademark Enterprise Name List”²⁰¹ and the *China500*.²⁰² However, only a handful of responses were received from this group. It is difficult to explain why the response rate was so low for this group of respondents. It is possible that the contact information provided by the publishers was inaccurate. It could also be the case that the low response rate reflects the lack of interest in intellectual property issues observed in domestic companies by various observers.

The final group of respondents were foreign invested enterprises in China. Questionnaires were sent to the members of the Quality Brands Protection Committee (QBPC), which is a group of multinational companies operating in China whose mission is “to work cooperatively with the Chinese central and local governments, local industry, and other organizations to make positive contributions to intellectual property protection in the People’s Republic of China.”²⁰³ Again, the number of responses was disappointing. It is possible that confidentiality concerns were a primary cause of non-responses, as indicated by the response of one company, which claimed that they “could not provide details in this respect as your questionnaire proposes, because all information is highly confidential.”²⁰⁴

²⁰¹ Ebuywww (Beijing) Info. Co. Ltd, *Chiming Shangbiao Qiye Minglu* (Well-known Trademark Enterprise Name List), (Beijing: Ebuywww (Beijing) Info. Co. Ltd., 2005).

²⁰² The list of the top 500 Chinese enterprises according to their revenue as produced by the China Enterprise Confederation (2005), “Zhongguo qiye 500 qiang” (Top 500 China Enterprises), <http://www.cec-ceda.org.cn/english/>, accessed September 24th 2006.

²⁰³ Quality Brands Protection Committee, “Factsheet”, <http://www.qbpc.org.cn/en/about/about/factsheet>, accessed 1st May 2005.

²⁰⁴ Comment from respondent FOOD03, June 2006.

In addition to the members of the Quality Brands Protection Committee, questionnaires were also sent to a variety of foreign enterprises operating in relevant sectors such as the luxury goods market and in the technology or telecommunications sector in China. These enterprises were selected from the “China Foreign Enterprise Directory”²⁰⁵, published by the China Economic Review.

The total number of questionnaires received from the initial postal survey was disappointing. Therefore, an electronic version of the questionnaire was prepared in order to increase the number of target respondents. This web-based questionnaire was uploaded to the University of Nottingham’s server using UNIX.²⁰⁶ The University’s FormManager was also used as a template for the web-based survey as this provided an easy way to ensure the completed forms would be emailed to my chosen email account and that the respondents would then see a standard confirmation page.²⁰⁷ After this webpage was uploaded to the University’s server, remaining respondents were contacted by email in order to ask them to complete the survey online at www.nottingham.ac.uk/~lixkm6, in order to increase the number of initial respondents.

Although response to the initial questionnaire was somewhat disappointing, the vast majority of questionnaire respondents also indicated their willingness to participate in follow-up interviews and indeed several were very enthusiastic about participating in the study. Consequently, during early 2006, a number of face-to-face interviews with respondents in China were conducted to obtain more detailed

²⁰⁵ China Economic Review, *China Foreign Enterprise Directory*, (Hong Kong: China Economic Review Publishing, 2006).

²⁰⁶ University of Nottingham- Information Services, "Getting Started on the Unix Service", <http://www.nottingham.ac.uk/is/support/knowledgebase/guides/IS1301.pdf>, accessed November 22nd 2006.

²⁰⁷ University of Nottingham- Information Services, "Handling HTML Forms with FormManager", <http://www.nottingham.ac.uk/is/support/knowledgebase/formmanager/index.phtml>, accessed December 14th 2006.

information on their opinions of the current state of the intellectual property system, ranging from thirty to eighty minutes. Several telephone interviews with respondents in Hong Kong were also completed and more detailed responses to follow-up questions were received from several other respondents who indicated their willingness to participate via email. The main form of contact with respondents is detailed in Appendix 1.

3.3.4.2 Respondent Characteristics

In total, 49 respondents participated in this study. In response to some basic questions about their involvement with this topic, all 49 informed me that they are involved with IP in China and furthermore, all 49 respondents are based in China or Hong Kong. It is also significant that 45 of the 47 respondents who gave a valid answer to this question claimed that they had experienced problems with IP in China. This may have been a strong factor in their participation in the study and may also have had a negative influence on their responses.

When asked how long their company had been working in China, the majority responded that they had been established in China for more than ten years. This affirms that respondents should be knowledgeable about the topic of intellectual property protection in China as all deal with IP and the majority have been based in China for many years. The table below illustrates the length of time that the respondents' companies have been working in China.

Table 3-1 Number of respondents according to the length of time their company has been established in China

2-5 years	5-10 years	More than 10 years	NA	TOTAL
7	9	32	1	49

The respondents also represented a mix of nationalities with 29 respondents from China and 20 from other countries, mostly in Europe or North America. The

type of enterprise represented in the study also showed a mix with the majority being domestic Chinese enterprises and the rest being foreign-invested enterprises operating in China. As noted above, it is sometimes difficult to define the exact status of an enterprise operating in China, so the simple definition for a foreign enterprise adopted in this study was whether the headquarters of the company were located outside China. The table below shows the breakdown of respondents by nationality and the type of enterprise that they work for:

Table 3-2 Number of respondents according to respondent nationality and type of enterprise

<u>Respondent Nationality</u>	<u>Type of Enterprise</u>	<u>Works for Domestic Chinese Enterprise</u>	<u>Works for Foreign-Invested Enterprise</u>	<u>TOTAL</u>
Chinese		22	5	27
Foreign		5	17	22
TOTAL		27	22	49

In addition to a variety of nationalities and enterprise types represented amongst my respondents, a number of different industries were represented. The majority of respondents were from law firms, but this was broadly defined as including trademark and patent agencies, as well as companies offering legal advice under a broader framework of consultancy. The number of respondents is shown in the table below according to the type of goods or services that their enterprise offers.

Table 3-3 Number of respondents according to the goods or services their company offers

<u>Type of Goods or Services Offered</u>	<u>Number of Respondents</u>
Legal Services	31
Manufacturing	8
Food & Beverage	3
Fashion & Luxury Goods	2
Services	2
Automobile	1
Pharmaceutical	1
Technology and Telecommunications	1
TOTAL	49

Therefore, although the number of respondents was somewhat limited, they represented a wide variety of nationalities, types of enterprises and goods and services offered. In addition, the respondents provided a great deal of rich qualitative data overall. The analysis of this data will now be considered.

3.4 Data Analysis

Data analysis did not constitute a discrete stage of research as the analytical process commenced much earlier than the formal coding of the data. Indeed, it is suggested that analysis of the data was inherent during the data collection stage, as questionnaires and detailed comments were received; follow-up questions drafted and decisions made about which areas to focus on. Furthermore, preliminary data analysis was not undertaken systematically, but rather through a process of reading and re-reading material to increase familiarity. As a result, by the time formal coding of the data began, some key themes and concepts had already been established which would influence the analysis.

Initially, grounded theory analysis²⁰⁸ was a major influence and it was intended that themes and concepts should emerge from the data, rather than being imposed by a pre-existing theoretical framework. However, it proved impossible to examine the data and not make connections between the data and key concepts which had emerged from the literature review. Therefore, although I remained open to new themes and concepts emerging from the data, existing theories were used as a strong influence on the initial coding frame (below at Figure 3-4).

The answers given on the questionnaire in response to the open questions were combined with the follow-up and documentary data and analysed using the NVivo

²⁰⁸ Barney Glaser and Anselm Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research*, (New York: Aldine, 1967).

software to code the answers given, to build a model of IP enforcement in post-WTO China. However, both during and after the coding process, nodes constructed of all an individual respondent’s comments were referred to in order to see their remarks in their full context. This was to try and avoid fragmentation of data which may occur when a researcher codes the interview data and discards comments which do not seem to fit an identified theme. Avoiding this potential problem with the use of qualitative data has been discussed in the context of advocating a narrative analysis approach²⁰⁹ to interview data, which instead treats an interview as a whole.

My initial coding framework was extensive and featured 41 potential nodes under which the data was coded. These nodes are shown below.

Initial Node Heading	
Assessing the Current System	Comparisons to other systems
	Experiences with the current system
	Praise for the current system
	Problems in the current system
	Inconsistency
	Local protectionism
	Problems with corruption
	Problems with enforcement
	Problems with legislation
	Other problems
Causes of the current state of the IP system	Fundamental factors
	Attitudes and values
	Economy
	Political or institutional
	Parameters
	History of IP in China
	Physical characteristics of China
	Proximate Factors
	Administrative capacity
	Knowledge and Information
	Leadership

²⁰⁹ Amanda Coffey and Paul Atkinson, *Making Sense of Qualitative Data: Complementary Research Strategies*, (London: SAGE Publications, 1996).

	Other causes
Forces for Change	Changes observed in the IP system
	Attitude of Leadership
	Foreign companies and foreign countries
	Impact of WTO entry
	Local companies
	Natural development or “matter of time”
	Other force for change
	Administrative changes
Solutions	Awareness
	Government commitment
	International cooperation
	Resources
	Training
	Other solutions
	Predictions for the future of the IP system

Figure 3-4 Initial coding framework used in NVivo

Following this initial coding, several of the nodes were then merged to create a more manageable framework for analysis and then continued this process of reading the data and making decisions about coding categories whilst attempting to move towards a comprehensive model of compliance.

3.4.1 Presentation of Data

The transcripts of the interviews followed some basic transcription conventions²¹⁰; the following are the most important which may appear in quotes taken from these transcripts:

- () parentheses indicates that the words were inaudible, or not clear enough to transcribe, words within the parentheses represent a best estimate of what was said;
- [] square brackets indicates overlapping talk, most commonly saying “yeah” or “uh-huh” whilst the respondent was talking;
- (()) double brackets indicates commentary of other events, such as observing a mobile phone ringing or knocking being audible on the tape;
- becau- hyphen represents a self-interruption or an abrupt cut-off of what the respondent was saying.

²¹⁰ David Silverman, *Qualitative Research: Theory, Method and Practice*, (London: SAGE Publications, 2004), Appendix: Transcription Conventions: 368-9.

The use of the interview data will tend towards more comprehensive data treatment, in an attempt to avoid ‘anecdotalism’.²¹¹ Therefore, longer extracts may be included where appropriate, in order to increase the transparency of the data analysis process and thus, help both the reliability and validity of my data analysis. Furthermore, a different font will be used for direct quotes from respondents, for ease of identification.

In order to maintain the confidentiality of all respondents, codes were assigned to each respondent which will be used to identify their comments. These codes aim to identify the basic characteristics of the respondents, such as the nature of the enterprise they work for, without revealing their identity or enough details to enable identification by someone knowledgeable in the IP field in China. Consequently, codes were assigned based on the respondents’ enterprise, followed by a two-digit number, and then a “T” if the comments had been translated. For example, LAW01T represents the first respondent from a law firm and that their comments have been translated. It is important to identify which comments are translated in order to maintain transparency of the data, as these comments are not in the respondents’ own words. A full table of the respondents with their codes and primary characteristics can be found in Appendix 1.

3.5 Ethical Considerations

Although the research methods applied in this study may appear to be relatively uncontroversial, ethical considerations must still play a part in the design and application of the chosen research methods. As the Economic & Social Research

²¹¹ David Silverman, "Who Cares About 'Experience'? Missing Issues in Qualitative Research", Silverman, *Qualitative Research: Theory, Method and Practice*, (London: SAGE Publications, 2004): 362.

Council (ESRC) explains, research is defined broadly and research ethics refer to the moral principles guiding all research, “from its inception through to completion and publication of results and beyond.”²¹² Therefore, any relevant ethical considerations must be identified and taken into account in the context of this specific research. Ethical considerations have a long history in social research and there are various codes of ethics which guide researchers. However, most codes have similar overlapping principles such as informed consent, avoiding deception, ensuring privacy and confidentiality and the accuracy of the data.²¹³ Consequently, the ESRC ethical code currently in operation will be applied.

From January 1st 2006, the ESRC put in place a new Research Ethics Framework (REF). This framework sets out what the ESRC and various other funding bodies perceive to be “good practice for all social science research.”²¹⁴ The REF lays down six broad principles which the ESRC expects to be addressed in all social science research. These are: firstly that research should be designed, reviewed and undertaken to ensure integrity and quality; next, that research subjects should be fully informed about the purpose, methods and intended possible uses of the research, what their participation entails and what risks, if any, are involved. Thirdly, the confidentiality of information supplied by research subjects and the anonymity of respondents must be respected and fourthly, that research participants must participate in a voluntary way, free from any coercion. Harm to research participants must be

²¹² Economic & Social Research Council, "Research Ethics Framework (REF)", http://www.esrcsocietytoday.ac.uk/ESRCInfoCentre/Images/ESRC_Re_Ethics_Frame_tcm6-11291.pdf, accessed March 14th 2006: 7.

²¹³ Clifford G. Christians, "Ethics and Politics in Qualitative Research", Denzin and Lincoln, *The SAGE Handbook of Qualitative Research*, (London: SAGE Publications, 2005): 144-5.

²¹⁴ Economic & Social Research Council, "Research Ethics Framework (REF)", 1.

avoided and finally, the independence of research must be clear and any conflicts of interest or partiality must be explicit.²¹⁵

These key principles of research ethics must be considered in turn in the context of my research on intellectual property protection in China. The first principle relating to integrity and quality entails a commitment throughout the research process to research of the highest quality and accountability. This principle underpins the remaining tenets. The second principle of informed consent is highly relevant to this research. “Informed consent entails giving as much information as possible about the research so that prospective participants can make an informed decision on their possible involvement.”²¹⁶ This information was provided to all respondents in this study prior to their initial involvement. My position as a postgraduate researcher and the aims of this research were explained in both the cover letter and the top of the questionnaire or start of the interview and it was made clear to all respondents that they could raise any questions or concerns that they had about their participation in this study.²¹⁷

The issue of informed consent is more problematic in this research as many of the respondents were Chinese. It is well recognised that the concept of informed consent relies on the ‘primacy of the individual’, which may not exist in some cultural contexts, where the individual may take less precedence to the family or community.²¹⁸ In the context of China, it is true that individual rights may not take precedence. However, many of the Chinese respondents worked for foreign invested enterprises or for multinational corporations operating in China and they have consequently been exposed to concepts of individual rights such as consent and

²¹⁵ Ethical principles taken from: Ibid.

²¹⁶ Ibid. 24.

²¹⁷ For details, see the cover letter used to make initial contact with respondents in Appendix 2.

²¹⁸ Ibid.

privacy on previous occasions. Therefore, the same wording was used to deal with the issue of informed consent in both the Chinese and English versions of the questionnaire and was handled in broadly the same way at the start of each interview.

The third principle regarding confidentiality and anonymity is a crucial consideration in this study. This ethical principle “requires that researchers take steps to ensure that research data and its sources remain confidential”.²¹⁹ The anonymity of all respondents was a key concern to many respondents as the issue of IP protection is commercially sensitive. Therefore, assurances of anonymity were given in the initial contact letter/email and reinforced in the questionnaire/interview. Contact details provided by respondents were contained within a separate sheet, which was detached from the survey immediately on receipt of the completed questionnaire. Furthermore, each respondent was assigned a code relating to which group of respondents they belonged to and this code was used in all documents relating to their individual responses and comments. Anonymization “is a matter of skill in changing details sufficiently so that the reader cannot identify the individual concerned but in such a way as not to destroy the social-science research value of the final report.”²²⁰ In this study, this balance between retaining sufficient detail and ensuring that individuals could not be identified was achieved by only providing basic details of the respondent, whether they were Chinese or foreign and the type of company they worked for. The location was also included when this was felt to be significant and where this did not increase the probability of the respondent’s identification.

The next principle concerns the need to ensure that participants take part voluntarily and without coercion. This is closely linked to the issue of informed

²¹⁹ Ibid. 25.

²²⁰ Tom Wengraf, *Qualitative Research Interviewing: Biographic Narrative and Semi-Structured Methods*, (London: SAGE Publications, 2001): 187.

consent. No pressure was exerted on participants who expressed their concern about participating and all respondents were assured that they could choose to withdraw at any time. Indeed, several respondents declined to answer certain questions as they were deemed to be too sensitive regarding the company's IP strategy and this response was not challenged.

The principle of avoiding harm to participants was also considered. Harm doesn't just include physical or psychological harm; it can also include "a subject's social standing, privacy, personal values or beliefs, their links to family and the wider community, and their position within institutional settings."²²¹ Therefore, a further consideration in this study was the possibility of harm to an individual's or company's reputation as a result of comments made. This possibility was minimised by giving clear assurances of anonymity and ensuring that respondents could not be identified in the results, but the possibility of later identification may have inhibited some respondents from giving their true opinions, particularly where these were critical of the current system.

The final principle is that the researcher should declare any affiliations and potential conflicts of interest. Although this is not directly relevant to my research, respondents were still informed of my status as postgraduate researcher and affiliation with the University of Nottingham and further, that the data collected was for use in my PhD thesis.

A further consideration was that the majority of my research was carried out outside of the U.K. This raises issues not only about the cultural context of key concepts such as consent and privacy, but also possible perceived differences between

²²¹ Economic & Social Research Council, "Research Ethics Framework (REF)", 21.

the power of the researcher and the researched and the handling of personal data.²²² Although these issues were not felt to pose any major difficulties to the research, it is still important to be mindful of their potential impact. The handling of personal data followed the standards laid down in the Data Protection Act 1998, despite the fact that data was collected outside the U.K. and thus outside the remit of this legislation. This legislation provides that data must be obtained for a specific purpose and should not be kept for any longer than is necessary for this purpose. Data should also be kept secure from unauthorised access.²²³ As a result, data collected from respondents was obtained for the specific aims of the research and will be destroyed on completion of the study. Data will also be stored in secure computer files and the use of codes to identify respondents should further protect their personal information.

Therefore, although the research methods chosen do not raise difficult ethical issues, ethical considerations were still considered in this research. The most important ethical issues were the informed consent of respondents and ensuring the anonymity of respondents, particularly given the sensitive nature of the topic of intellectual property protection.

3.6 Practical Issues

There are various practical issues which arose during this research. The main two practical issues which need to be discussed here are the issue of translation and the issue of the use of computer software to assist my data analysis.

3.6.1 The Issue of Translation

There are three main practical problems that may arise from attempting to translate questionnaires from one language into another target language. These are

²²² Ibid. 17.

²²³ Information Commissioner's Office, "The Basics", http://www.ico.gov.uk/what_we_cover/data_protection/the_basics.aspx, accessed February 24th 2007.

the lack of semantic equivalence across languages, the lack of conceptual equivalence across cultures and the lack of normative equivalence across societies.²²⁴ These factors may be relevant to the translation of a survey written initially in English to Chinese. For example, legal concepts do not necessarily translate into easily understood Chinese categories. One case in point would be the widely discussed concept of the 'rule of law', which has different translations into Chinese depending on the usage. For example, 法治 (fazhi) translates as 'rule of law', but the Constitution uses the phrase 依法治国 (yifazhiguo), which has been translated as both ruling the country by law and rule of law.²²⁵ This may also be due to a lack of conceptual equivalence across different legal cultures; coming from a western common law background, it is important not to assume that legal norms applicable in one jurisdiction necessary are applicable in China.

Finally, the lack of normative equivalence in China may relate to certain social conventions. These include the willingness or otherwise to discuss certain topics, the manner in which ideas are expressed and the treatment of strangers.²²⁶ It is important to be aware of all of these potential problems in the Chinese context as the concepts of 'face' and 'networks/relationships' (*guanxi*) may be influential, both in terms of access, but also in terms of the answers given to an outsider. Furthermore, as the majority of the questions in my survey relate to attitudes and opinions, it is more likely that these social conventions and norms will play a role in the answers received from respondents.

²²⁴ Orlando Behling and Kenneth S. Law, *Translating Questionnaires and Other Research Instruments: Problems and Solutions*, (London: Sage Publications, 2000): 4-5.

²²⁵ Yongnian Zheng, "From Rule By Law to Rule of Law? A Realistic View of China's Legal Development", *China Perspectives*, 25 (Sept.-Oct. 1999).

²²⁶ Behling and Law, *Translating Questionnaires and Other Research Instruments: Problems and Solutions*, 5-6.

In order to minimise these potential problems, the following steps were performed. With regards to semantic issues, the language used was carefully considered when drafting the original survey in English. This was especially important when considering the wording of attitudinal questions. Key guidelines developed to aid translation were also considered during the drafting process. These guidelines include; using short, simple sentences of less than sixteen words; employing the active rather than passive voice; avoiding subjunctives such as 'could' or 'would' where possible; and avoiding words indicating vagueness such as 'possibly' or 'probably' where possible.²²⁷

With regards to conceptual issues, as stated above, certain legal concepts may be grounded in the Western legal tradition and this was also borne in mind whilst drafting the survey. To minimise these issues, the legal terms used in the primary legislation was used, as this should represent the most familiar IP terms and concepts. However, it is still possible that certain conceptual problems remained in the survey and this is a limitation of the research methodology.

Finally, with regards to solving normative problems, there are recognised problems in China with questions asking for political opinions. This is thought to be a legacy of the Cultural Revolution which has "led to a general pattern of disguising attitudes and feelings."²²⁸ As a result, assurances of anonymity in this study were strengthened to assure respondents that their identity would not be revealed under any circumstances. Individual names and company affiliations were also not requested, unless the respondent wished to provide them for follow-up contact. This aimed to reassure respondents and decrease any potential reticence on sensitive topics.

²²⁷ R.W. Brislin, "Translation and Content Analysis of Oral and Written Materials", Triandis and Berry, *Handbook of Cross-Cultural Psychology*, (Boston: Allyn & Bacon, 1980).

²²⁸ Behling and Law, *Translating Questionnaires and Other Research Instruments: Problems and Solutions*, 42.

However, it is still possible that Chinese respondents were less willing to be critical of their legal system and framework of IP protection and again this must be borne in mind during analysis of responses.

Two Chinese translators were used to confirm semantic equivalence in the survey; their role was also to advise on the wording of the survey with knowledge of the target culture and social norms, in order to minimise normative issues. The issue of striving for semantic and conceptual equivalence was also an issue in the translation of respondents' answers from Chinese to English. Again, translations were as close to the original text as possible, but did require some interpretation in certain cases. As with the translation of the original research instrument from English into Chinese, Chinese research assistants were asked to check the translation and discuss any phrases or sentences which were particularly problematic in terms of language or context. Consequently, although it was not always possible to check with the respondents as to their intended meaning, mistranslations were hopefully minimised. However, the issue of translation should constantly be borne in mind when reading quotes given, as they may be an interpretation of the respondents' original meaning.

Additionally, the use of a survey was not the only research method used. Document analysis is useful in this context for providing an unobtrusive method of collecting data without encountering the same levels of semantic, conceptual and normative problems. Face-to-face and telephone interviews were also carried out in English, thus direct quotes can be given from respondents from these interviews.

3.6.2 The Use of CAQDAS in Data Analysis

The qualitative data collected may be interesting, but without coherent analysis, it may be meaningless. Therefore, qualitative data analysis is crucial to increasing the legitimacy of the results obtained. In the analysis of qualitative data,

coding is crucial. “Codes or categories are tags or labels for allocating units of meaning to the descriptive or inferential information compiled during a study.”²²⁹

The researcher needs to be able to create and change codes, as well as adding memos, in order to constantly reflect on the data collected.²³⁰ Therefore, the merits of using computer software to assist in the coding and analysis process have been strongly debated over the past couple of decades. The first rudimentary mainframe CAQDAS programs began to be used in the early 1980s, with theory building programs being developed in the late 1980s, but “in the early stages of their development computer-based methods for qualitative analysis faced resistance based on epistemological suspicion.”²³¹

However, it now appears that the use of software to assist with data analysis is now more accepted in qualitative research; the ESRC advised in 2001 that “students should have skill in the use of qualitative data analysis software packages”.²³² There are certain advantages to using computer-assisted qualitative data analysis software (CAQDAS), which include increasing the transparency of data analysis, which in turn can increase the legitimacy of qualitative research; improving data management; and supplying the ability to experiment with different approaches.²³³ Conversely, although CAQDAS can clearly be a useful tool in qualitative data analysis, it is also important to recognise that the “benefits of CAQDAS are dependent on the skills of the researcher, how the researcher chooses to use available tools, and how CAQDAS

²²⁹ Tehmina N. Basit, "Manual or Electronic? The Role of Coding in Qualitative Data Analysis", *Educational Research*, 45 (2), (Summer 2003), 144.

²³⁰ Nigel Fielding, "Automating the Ineffable: Qualitative Software and the Meaning of Qualitative Research", May, *Qualitative Research in Action*, (London: Sage Publications, 2003): 163.

²³¹ Nigel G. Fielding and Raymond M. Lee, *Computer Analysis and Qualitative Research*, (London: SAGE Publications, 1998): 13.

²³² Joy D. Bringer, Lynne H. Johnston and Celia H. Brackenridge, "Maximising Transparency in a Doctoral Thesis: The Complexities of Writing about the Use of QSR*NVIVO Within a Grounded Theory Study", *Qualitative Research*, 4 (2), (2004), 247.

²³³ Fielding, "Automating the Ineffable: Qualitative Software and the Meaning of Qualitative Research", 169.

is taught.”²³⁴ It is also important to recognise that the use of CAQDAS should not be seen as a time saving device, as data coding and analysis will always be a time-consuming process.

There are also potential disadvantages to using CAQDAS, which must be acknowledged in order to minimise their effect. The main criticism levelled at the use of CAQDAS is that is “has the potential to transform qualitative research into a rigid, automated analysis of text that, in actuality, requires human interpretation.”²³⁵ However, the software can only do so much; the researcher is still ultimately responsible for the analysis. This is the idea of ‘rubbish in- rubbish out’; that the analysis is still guided by the skills of the researcher.

It is also a frequently voiced concern that researchers may choose their research methods and perspective based on the strengths and limitations of the software. However, in this study, the use of CAQDAS was considered after data collection as a helpful tool in drawing together qualitative data from various sources to analyse, including questionnaire responses, more detailed follow-up responses and interview transcripts. The use of CAQDAS is also appropriate to this research as it explores a relatively new area of research with little existing theory in this area. Thus, CAQDAS is an appropriate tool for testing and modifying existing theories, as well as theory building. Therefore, it was felt that the use of CAQDAS was justified in this study and NVivo software was consequently used in the data analysis stage of research.

²³⁴ Bringer, Johnston and Brackenridge, "Maximising Transparency in a Doctoral Thesis: The Complexities of Writing about the Use of QSR*NVIVO Within a Grounded Theory Study", 250.

²³⁵ Ibid. 248.

3.7 Alternative Approaches

Although a mixture of methods were chosen to research this topic of IP protection in China and compliance with the TRIPS Agreement, there are a variety of other methods that could have been employed. For example, a more conventional quantitative approach could have been followed by expanding the number of questionnaires distributed and sampling the respondents randomly from a total population of lawyers operating in China. Analysis of available enforcement statistics such as a breakdown of fines imposed by province could also have provided data for a quantitative comparison of possible areas where local protectionism flourishes.

If a more streamlined qualitative approach had been taken, interviews with a greater number of respondents could have been conducted without an initial survey. Observation of respondents dealing with IP issues and infringements in practice would also have been an informative approach to take, but access would obviously have been more of an issue. Furthermore, the respondents targeted by this study could have focused solely on one group of respondents such as multinational enterprises to evaluate their perception of the current IP system in more detail. Equally, legal professionals could have been the only respondents targeted in order to take a more formal legalistic approach to compliance with the letter of the TRIPS Agreement. However, it is argued that the chosen research strategy, incorporating different methods of data collection and three distinct groups of respondents, combined the advantages of qualitative research, with the benefits of viewing the IP system in China from various different perspectives. This approach offered the best opportunity to comprehend a complex and opaque system and to answer the key research questions.

3.8 Summary and Conclusion

This chapter has outlined the research strategy that was applied to analysis of the question of China's TRIPS compliance. Essentially, a qualitative approach was used, which combined different methods of data collection: a brief questionnaire used to make initial contact; detailed follow-up interviews; and documentary data from primary legal documents such as GATT/WTO minutes and Chinese IP laws, regulations and white papers. All this qualitative data was codified using NVivo software and the initial coding framework was modified to move toward amending the existing model of compliance for the specific context of TRIPS compliance.

Important practical issues have also been examined in this chapter. These issues included the issue of translation and the use of computer software to assist in the data analysis process. Finally, the alternative approaches that could have been taken were outlined. The next chapter will begin the process of examining compliance with the TRIPS Agreement by describing the drafting of the TRIPS Agreement in more detail and considering non-country specific factors which may affect compliance with the Agreement.

4 Implementing the TRIPS Agreement: Non-country Specific Factors Influencing TRIPS Compliance

4.1 Introduction

According to the comprehensive model of compliance outlined above at page 48, there are various categories of factors which may influence the likelihood or otherwise of compliance with a specific international accord. These categories include both country-specific factors such as the history, size and culture of the country, as well as non-country specific factors relating to the agreement and the activity concerned. In this chapter, the non-specific factors influencing compliance with the TRIPS Agreement will be considered.

Firstly, the background to the TRIPS Agreement will be outlined, in order to detail the drafting history and consequent context of compliance with this specific accord. Then, the specific characteristics of the TRIPS Agreement will be examined, to analyse their possible affect on compliance. The chapter will also include discussion of the characteristics of the activity which the TRIPS Agreement was designed to solve, that is intellectual property infringements. Finally, the international environment surrounding the protection of intellectual property rights will be explored.

4.2 The Drafting of the TRIPS Agreement

As detailed above at page 6, the pre-WTO international trading system did not offer a detailed and universal framework for IPR protection. Under the General Agreement on Tariffs and Trade 1947 (GATT), provisions relating to intellectual property had been limited and effectively no substantive terms applied.²³⁶ However, GATT protection of intellectual property became prioritised by developed countries during the 1980s and 1990s due to a growing reliance on technology. It was

²³⁶ Bernard M. Hoekman and Michel M. Kostecki, *The Political Economy of the World Trading System: The WTO and Beyond*, (Oxford: Oxford University Press, 2001): 282.

consequently an important issue during the Uruguay round of trade negotiations (1986-94), where it proved to be a divisive issue. Following this key round of negotiations, the World Trade Organisation (WTO) emerged as the successor to GATT in 1995,²³⁷ with the TRIPS Agreement at the heart of the new international organisation.

The issue of IP protection was first raised in the context of the GATT system at the close of the Tokyo negotiation round in 1979, where the European Community and the United States unsuccessfully tried to obtain an 'Agreement on Measures to Discourage the Importation of Counterfeit Goods'.²³⁸ Although the Tokyo round had attempted to move beyond reducing tariffs as barriers to trade to consideration of non-tariff barriers, this shift in focus was taken to new levels in the years following the conclusion of the Tokyo Round.

This new emphasis on intellectual property protection arose as technology started to become more of an important factor in global competition.²³⁹ Developed industrialised countries were becoming conscious of the pressure that newly industrialising nations especially in Asia were beginning to place on their own economic growth. However, initial proposals regarding the inclusion of IP in GATT negotiations were modest. In the early 1980s, proposals for consideration of intellectual property rights in the multilateral trading system focused almost exclusively on trade in counterfeit goods; "this was because commercial counterfeiting had become such a serious problem for trademark owners in a number

²³⁷ For further information on the history of the WTO, TRIPS agreement and GATT, see World Trade Organisation, "What is the WTO?" http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm, accessed April 10th 2004.

²³⁸ Goldstein, *International Copyright: Principles, Law and Practice*, 53.

²³⁹ Carlos M. Correa, *Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options*, (London: Zed Books Ltd., 2000): 3.

of countries.”²⁴⁰ Thus, initial consideration of the inclusion of IP protection in the GATT/WTO system was much narrower than the broad scope of the final TRIPS Agreement.

Furthermore, the very inclusion of intellectual property protection in the scope of multilateral trade negotiations was strongly resisted by some of the large developing countries such as Brazil and India, who argued that the World Intellectual Property Organisation (WIPO) was the proper forum within which to negotiate this issue.²⁴¹ However, WIPO was widely regarded as ineffective at enforcing the various treaties it was responsible for such as the Paris and Berne Conventions, whereas the GATT dispute settlement mechanism was admired as a potentially more efficient tool in enforcing international IP obligations.²⁴² These Conventions were also criticised for relying on the principles of non-discrimination and national treatment, rather than providing uniform standards of protection. This meant that if a country did not offer any IP protection to its own nationals, then it was not obliged to offer higher protection to foreign nationals. This lack of pressure on developing countries to introduce IPR was clearly unsatisfactory to the richer industrialised nations.

In other words, the reasons why the developed countries wished to include intellectual property protection in the GATT system were two-fold; first, to subject intellectual property disputes to the multilateral dispute settlement body, and second, to provide uniform standards of protection which all signatories would have to provide. The lack of enforcement provisions in the existing conventions was also seen as a weakness of the international intellectual property system then in force. The

²⁴⁰ A. Jane Bradley, "Intellectual Property Rights, Investment, and Trade in Services in the Uruguay Round: Laying the Foundations", *Stanford Journal of International Law*, 23 (1987), 65.

²⁴¹ *Ibid.* 67.

²⁴² John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations*, (Cambridge, Massachusetts: The MIT Press, 1997): 311.

Uruguay Round of negotiations, launched in Punta del Este on September 20th 1986, included the issue of intellectual property for negotiation as follows:

“In order to reduce the distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, the negotiations shall aim to clarify GATT provisions and elaborate as appropriate new rules and disciplines.”²⁴³

Therefore, the scope of intellectual property protection to be negotiated during the Uruguay Round already appeared to be broader than the narrow scope of counterfeit goods originally tabled in the Tokyo Round. From the very outset of the Uruguay Round, there were severe disagreements between developed and developing countries over the direction of the intellectual property negotiations. Australia proposed that the Berne, Paris, Rome and Geneva Conventions be incorporated into the multilateral system, a proposal with which most economically developed countries agreed. On the other hand, India proposed that negotiations be limited to practices that distort international trade, a proposal with which many developing countries concurred.²⁴⁴

Resistance to the broader scope of TRIPS was not based on resistance to the idea of combating counterfeiting *per se*, rather it arose from the perception that the proposed TRIPS Agreement would embody “a policy of ‘technological protectionism’ aimed at consolidating an international division of labour.”²⁴⁵ This ‘technological protectionism’ was perceived as protecting the interests of industrialised countries at the expense of the developing economies and was thus strongly resisted by many of the negotiating powers. Developing countries were concerned that greater intellectual

²⁴³ GATT, "Ministerial Declaration on the Uruguay Round", 7.

²⁴⁴ Terence P Stewart, *The GATT Uruguay Round: A Negotiating History (1986-1993)*, (Deventer, The Netherlands: Kluwer Law and Taxation Publishers, 1993): 2270-2272.

²⁴⁵ Correa, *Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options*, 5.

property protection would strengthen the monopoly power of multinational corporations, and detrimentally affect the poor by increasing the prices of key medicines and foods.²⁴⁶ It has also been claimed that developing countries never really had a significant part to play in the TRIPS negotiations. According to one commentator:

“The negotiations on TRIPS are often said to have begun properly in the second half of 1989, when a number of countries made proposals, or the first part of 1990, when five draft texts of an agreement were submitted to the negotiating group. A more sceptical view is that the negotiations were by then largely over. An even more sceptical view is to say that no real negotiations ever took place. Developing countries had simply run out of alternatives and options.”²⁴⁷

It is certainly undeniable that private actors had a significant role to play in the drafting of the TRIPS Agreement, a public law instrument. For example, the Intellectual Property Committee (IPC) was seen as crucial in the TRIPS negotiations.²⁴⁸ The IPC was made up of representatives from major US multinational corporations and presented a draft text which the negotiators then fine-tuned. Thus, it could be said that the negotiators did not actually draft the full text of the final Agreement, but rather were heavily influenced by powerful private participants in the shape of the IPC and other lobby groups. Developing countries were concerned that intellectual property protection was only being considered in the context of its commercial effects, rather than also considering the use of IP protection in the context of national development.²⁴⁹ Nevertheless, these concerns were sidelined by the developed countries who dominated the TRIPS negotiations.

Indeed, as the Uruguay Round of negotiations progressed, the tensions between developing and developed countries appeared to diminish, whereas tensions

²⁴⁶ Hoekman and Kostecki, *The Political Economy of the World Trading System: The WTO and Beyond*, 283.

²⁴⁷ Peter Drahos, *A Philosophy of Intellectual Property*, (Aldershot: Dartmouth, 1996): 171.

²⁴⁸ Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights*, Chapter 5.

²⁴⁹ May and Sell, *Intellectual Property Rights: A Critical History*, 157.

grew between industrialised nations, such as the United States and the European Community. This was as a result of the negotiations moving towards detailed substantive provisions which were not always in congruence with the existing domestic systems of protection.²⁵⁰

Whatever the truth about the tensions or otherwise between the countries negotiating the TRIPS Agreement, by a midterm review carried out in 1989, most countries, both developed and developing, agreed that substantive intellectual property protection was desirable and a framework for the TRIPS Agreement was put in place.²⁵¹ Furthermore, “by the time of the Dunkel text in December 1991, there seemed to be an enormous change in attitudes, including attitudes of developing countries, which led many such countries to be willing ultimately to accept the IP Agreement as part of the very broad package of the Uruguay Round.”²⁵²

It is unlikely that agreement between developing and developed countries, who had initially appeared diametrically opposed, was reached based solely on the text of the proposed TRIPS Agreement alone. Instead, consensus was achieved through the common negotiating strategy of ‘linkage-bargaining’. This “occurs when a negotiator offers something of value to a counterpart as a means of convincing the counterpart to offer concessions on matters considered valuable to the negotiator.”²⁵³ In other words, developed countries gained the agreement of developing countries on intellectual property issues by threatening to withdraw concessions agreed in other trade areas of concern to developing nations, such as agriculture. Put simply,

“They [the developing countries] were subjected to pronounced economic coercion leading up to and during the negotiations. Furthermore, they

²⁵⁰ Jackson, *The World Trading System: Law and Policy of International Economic Relations*, 312.

²⁵¹ Goldstein, *International Copyright: Principles, Law and Practice*, 55.

²⁵² Jackson, *The World Trading System: Law and Policy of International Economic Relations*, 311.

²⁵³ Donald G. Richards, *Intellectual Property Rights and Global Capitalism: The Political Economy of the TRIPS Agreement*, (Armonk, New York: M. E. Sharpe, 2004): 123.

assented to an IP agreement in exchange for the OECD commitments to expand market access for developing countries agricultural and textile exports.”²⁵⁴

This high stakes negotiating strategy has been heavily criticised, but did lead to agreement overall, which ultimately would not have been possible in single issue negotiations involving international standards for intellectual property protection. The final text of the Agreement on Trade-Related Aspects of Intellectual Property Rights was signed at Marrakesh, Morocco on April 15th 1994 and can consequently be seen as a compromise on the part of the developing countries, in order to receive benefits from other areas of the WTO Agreements.

Although the TRIPS Agreement can be seen as a highly significant step in the expansion of IP protection in the global system and is notable on many levels, TRIPS has also been the subject of various criticisms. In contrast to the existing international intellectual property Conventions, the TRIPS Agreement removes the national autonomy which was used to decide the appropriate level of protection at a domestic level. The TRIPS Agreement instead advances a ‘one size fits all’ approach which “defies both economic analysis and historical experience.”²⁵⁵

Furthermore, the stated justification for the TRIPS Agreement has come under fire; the explicit aim of promoting economic development through stronger IP protection is disputed by several studies and the delicate balance between rights holders and the public interest is tipped firmly in favour of protection. Finally, the TRIPS obligations represent a stark departure from the existing GATT system. Not only was GATT previously focused on trade in goods, but the TRIPS Agreement also

²⁵⁴ Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights*, 9.

²⁵⁵ Ibid. 13.

contrasts with the Uruguay Round's aims of deregulation and trade liberalization by striving for "internationally driven re-regulation."²⁵⁶

Moreover, it could be claimed that the controversy surrounding the inclusion of intellectual property protection in the Uruguay round of GATT negotiations has its legacy in the full title of the resulting agreement, 'Agreement on Trade-Related Aspects of Intellectual Property Rights', known as TRIPS. Initial negotiations had limited intellectual property protection to that relating to trade, but the final agreement is so far-reaching that 'trade-related' is a misleading title.²⁵⁷ It has even been claimed that "the term TRIPS was invented to make the issue look GATT-relevant, but many economists think it is meaningless because intellectual property cannot be trade-specific."²⁵⁸ However, as both developed and developing countries conceded that a system of IP protection was a necessary inclusion in the international trading system, this seems an overly critical stance.

The TRIPS Agreement, which resulted from these negotiations, has also been criticised as beneficial only to industrialised nations, whilst detrimentally affecting developing countries. This criticism is based on the notion that the standards of intellectual property protection it expounds are solely suitable for industrialised nations.²⁵⁹ By protecting technology already established in developed countries and restricting the development of technology in poorer countries, it has been argued that developed countries could increase exports and stifle competition. The TRIPS Agreement has also been criticised for attempting to remove intellectual property

²⁵⁶ Ibid. 15.

²⁵⁷ Bhagirath Lal Das, *The World Trade Organisation: A Guide to the Framework for International Trade*, (London: Zed Books Ltd., 1999): 355.

²⁵⁸ Graham Dunkley, *The Free Trade Adventure: The WTO, the Uruguay Round and Globalism- A Critique*, (London: Zed Books Ltd., 2000): 187.

²⁵⁹ Correa, *Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options*, 5.

protection from the realm of global politics by ignoring the developmental implications for developing nations and redefine it solely as a legal issue.²⁶⁰

Therefore, the TRIPS Agreement clearly had a controversial drafting history and has also been strongly criticised as favouring developed countries over developing countries. The specific provisions of the TRIPS Agreement which resulted from this complex negotiating process will now be considered.

4.2.1 The Provisions of the TRIPS Agreement

The TRIPS Agreement is one of the three so-called ‘pillar’ agreements that together make up the commitments of the WTO.²⁶¹ While the drafting of the TRIPS agreement clearly caused controversy, what provisions does the final text of the Agreement actually contain? In sharp contrast to most ‘negative’ obligations imposed by the WTO agreements (e.g. not to use certain policies such as export subsidies or quotas), TRIPS invokes a ‘positive’ obligation to adopt a set of substantive rules.²⁶² This set of substantive rules is contained within 7 major parts and 73 articles of TRIPS. The seven areas covered are: copyright, trademarks, geographical indication, industrial design, patents, layout-design of integrated circuits, and undisclosed information.²⁶³

Among other provisions, the TRIPS Agreement:

- Sets minimum standards of protection for these seven areas;
- Sets minimum standards for the enforcement of intellectual property rights in administrative and civil actions;

²⁶⁰ May and Sell, *Intellectual Property Rights: A Critical History*, 162.

²⁶¹ The full text of TRIPS is available at: World Trade Organisation, "Agreement on Trade-Related Aspects of Intellectual Property Rights".

²⁶² Hoekman and Kostecki, *The Political Economy of the World Trading System: The WTO and Beyond*, 274.

²⁶³ Bhagirath Lal Das, *An Introduction to the WTO Agreements*, (London: Zed Books Ltd., 1998): 115.

- Sets minimum standards, with regard to copyright piracy and trademark counterfeiting, for the enforcement of intellectual property rights in criminal actions and actions at the border;
- Requires that, subject to limited exceptions, WTO members provide national and Most Favoured Nation (MFN) treatment to the nationals of other WTO members with regard to protection and enforcement of intellectual property rights.²⁶⁴

The extensive provisions of the TRIPS Agreement did not emerge solely from the Uruguay Round of negotiations; rather it pulls together and supplements previous intellectual property conventions.²⁶⁵ In fact, the substantive provisions on minimum levels of protection essentially incorporate existing IP conventions into the TRIPS Agreement. Part III of the TRIPS Agreement deals specifically with minimum standards for the enforcement of intellectual property rights. The TRIPS Agreement was a result of compromise between the negotiating positions of the developed and developing countries respectively, and the provisions on enforcement demonstrate this compromise.²⁶⁶ In general, developed countries argued for stringently applied remedies, whereas developing countries were concerned about maintaining their judicial discretion.

Thus, members are required to give the appropriate judicial authorities the power to grant certain remedies but without further specifying the substantive form that the remedy should take. This preserves the concept of judicial autonomy, seen as crucial by some members. The enforcement provisions of the TRIPS Agreement were

²⁶⁴ Summary of TRIPS provisions adapted from Terence P Stewart, "China's compliance with World Trade Organization obligations: a review of China's first two years of membership", http://www.uscc.gov/researchreports/2004/stewartpaper/04_04_15stewart.htm, accessed April 21st 2004.

²⁶⁵ Richards, *Intellectual Property Rights and Global Capitalism: The Political Economy of the TRIPS Agreement*, 4.

²⁶⁶ Goldstein, *International Copyright: Principles, Law and Practice*, 59.

also seen as crucial because the lack of enforcement provisions in the existing conventions was one of the main stimuli to the negotiation of the TRIPS Agreement.²⁶⁷ Consequently, the TRIPS provisions on enforcement will be decided below.

4.2.2 The TRIPS Provisions on Enforcement

As stated above, Part III of the TRIPS Agreement is concerned with the *enforcement* of intellectual property rights and this Part is divided into twenty one articles and five sections:

- General Obligations (Article 41)
- Civil and Administrative Procedures and Remedies (Articles 42-49)
- Provisional Measures (Article 50)
- Special Requirements Related to Border Measures (Articles 51-60)
- Criminal Procedures (Article 61)

All of these provisions on enforcement can be said to have two basic objectives: “One is to ensure that effective means of enforcement are available to rights holders; the second is to ensure that enforcement procedures are applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.”²⁶⁸ Part III as a whole also complements the substantive minimum standards of TRIPS as “from a rights holder’s perspective, substantive minimum rights are of little value if there are no effective procedures for the enforcement of such rights.”²⁶⁹

Section 1 of Part III outlines the general obligations relating to enforcement. The first paragraph of Article 41 outlines the main principles of enforcement, that

²⁶⁷ May and Sell, *Intellectual Property Rights: A Critical History*, 173.

²⁶⁸ World Trade Organisation, "Overview: The TRIPS Agreement", http://www.wto.org/english/tratop_e/trips_e/intel2b_e.htm#enforcement, accessed November 2005.

²⁶⁹ UNCTAD-ICTSD, "Resource Book on TRIPS and Development: An Authoritative and Practical Guide to the TRIPS Agreement", http://www.iprsonline.org/unctadictsd/docs/RB_4.30_update.pdf, accessed October 2005, 575.

enforcement procedures shall “permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.” Sections 2 and 3 (dealing with civil and administrative procedures and remedies; and provisional measures) are applicable to all intellectual property rights infringements, whereas sections 4 and 5 (special requirements related to border measures and criminal procedures) apply only to trademark counterfeiting and copyright piracy.

It is significant that, in sharp contrast to the substantive provisions, the TRIPS provisions on enforcement in part III mark a significant departure from previous intellectual property protection offered by international agreements such as the Paris and Berne Conventions by adding teeth to the substantive provisions.

“Under these ‘Great Conventions’ as they are known, state practice treated the adoption in domestic law of a statute that more or less embodied an international standard as sufficient to discharge a given state’s international responsibility, even if the domestic law in question were lax or loosely enforced,”²⁷⁰

whereas under TRIPS, the prescribed minimum standards of protection have to actually be implemented.

Another important consideration to take into account is that Part III of TRIPS does not attempt to harmonise national enforcement procedures, but rather aims to establish general minimum standards, which can then be implemented by each Member as they see fit. This approach is also laid out in the Preamble to TRIPS which states that the negotiating parties saw “the need for new rules and disciplines concerning... c) the provision of effective and appropriate means for the enforcement of trade-related intellectual property rights, *taking into account differences in national*

²⁷⁰ J. H. Reichman, “Enforcing the enforcement procedures of the TRIPS Agreement”, *Virginia Journal of International Law*, 37 (Winter 1997), 338.

legal systems”(emphasis added). This is important to remember when assessing China’s compliance; even if China’s IP system is considerably different from that of its trading partners, China could still be in compliance with TRIPS due to this built-in flexibility in the TRIPS Agreement.

Overall, the drafting of the TRIPS Agreement provoked controversy between the developed and developing WTO Members and as a result, the final text of the Agreement reflects the compromises made in the negotiating process. This compromise is reflected most prominently in Part III provisions on enforcement. As the controversy surrounding the establishment of the TRIPS regime has now been outlined, the TRIPS Agreement will now be analysed in the context of compliance.

4.3 Analysing the TRIPS Agreement- The Characteristics of the Accord

According to the model of compliance presented above in Chapter 2 at page 48, the characteristics of the specific accord may affect the prospects of compliance with it. Thus, it is crucial to consider the TRIPS Agreement itself before judging China’s compliance with its intellectual property obligations under this accord. The non-country specific factors which may influence compliance with the TRIPS Agreement should be considered under various categories: the perceived equity of the obligations; the precision of the obligations; provisions for obtaining scientific and technical advice; reporting requirements; provisions for other forms of monitoring; the secretariat; and other incentives and sanctions.

4.3.1 The Perceived Equity of the Obligations

The perceived equity of the TRIPS Agreement is in some doubt. As discussed above at section 4.2, negotiations over intellectual property rights within the GATT system were protracted and involved serious compromises on the part of the

developing countries in return for concessions in other areas of trade negotiations. During the TRIPS negotiations, China participated as an observer and joined with the bloc of developing countries in the TRIPS negotiations. Fourteen of these developing countries, including China, submitted a draft text concerning intellectual property in May 1990.²⁷¹ Unlike the three rival drafts submitted by the United States, Japan and Switzerland respectively, the developing countries' draft emphasised the "need to take into consideration the public policy objectives underlying national systems for the protection of intellectual property, including developmental and technological objectives."²⁷² This draft also emphasised that signatories should not have recourse to unilateral measures in the event of any dispute. However, the draft was heavily criticised for providing "a wide degree of latitude" to governments with respect to legislating on standards and for providing levels of protection seen as insufficient by developed countries.²⁷³

It was clear after the rival drafts had been submitted that tensions still existed between the objectives of the developed countries and those of the developing countries within the TRIPS negotiations. In 1991, one developing country commented that they "continued to believe that the situation of the negotiations fell far short of addressing the special needs and problems of developing countries."²⁷⁴ Therefore, it is clear that throughout the negotiating and drafting process, there were concerns amongst the developing countries that their interests and concerns were

²⁷¹ Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, "Communication from Argentina, Brazil, Chile, China, Columbia, Cuba, Egypt, India, Nigeria, Peru, Tanzania and Uruguay", Document MTN.GNG/NG11/W/71 at docsonline.wto.org accessed November 18th 2006.

²⁷² Ibid. 1.

²⁷³ Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, "Minutes of Meeting of Negotiating Group of 14-16 May 1990", Document MTN.GNG/NG11/21 at docsonline.wto.org, accessed November 18th 2006.

²⁷⁴ Negotiating Group on Trade-Related Aspects of Intellectual Property Rights including Trade in Counterfeit Goods, "Meeting of Negotiating Group of 27 and 28 June 1991 Note by the Secretariat", Document MTN.GNG/TRIPS/1 at docsonline.wto.org, accessed November 20th 2006.

being overlooked. As a result, there may still be a lingering perception that the final Agreement is not fair as it favours the interests of industrialised nations over poorer Members. If some Members do hold this perception, this may decrease the likelihood of their full compliance with their TRIPS obligations.

4.3.2 *The Precision of the Obligations*

The precision of the TRIPS Agreement is almost certainly an area of some doubt. This is not helped by the nature of the TRIPS Agreement itself, which is a minimum standards agreement. This means that each member must provide protection of at least the standard provided for in the agreement, but is free to decide exactly how to implement the specific provisions. In this minimum standards nature, it is similar to a European Union directive. The minimum standards nature of the TRIPS Agreement is provided for by Article 1, which states:

“Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.”²⁷⁵

The precision of the obligations contained within the TRIPS Agreement is also subject to the balance between substantive precision and judicial autonomy which is a result of the hard fought negotiations during the drafting of the Agreement. For example, many of the Articles relating to enforcement provisions are couched in language which states that the judicial authorities should have the authority to grant a particular remedy but without further guidance on how this should be implemented. An example of this is Article 44, which provides that: “the judicial authorities shall have the authority to order a party to desist from an infringement”. However, the

²⁷⁵ World Trade Organisation, "Agreement on Trade-Related Aspects of Intellectual Property Rights".

exact process of granting an injunction, the evidence which must be presented in order for an injunction to be granted, or any remedies for breach of an injunction are not further specified. This vagueness of language may lead to disputes.

In general, the wording of the TRIPS Agreement has been condemned as “result-oriented” and vague. Many of the provisions require members to give judicial or other authorities the authority to do something, but these authorities are not then obliged to exercise this power.²⁷⁶ This flexibility within the obligations, particularly contained in Part III of TRIPS, means that assessing a Member’s compliance can be problematic.

For example, as stated above, Article 41 outlines the general obligations regarding enforcement procedures. Article 41 (1) commits Members to ensuring the availability of the specified enforcement procedures “so as to permit effective action against any act of infringement”. “Effective action” is not defined here and thus, there is considerable room for interpretation. It has even been stated that “any judgment about compliance should be objectively based on whether Members have made or not the required procedures available.”²⁷⁷ This test seems to be permissive; mere existence of the procedures seems to satisfy this obligation, regardless of how, or indeed if, the procedures are actually utilised.

The analytical index of the WTO offers interpretation and application for any provisions that have been interpreted in cases brought before the WTO.²⁷⁸ However, there is little formal interpretation available concerning the TRIPS provisions on enforcement. The interpretation that is available concerns the scope of “unwarranted

²⁷⁶ UNCTAD-ICTSD, "Resource Book on TRIPS and Development: An Authoritative and Practical Guide to the TRIPS Agreement", 576.

²⁷⁷ Ibid. 580.

²⁷⁸ World Trade Organisation, "WTO analytic index- Guide to WTO law and practice", http://www.wto.org/english/res_e/booksp_e/analytic_index_e/analytic_index_e.htm, accessed August 2005.

delays” in Article 41 (2) and the words “shall have the authority” in Article 42. As many subsequent Articles also use the wording “shall have the authority”, this interpretation is signalled to be of broader application than just to Article 42.

In *India-Patents (EC)*, India tried to claim that a generally available system was not required by the wording “shall have the authority” in Articles 42-48. However, this argument was rejected by the panel who affirmed that “the function of the words ‘shall have the authority’ is to address the issue of judicial discretion, not that of general availability.” Therefore, although it has been argued that the mere provision of these procedures is sufficient, the outcome in this case would appear to suggest that compliance requires more; the procedures have to be available.

To date there have been twenty-four disputes involving provisions of the TRIPS Agreement.²⁷⁹ Several of these disputes have involved legal arguments about the precise nature of the obligations and arise from the imprecise nature of these obligations. Therefore, the precision of the obligations in the TRIPS Agreement is in doubt and this lack of precision may be a factor affecting compliance with the Agreement overall.

4.3.3 Provisions for Obtaining Scientific and Technical Advice

There are several provisions within the TRIPS Agreement which provide for technical assistance and cooperation to assist members to comply with their obligations. The main provision is contained within Article 67. Under Article 67, developed countries shall provide technical and financial cooperation in favour of developing and least-developed countries:

“Such cooperation shall include assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and shall include support

²⁷⁹ As of July 2007 and including the recently launched complaints against China discussed below at page 216.

regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel.”

This issue of technical assistance has been central to the agenda of the Council of TRIPS and has resulted in numerous initiatives, such as conferences and training seminars. It has also led to two joint initiatives between WIPO and the WTO; specifically, “in 1998, the joint initiative on technical cooperation to assist developing countries in meeting the deadline for implementation of the TRIPS Agreement and, in 2001, the same initiative targeted the least-developed country Members.”²⁸⁰

In addition to the WIPO-run Cooperation for Development Program, the European Patent Office offers various programs, the World Bank includes IP in their legal training program and the WTO, UNCTAD and NGOs all offer support. In terms of bilateral support, the U. S. Agency for International Development (USAID) “spends around a quarter of its annual budget on legal and regulatory training.”²⁸¹ Therefore, it is clear that a variety of training programs exist under the auspices of Article 67 in order to assist developing countries to comply with the TRIPS Agreement. Furthermore, as the changes necessary to comply with TRIPS require considerable resources, many developing countries rely on this assistance.²⁸²

However, it is clear from the wording of this provision that any such cooperation must be at the request of the developing country member and cannot be imposed by the developed country partner without mutually agreed terms and conditions. Therefore, this provision may not always allow for the necessary cooperation where it is perceived by the developing country member that the assistance offered is interference in domestic affairs rather than helpful support.

²⁸⁰ Gervais, *The TRIPS Agreement: A Drafting History*, 354.

²⁸¹ May and Sell, *Intellectual Property Rights: A Critical History*, 177.

²⁸² *Ibid.*

In addition, the training programs and assistance offered has also been criticised for encouraging countries to adopt ‘TRIPS-plus’ legislation, regardless of whether it is in the country’s best interests or not and for discouraging the use of autonomy or flexibility in implementation permitted under the TRIPS Agreement.²⁸³ In other words, the assistance offered by developed countries may encourage recipients to model their IP system on the developed country which may not be a suitable model for emulation, particularly if it requires stronger protection than mandated by TRIPS. Furthermore, assistance offered may also breach the key TRIPS principle that each member is free to implement TRIPS provisions as they see fit. Thus, although assistance is available under Article 67 and many developing countries need such assistance, this training and cooperation may not always benefit the developing country as intended. Indeed, it has also been claimed that despite the provisions for cooperation under Article 67, “in the years since the promulgation of the WTO treaty there has been little- if any- real effort by developed countries to meet the Article 67 obligation.”²⁸⁴

There is further provision under Article 69 for more general international cooperation. This article provides that members:

“Shall establish and notify contact points in their administrations and be ready to exchange information on trade in infringing goods. They shall, in particular, promote the exchange of information and cooperation between customs authorities with regard to trade in counterfeit trademark goods and pirated copyright goods.”

To comply with this provision, the WTO Secretariat established a list of contact points in the administration of members and the World Customs Organisation

²⁸³ Ibid. 178.

²⁸⁴ Hon. Bruce Lehman, "Copyright, Culture and Development: The Role of Intellectual Property and of WIPO in the Cultural Industries", http://www.iipi.org/speeches/Beijing_Culture_052202.pdf, 12.

has established a database to facilitate the exchange of information regarding cross-border trade in goods which infringe intellectual property rights.²⁸⁵

Overall, there are provisions within the TRIPS Agreement itself for assistance and cooperation regarding implementation of TRIPS provisions. However, there is some dispute over the effectiveness of some of these measures and in general, there is a perception that developed countries could do more to assist developing country Members.

4.3.4 Reporting Requirements

The main reporting requirement is created by Article 63 of the TRIPS Agreement which concerns transparency. Article 63(2) of the TRIPS Agreement provides that Members shall notify relevant laws and regulations to the Council for TRIPS “in order to assist that Council in its review of the operation of this Agreement.” Relevant laws and regulations can also include final judicial decisions and administrative rulings which pertain to the subject matter of the TRIPS Agreement (Article 63(1)). There are also further reporting requirements contained in TRIPS, such as the requirement to notify of contact points under Article 69 or notification of certain options relating to national treatment under Article 3. The TRIPS Council may also ask for notification regarding a Member’s involvement in cooperation under Article 67.

It is clear that the notification requirements arising from the TRIPS Agreement are not insignificant. For example, notifications of laws and regulations under Article 63 include: the texts of all relevant laws and regulations in their original language; translations into one WTO language; a listing of “other laws and regulations” in a specific format; as well as responses to a checklist regarding the law and practice of

²⁸⁵ Gervais, *The TRIPS Agreement: A Drafting History*, 360.

enforcement.²⁸⁶ However, the Council for TRIPS also recognises that the notification requirements may constitute a considerable burden for some Members:

“It was recognised that the volume of these notifications would be very large and procedures were adopted to attempt to reduce the burdens for Members in preparing them as well as for the Secretariat in processing them.”²⁸⁷

Therefore, the reporting requirements of the TRIPS Agreement may operate against full compliance despite some allowances made by the TRIPS Council. Although it is clearly necessary for Members to inform the Council for TRIPS of laws and regulations affecting IP rights, some Members, especially developing country Members, may struggle to fulfil their reporting obligations, especially when combined with various other reporting requirements of the WTO. It may be necessary to offer further assistance to support some Members in fulfilling these reporting requirements, such as the WIPO assistance with translation of laws and regulations into a WTO language for the purposes of Article 63.2.

4.3.5 Provisions for Other Forms of Monitoring

There are various bodies which monitor intellectual property standards internationally. The World Intellectual Property Organisation (WIPO) is one of the main organisations in the field of international intellectual property. WIPO's strategic goals are to promote an IP culture; to integrate into national development policies and programs; to develop laws and standards; to deliver quality services in global IP protection systems; and to increase the efficiency of WIPO's management and support processes.²⁸⁸ Consequently, although the role of WIPO is not directly related to active monitoring of individual countries' IP standards, the development of these

²⁸⁶ World Trade Organisation, "Technical Cooperation Handbook on Notification Requirements: Agreement on Trade-Related Aspects of Intellectual Property Rights", available at http://www.wto.org/english/thewto_e/whatis_e/eol/e/pdf/notrips1.pdf, accessed January 2006, 4.

²⁸⁷ Ibid.

²⁸⁸ WIPO, "What is WIPO?" http://www.wipo.int/about-wipo/en/what_is_wipo.html, accessed February 24th 2006.

standards indirectly incorporates a form of passive monitoring. Thus, the role of WIPO could be said to be a form of monitoring.

There are also a number of international intergovernmental organisations which are granted observer status at meetings of the TRIPS Council.²⁸⁹ These organisations could also be informally seen as a form of monitoring of the operation of the TRIPS Agreement, although clearly their role is not to question an individual Member's compliance.

Food and Agriculture Organization (FAO)
International Monetary Fund (IMF)
International Union for the Protection of New Varieties of Plants (UPOV)
Organization for Economic Cooperation and Development (OECD)
United Nations (UN)
United Nations Conference on Trade and Development (UNCTAD)
World Bank
World Customs Organization (WCO)
World Intellectual Property Organization (WIPO)

Figure 4-1 International Intergovernmental Organisations with observer status at TRIPS Council

In addition to these organisations which hold formal observer status, the World Health Organisation (WHO) may also observe TRIPS Council meetings on an ad hoc basis. Additionally, there are various bodies globally that may informally monitor the operation of the TRIPS Agreement through monitoring intellectual property protection and levels of counterfeiting and piracy. These bodies will be considered further under the category of the international environment below at page 135.

²⁸⁹ World Trade Organisation, "International Intergovernmental Organizations granted Observer Status to WTO Bodies", http://www.wto.org/english/thewto_e/igo_obs_e.htm#trips, accessed November 22nd 2006.

4.3.6 The Secretariat

The Council for Trade-Related Aspects of Intellectual Property Rights (the Council for TRIPS) is formally established by the WTO Agreement. Article IV (5) establishes that the Council for TRIPS shall operate under the general guidance of the General Council, but with the power to create its own rules of procedure and subsidiary bodies as necessary.²⁹⁰ Article 68 of the TRIPS Agreement further details the creation of the Council for TRIPS, which is responsible for monitoring the operation of the TRIPS Agreement. Article 68 states:

“The Council for TRIPS shall monitor the operation of this Agreement and, in particular, Members’ compliance with their obligations hereunder, and shall afford Members the opportunity of consulting on matters relating to the trade-related aspects of intellectual property rights.”

It is clear that monitoring Members’ compliance with TRIPS “is the predominant task of the Council.”²⁹¹ However, as the wording of Article 68 implies, monitoring by the Council does not only relate to Members’ compliance, but extends to the operation of the TRIPS Agreement in general.

The Council for TRIPS is also the forum where members can consult on matters relating to intellectual property. This provision that the Council shall provide Members with a chance to consult over IP issues is intended to avoid the use of the formal dispute settlement process. The Council is also responsible for providing assistance in the event of any disputes and overseeing the review of legislation in member countries. One of the first tasks completed by the Council for TRIPS was the establishment of formal links with WIPO under Article 68, for ease of cooperation. The Council for TRIPS is also the body responsible for the review and amendment of the TRIPS Agreement, after the expiration of the one year transitional period and

²⁹⁰ World Trade Organisation, "Agreement Establishing the World Trade Organization", http://www.wto.org/english/docs_e/legal_e/04-wto.pdf, accessed December 18th 2004: 11.

²⁹¹ UNCTAD-ICTSD, "Resource Book on TRIPS and Development: An Authoritative and Practical Guide to the TRIPS Agreement", 744.

every two years thereafter under Article 71. Thus, there are five main functions that the Council for TRIPS performs²⁹², as summarised in the table below.

Role of the TRIPS Council
1. Monitoring
2. Consultation
3. Technical Cooperation
4. Review and Negotiations on Specific Subjects
5. Review of the TRIPS Agreement

Figure 4-2 Role of the TRIPS Council as specified by the WTO

It is clear from the detailed Annual Reports submitted by the Council for TRIPS that the Council performs a significant number of important tasks to ensure the full implementation of the TRIPS Agreement. For example, the Annual Report for 2006 lists the activities carried out in three formal meetings of the Council.²⁹³ The Council took note of new notifications by members regarding new or amended legislation relevant to the TRIPS Agreement; continued with the process of reviewing the legislation of developing country members; undertook the annual transitional review of China’s implementation efforts required by Article 18 of China’s accession protocol; continued its discussion relating to biological diversity and the protection of traditional knowledge and folklore; continued its discussion of the issue of geographical indications; and agreed a draft regarding TRIPS and public health to be sent to the General Council, amongst other issues.

Overall, the Council for TRIPS works hard to fulfil its role of monitoring both individual Members’ compliance and the operation of the TRIPS Agreement in general. In addition, the Council plays a useful role in mediating between Members,

²⁹² World Trade Organisation, "Frequently Asked Questions about TRIPS in the WTO", http://www.wto.org/english/tratop_e/trips_e/tripfq_e.htm, accessed November 23rd 2006.
²⁹³ Council for TRIPS, "Annual Report (2006) of the Council for TRIPS" (IP/C/44), available at docsonline.wto.org, accessed February 2nd 2007.

to try to avoid the use of the formal dispute resolution mechanism. Therefore, the role of the secretariat would appear to be a factor which encourages compliance.

4.3.7 *Other Incentives and Sanctions*

There are certain provisions in the TRIPS Agreement relating to least-developed country members. These provisions act in addition to the general clauses relating to technical and international cooperation outlined above. For example, under Article 66, in addition to granting the least-developed countries substantial transitional periods to comply with the TRIPS Agreement, Article 66(2) also provides that:

“Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base.”

In theory, this provision should increase the incentives for least-developed countries to cooperate with the TRIPS regime as they will be entitled to significant assistance in terms of technology transfer from more developed members. However, in practice, transfers are not as frequent as the Article would suggest, as many Members are reluctant to transfer their technology prior to the least-developed partner enacting effective intellectual property protection.

With this reluctance in mind, on 19th February 2003, the Council for TRIPS adopted a decision that developed country Members should make annual reports regarding their activities under Article 66.2.²⁹⁴ This decision was prompted by the Ministerial meeting at Doha which had directed Members to put in place a mechanism for ensuring the monitoring and full implementation of the obligations in Article 66.2. These annual reports should contain an overview of the incentives regime put in place,

²⁹⁴ Council for TRIPS, "Implementation of Article 66.2 of the TRIPS Agreement - Decision of the Council for TRIPS of 19 February 2003" (IP/C/28), available at docsonline.wto.org, accessed June 24th 2006.

as well as information regarding the operation of these incentives, including details of technology transferred and recipient countries.

According to the minutes of the Council for TRIPS meeting which established the annual report mechanism to monitor Article 66.2, the proposal was well-received by developing countries. For example, the representative of Bangladesh said that:

“Implementation of Article 66.2 was of prime importance to LDCs. Developing countries, and in particular LDCs, had assumed onerous responsibilities in the TRIPS Agreement. Article 66.2 was one of the few provisions in Uruguay Round agreements that provided LDCs opportunities to build up their economies, and thereby helped them to comply with TRIPS provisions.”²⁹⁵

It is clear from the comments of the Bangladesh representative that Article 66 is seen as highly significant for the developing countries. In fact, Article 66 is almost seen as ‘payback’ for agreeing to some of the most burdensome obligations contained within TRIPS and could therefore be seen as one of the ‘carrots’ offered in the negotiating process.

In contrast to these additional incentives available for complying with the TRIPS Agreement, sanctions for non-compliance are less clear. The Council for TRIPS does not have any power to impose sanctions for non-compliance; the role it plays is positive, to facilitate Members’ compliance rather than identify offenders. Thus, the only route available to sanction non-complying Members is through the WTO dispute resolution mechanism. Overall, although further incentives do exist to increase the likelihood of compliance, particularly the potential for technology transfer under Article 66(2), there are few sanctions applicable to Members that do not fully comply with their TRIPS obligations.

²⁹⁵ Council for TRIPS, "Minutes of Meeting- Held 18-19 February 2003" (IP/C/M/39), available at docsonline.wto.org, accessed June 18th 2006.

4.3.8 The Characteristics of the Accord Overall

The various characteristics of the TRIPS Agreement itself may affect whether Members fully comply with their obligations or not. These characteristics and their effect on compliance are summarised in the table below.

<u>Characteristic of the TRIPS Agreement</u>	<u>Evaluation</u>
Perceived equity of the TRIPS obligations	Poor
Precision of the TRIPS obligations	Poor
Provisions in TRIPS for obtaining scientific and technical advice	Adequate
Reporting requirements under the TRIPS Agreement	Adequate
Provisions for other forms of monitoring under the TRIPS Agreement	Poor
The Secretariat of the TRIPS Agreement	Good
Other incentives and sanctions	Incentives- Adequate Sanctions- Poor

Figure 4-3 Summary of characteristics of the TRIPS Agreement and Effect on Compliance

The most problematic areas of the TRIPS Agreement overall are the perceived equity and the precision of the obligations contained within the Agreement. There is a general perception originating in the drafting process that the standards of protection embodied in the TRIPS Agreement protect the interests of developed country Members, whilst preventing the economic development of developing country Members. This perceived inequality clearly operates against compliance. The precision of the obligations is also in doubt; as TRIPS obligations are imprecise, compliance with them is difficult to measure and thus countries may not do all that they should to comply with the accord. In addition, although the Council for TRIPS plays an important role in monitoring compliance, other monitoring provisions are largely absent. Moreover, the reporting requirements may be difficult for some Members to comply with and the provisions for assistance and cooperation that exist may not be used as much as they should be.

Therefore, in relation to the TRIPS Agreement, the institutional framework as represented by the Council for TRIPS is sound, but the procedural framework in terms of available incentives, sanctions and monitoring varies in terms of promoting compliance. The features that most discourage full implementation of and compliance with the TRIPS Agreement are related to how the substantive provisions are actually written, namely the perceived inequality and imprecision of the obligations. This may be a result of the negotiating process that led to the establishment of the TRIPS Agreement and the inevitable compromises that were made between negotiating parties. Overall, there are certain characteristics of the TRIPS Agreement itself that may not encourage full compliance, particularly the perception that the provisions benefit certain Members more than others and the imprecision of some of the provisions.

4.4 The Characteristics of the Activity Involved

According to the Brown Weiss and Jacobson comprehensive model of compliance, the characteristics of the activity involved may also affect whether compliance with the international accord can be achieved. There are four elements of the activity which need to be considered: the number of actors involved; the effect of economic incentives; the role of multinational corporations (MNCs) in the activity; and the concentration of the activity in major countries. These elements will now be considered for the specific activity with which the TRIPS Agreement is concerned to resolve, namely intellectual property infringements.

4.4.1 Number of Actors Involved

The first element of intellectual property infringements that may be influential in ensuring compliance with the TRIPS Agreement is the number of actors involved in the activity. Clearly, in the case of piracy and counterfeiting, large numbers of

actors are involved worldwide. However, it is equally clear that it is difficult to estimate clearly the number of actors involved due to the opaque nature of the activity.

Furthermore, intellectual property infringements are a problem worldwide and are not just restricted to a few developing countries. Thus, the number of actors involved in the activity is large and this may act against compliance. As a large number of actors are involved in counterfeiting and piracy, dealing with this activity is clearly not straightforward as it follows the “conventional wisdom that the smaller the number of actors involved in the activity, the easier it is to regulate it.”²⁹⁶

4.4.2 Effect of Economic Incentives

The second element of intellectual property infringements which needs to be considered is the possible effect of economic incentives. In this case, the effect of economic incentives on the levels of intellectual property infringements needs to be considered. Undoubtedly, economic incentives are highly relevant to the specific activity of IP infringements, as economic considerations are the primary factor behind a great deal of the existing global infringements.

Clearly, economic incentives may play a large role in intellectual property infringements in general; for an individual company, infringing activities offer easy profits in the short-term which may seem more attractive than unknown long-term benefits from complying with intellectual property accords. The economic benefits of TRIPS compliance may be easier to appreciate on a macro-economic level, where stronger intellectual property protection may encourage greater innovation.²⁹⁷

²⁹⁶ Jacobson and Brown Weiss, "Assessing the Record and Designing Strategies to Engage Countries", 521.

²⁹⁷ Keith Maskus, "Intellectual Property Rights in the WTO Accession Package: Assessing China's Reforms", http://siteresources.worldbank.org/INTRANETTRADE/Resources/maskus_tips.pdf, accessed 24th February 2004, 7.

4.4.3 The Role of MNCs in the Activity

The third element of intellectual property infringements that may be important to the likelihood or otherwise of compliance with the TRIPS Agreement is the role of multinational corporations (MNCs) in the activity. The companies actually committing the majority of intellectual property infringements do not tend to be MNCs, but rather smaller, less visible enterprises. In the context of intellectual property rights, MNCs do have a strong role to play, as there is a growing recognition of the value of intangible assets to a company. However, it is only in the past couple of decades that this recognition has been widespread amongst MNCs.

Therefore, the role MNCs played in intellectual property protection was limited until the 1980s. Once MNCs did begin to seek to protect their rights, they swiftly formed a powerful lobby group, in order to pressurise governments globally to seek stronger international IP standards. This is clearly evidenced in the Uruguay round of GATT negotiations, when, for the first time, the influence of the MNCs was notable.²⁹⁸

However, this pressure from MNCs may not necessarily be seen as a positive force; on the contrary, MNCs are sometimes perceived as just seeking to protect their own interests with little or no regard to the economic development of developing countries. Hence, the role of MNCs in the field of intellectual property rights is a significant driver toward stronger protection, but may not be a wholly positive factor in encouraging compliance amongst smaller developing WTO Members as vocal MNCs can cause local hostility.

²⁹⁸ See discussion above at page 107 concerning the role of the Intellectual Property Committee in the TRIPS drafting process, for example.

4.4.4 The Concentration of the Activity in Major Countries

The final element of the specific activity that should be taken into account as an influence on potential TRIPS compliance is the concentration of the activity in major countries. This factor is important because it could affect the concentration of pressure to comply; if the activity is limited geographically, pressure to comply is less likely to be universal. In the case of intellectual property infringements, the activity is certainly not only limited to a handful of countries. On the contrary, infringements are a global phenomenon, although rates of IP infringements do vary from country to country.

For example, the Global Piracy Study conducted annually by the Business Software Alliance shows marked variation in levels of software piracy worldwide.²⁹⁹ Globally, piracy of software stands at an average of 35%, implying that “for every two dollars worth of PC software purchased legitimately, one dollar’s worth was obtained illegally.”³⁰⁰ However, this average includes vast differences in piracy rates from one country to another. The highest piracy rate observed was in Vietnam at 90%, while the lowest was in the US where only 21% of software was pirated. China was ranked as fourth worst offender for software piracy with a piracy rate of 86%. However, this did represent a four-point drop from the previous survey, the biggest improvement of any of the ninety-seven countries surveyed.³⁰¹ Therefore, it is obvious that even the most developed countries suffer from intellectual property infringements and this activity is not solely concentrated in a few developing countries. However, the worst rates of infringements are to be found in developing countries, predominantly in the Asia-Pacific region.

²⁹⁹ Business Software Alliance, "Third Annual BSA and IDC Global Software Piracy Study", <http://www.bsa.org/globalstudy/upload/2005%20Piracy%20Study%20-%20Official%20Version.pdf>, accessed July 19th 2006.

³⁰⁰ Ibid. 1.

³⁰¹ Ibid. 4.

In addition to the overall number of countries involved in infringing activities, it is also relevant to consider the extent of the activity in one country as a proportion of the total. In other words, it may be more efficient to focus on one country which is responsible for a large proportion of the overall activity rather than several smaller countries each responsible for a small proportion of the total. In fact, this may explain why China is so consistently the focus of scrutiny regarding its intellectual property protection; as China's contribution is so large, if compliance in China can be achieved, this would make a significant contribution toward decreasing the total amount of infringing activity. Conversely, this constant pressure on China may contribute to China's perception of unequal treatment and actually discourage greater compliance with TRIPS obligations. Overall, the location of infringing activity may be relevant to compliance for two reasons. Firstly, as infringements are not limited to just a few countries, the problem is more difficult to tackle. Secondly, certain countries may be responsible for a larger proportion of the infringing activity overall and thus more attention may be devoted to those countries, although this attention may create resentment.

4.4.5 The Characteristics of the Activity Overall

In general, the characteristics of the activity involved in the TRIPS Agreement, intellectual property infringements, may play a part in affecting the implementation of and compliance with the Agreement. The most significant of these is the economic incentives involved in infringing activities and the discouraging effect that they may have on compliance with TRIPS obligations by offering individuals and private companies easy profits in the short-term.

Multinational corporations also play a role in lobbying for stronger intellectual property protection. Although they played a large part in the negotiations regarding

the drafting of the TRIPS Agreement, their role in the IP field today is not entirely welcome. In fact, pressure from MNCs may discourage implementation of and compliance with TRIPS obligations in some developing countries. Finally, both the number of actors and the number of countries involved in intellectual property infringements may also discourage compliance with the TRIPS Agreement. As both a large number of actors and a large number of countries are involved, it may be difficult to assess compliance reliably and there may be scope for individual enterprises and countries to not do as much as they should.

4.5 The International Environment

In addition to the characteristics of the specific accord and the specific activity involved, the international environment surrounding the specific activity and accord should also be examined. According to the comprehensive model of compliance proposed by Brown Weiss and Jacobson, there are several elements of the international environment that may influence compliance with the specific international obligations. These include: major international conferences, worldwide media and public opinion, the presence of international non-governmental organisations (NGOs), the number of parties adhering to the accord and other international organisations including international financial organisations. As the model is not restricted to intellectual property protection, some of these factors may be more relevant than others. Thus, the international environment will be considered under three main headings: the role of international organisations; worldwide media and public opinion and the number of parties adhering to the TRIPS Agreement.

4.5.1 The Role of International Organisations

International organisations active in the intellectual property field may include both intergovernmental organisations and industry lobby groups. The role that these

organisations may play mostly consists of monitoring and pressure. Apart from the WTO, WIPO is arguably the most important international organisation operating in the field of intellectual property rights and WIPO's role in working with the Council of TRIPS to improve TRIPS compliance and assist developing countries to build effective IP systems has been discussed above. Although WIPO does play an important role in supporting the TRIPS Agreement, the organisation is also criticised for lacking any effective means of enforcing IP Agreements which it is charged with administering.

However, there are also a host of other international bodies which may play a part in intellectual property protection. For example, the International Intellectual Property Alliance (IIPA) is a coalition representing US copyright-based trade associations in a number of sectors such as software, music, film and publishing.³⁰² The IIPA has a large part to play in the Annual Special 301 Report issued by the United States Trade Representative (USTR); the IIPA issues specific recommendations for each country which can form a significant part of the USTR's final report.³⁰³ The Intellectual Property Owners Association (IPO) is another US based organisation lobbying for higher levels of IP protection, with membership open to IP rights holders predominantly in the US. There are also a number of think-tanks world wide which contribute to the IP debate, such as the IP Institute, a London-based think-tank focused on research into economic aspects of intellectual property.

Despite the large number of international organisations which exist within the IP arena, their role in encouraging TRIPS compliance is minor. This is due to a number of reasons; not only do these international organisations not enjoy widespread

³⁰² International Intellectual Property Alliance, "Description of the IIPA", November 2005, <http://www.iipa.com/aboutiipa.html>, accessed February 19th 2007.

³⁰³ The Special 301 reports and China are discussed further below at section 6.3.4.1.

public support, but as many of them are US based, they may face the same feelings of resentment that MNCs do when pressuring for stronger IP protection.

4.5.2 Worldwide Media/ Public Opinion

The influence of global public opinion is linked to previous discussion of the limited role of MNCs and international organisations; as there is a lack of consensus in public opinion worldwide on the issue of IP protection, strong pressure to increase IP standards is at risk of being perceived as imposed by certain self-interested actors. Indeed, the global issue of IP protection could be seen as a delicate balancing act between weak IP protection to stimulate low level economic growth and strong IP protection to protect innovative industries. This lack of global agreement on required IP standards differs from public opinion regarding other areas of international agreements; not everyone may benefit equally from improved IP protection. Therefore, without clear consensus in worldwide opinion, there is a lack of consistent media pressure toward TRIPS compliance.

4.5.3 Number of Parties Adhering to this Accord

As of 11th January 2007, the WTO has 150 Members.³⁰⁴ After the establishment of the WTO in 1995, developed countries were granted a one-year transition period, meaning they had to comply with TRIPS from 1st January 1996; developing countries and most transition economies were allowed until 1st January 2000 to comply. In addition, 32 WTO Members are designated as least-developed countries, which means they have a longer transition period within which to bring their IP system into compliance with the TRIPS Agreement. This was due to expire on 1st January 2006, but was extended to 1st January 2016 for pharmaceutical patents.

³⁰⁴ World Trade Organisation, "Understanding the WTO: Members and Observers", http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm, accessed April 27th 2007.

Therefore, the majority of WTO Members are now subject to the provisions of the TRIPS Agreement and must adhere to their commitments. As there are now such a large number of countries within the TRIPS system, it is possible that this may drive momentum towards greater overall compliance with the Agreement.

4.5.4 The International Environment Overall

In general, the international environment does not play a critical role in the formulation and implementation of international intellectual property protection standards. In contrast to the field of international environmental protection, where changes in the international environment are considered to be the most important factor in the trend toward improved implementation and compliance in the 1980s and 1990s, the international environment is not as significant for intellectual property protection. The sole feature of the international environment that may encourage greater compliance with the TRIPS Agreement is the number of countries that are now WTO Members and thus subject to the provisions of the TRIPS Agreement. In terms of momentum, there are few countries left outside of this regime and thus individual Members may not want to be seen to be lagging behind. This effect may accelerate once all the transition periods applicable to least-developed countries have ended and when all countries then have to fully comply with the TRIPS Agreement.

4.6 Summary and Conclusion

This chapter has considered various non-country specific factors which may have an impact on compliance with the TRIPS Agreement. Of these factors, arguably the most significant are the perceived inequity and imprecision of the obligations contained within the TRIPS Agreement. These factors arose due to the drafting history of the Agreement and the nature of TRIPS as a minimum standards agreement. Other factors related to characteristics of the TRIPS Agreement specifically include

the burden of notification obligations that Members must fulfil and the lack of sufficient incentives in the form of technology and cooperation from developed country Members. On the other hand, the TRIPS Agreement does have several features that may have a positive effect by encouraging compliance. These include the broad role of the Council for TRIPS and the role of the WTO dispute resolution body as a multilateral forum for resolving disputes and imposing sanctions.

With regards to the characteristics of the activity that the TRIPS Agreement aims to confront, namely the problem of intellectual property infringements, and the international environment surrounding the issue of IP protection, there are also several factors which may affect compliance. The most significant of these are the large number of actors and countries involved in IP infringements; piracy is a global activity, which makes it difficult to combat. In addition, many infringers are encouraged by short-term economic gains from IP infringements. Other factors which may have a smaller adverse effect on compliance include the lack of consensus in public opinion worldwide on the subject of IP protection and a certain amount of resentment towards MNCs and international IP organisations based in powerful developed countries for the pressure they impose for stronger IP protection.

However, as with the characteristics of the TRIPS Agreement, the international environment and characteristics of the activity of IP infringements may also have a positive impact on compliance. Specifically, the role of international organisations such as WIPO and the large number of countries which are now included in the WTO system may both entice countries to comply with the TRIPS Agreement. Having examined factors relating to the TRIPS Agreement in general, the next chapter will focus specifically on factors which may influence China's compliance with the TRIPS Agreement.

5 Implementing TRIPS in China: Country-Specific Factors Influencing TRIPS Compliance

According to the comprehensive model of compliance outlined previously in section 2.4, in addition to the characteristics of the activity involved, the characteristics of the accord and the international environment, there are various country-specific factors which should be considered in analysing China's compliance with international obligations, the provisions of the TRIPS Agreement in this instance. Under this model, these country-specific factors can be divided into three categories; parameters, fundamental factors and proximate factors. It is immediately clear that these categories may not be mutually exclusive and indeed, there is a considerable overlap between some of the factors.

For example, several of the respondents comment on the pace of China's economic development in the past few decades and the corresponding influence on the IP system today. However, these comments defy simple categorization, as they clearly relate both to the influence of China's economy on the IP system, as well as the history of the IP system. Therefore, in the discussion below, some elements may be discussed under more than one category and any overlaps may be highlighted further in the analysis of the original model below. On the questionnaire, the factors which may contribute to the current state of the IP system in China were divided into four loose categories; social and cultural factors, economic factors, political factors and factors specific to the legal system (see Appendix 3 for a copy of the questionnaire used in this study).

Furthermore, question 15 listed sixteen factors which had been previously cited in the literature as responsible for the current state of the intellectual property system in China. Respondents were asked to rate the contribution of each of these

factors on a scale from 0 to 6, where 0 represents no contribution and 6 signifies a major contribution to the current IP system in China.

The results of question 15 in terms of the respondents’ ranking of these factors is summarised below in Table 5-1.

Table 5-1- Factors contributing to the current IP system as ranked by respondents

<u>Rank</u>	<u>Factor</u>	<u>Average score</u>
1	Lack of public awareness of IP rights	4.44
2	Local protectionism	4.13
3	Inadequate penalties	3.96
4	Lack of consistency in enforcement	3.8
5	Weak judicial enforcement	3.76
6	Lack of powers to enforce court judgments	3.73
7	Lack of trained and experienced legal personnel	3.71
8	Length of the process	3.24
9	Lack of transparency	3.11
10	Lack of the concept of individual rights in China	3
11	The role of the government in the economy	2.89
12	Over-reliance on public enforcement mechanisms	2.84
13	Lack of a unified agency for dealing with IP	2.76
14	Perception that IP only benefits foreigners	2.42
15	Influence of socialism	1.78
16	Influence of Confucianism	1.09

These country-specific factors contributing to China’s TRIPS compliance will now be analysed in more detail.

5.1 Parameters

According to the Brown Weiss and Jacobson comprehensive model of compliance, the first category of country-specific factors that may affect China’s compliance with its international obligation is parameters. Parameters include basic characteristics of the specific country such as the previous behaviour of the country in

that area of concern; the history and culture of the country; the physical size of the country; the physical variation within the country and the number of neighbours that the country has. These suggested parameters will now be applied to China to assess their significance to China's TRIPS compliance.

5.1.1 Previous Behaviour

As described above in Chapter 1, the development of intellectual property law has not followed a smooth and unbroken path. Intellectual property was virtually unknown until the final years of the Qing dynasty and its introduction in the early years of the twentieth century was predominantly as a result of Western pressure to reform the legal system and China's concomitant desire to bring extraterritoriality to an end. These initial intellectual property laws, introduced first by the Qing rulers and later by the KMT government, were not comprehensively implemented due to political unrest during China at that time.

When the PRC was established in 1949, the legal system, including the early intellectual property laws, was overhauled as new socialist laws were launched. These laws initially conformed to the Soviet model of IP laws, but later became even more radical, transferring all IP rights in inventions and creations to the state. In addition, much of the legal framework of courts, lawyers and judges was dismantled during the Cultural Revolution. Thus, at the start of the reform period in the late 1970s, China faced an awesome task in rebuilding the entire legal system, embracing both substantive laws and regulations, the court system and the necessary legal personnel.

The establishment of a modern legal system beginning in 1978 also included the need for a modern system of intellectual property protection. Therefore, it could be said that the intellectual property system in China is still less than thirty years old.

It is noticeable that no respondents explicitly refer to intellectual property protection in China prior to the start of the reform period in 1978, although many respondents do consider China's development in the post-1978 period as a key factor in the contemporary IP system. For instance, one Chinese respondent explicitly states that the IP system:

"Is changing every year since China's reform and opening-up"
and that:

"The success that China has achieved in intellectual property protection in the past 20 years is equivalent to what has been gained by others through several decades or even the efforts of a century. Without knowing this, it is unlikely that you will fully understand the development of IPR in China, or learn the relevant regulations."³⁰⁵

This idea, that China's previous behaviour in the intellectual property arena only stretches back a short distance is echoed by this respondent:

"Don't forget that the country only opened up 30 years ago. So these issues are only a small hick up ((sic))."³⁰⁶

As a consequence, it would seem that respondents do not feel that China's previous behaviour of protecting intellectual property rights is a significant factor in the current system of protection. Rather, the only mention of the past is to recognise China's progress in such a short time span.

5.1.2 History and Culture

In addition to the influence of previous behaviour on a country's compliance, the history and culture of that country is also thought to play a significant role. In China, the historical influences of Confucianism and socialism are often cited as continuing influences in contemporary Chinese culture and consequently on the

³⁰⁵ Questionnaire comments from respondent LAW27T.

³⁰⁶ Questionnaire comments from respondent SERVICES01.

intellectual property system today. This category of factors clearly overlaps with the category of attitudes and values considered below at page 156 under the issue of fundamental factors affecting compliance.

5.1.2.1 The Influence of Confucianism

The first element of Chinese history and culture which may be significant in China's TRIPS compliance today is the influence of Confucianism. Confucianism is often cited as the main reason why intellectual property protection is not stronger in China, even to the exclusion of other factors. The following quote is typical of the importance placed by some commentators on the influence of Confucianism by some commentators: "The cultural and political reasons for China's failure to develop intellectual property laws equivalent to those being contemporaneously developed elsewhere are rooted in the teachings of Confucius."³⁰⁷

There are two aspects to the influence that Confucian thought is believed to exert on the concept of intellectual property in China. Firstly, it is contended that Confucianism advocates a belief that "copying another's creative works is not morally bankrupt, a view contrary to Western beliefs."³⁰⁸ This is because copying or imitation is seen as a "noble art", and thus the Chinese were encouraged to become compilers rather than composers.³⁰⁹ Imitation of a great master was seen as a mark of respect rather than a theft of their ideas. The second aspect of Confucianism that is held to impact upon the modern protection of intellectual property is the emphasis placed on collective rights, over individual rights.³¹⁰ It has been suggested that this has led to a

³⁰⁷ Feder, "Enforcement of Intellectual Property Rights in China: You Can Lead a Horse to Water But You Can't Make it Drink", 231.

³⁰⁸ Kolton, "Copyright Law and the People's Courts in the People's Republic of China: A Review and Critique of China's Intellectual Property Courts", 424.

³⁰⁹ Yu, "The Second Coming of Intellectual Property Rights in China", 17.

³¹⁰ Ibid. 18.

lack of individual private property rights, which in turn has been blamed for the lack of intellectual property enforcement.³¹¹

However, despite the strong emphasis placed on the influence of Confucianism in the literature, most respondents did not agree that Confucianism is a primary factor in the effectiveness of the contemporary IP system in China. On the contrary, many respondents consider the influence of Confucianism on the modern IP system to be minimal. Out of the sixteen factors identified on the questionnaire as potential influences on the IP system in China, Confucianism did not rank as one of the most significant factors. On a scale of 0 to 6, where 0 represented no influence at all and 6 represented a very strong influence, Confucianism was ranked an average of 1.09, suggesting that it plays only a minor role, if any, in the current IP system. Furthermore, compared to the scores chosen for other factors, Confucianism ranked sixteenth out of the sixteen factors.

Clearly, this would suggest that most respondents feel that although Confucianism may still make some minor contribution to the IP system, there are many other factors of greater significance. However, this finding is in stark contrast to the position of many previous studies. Thus, although it is possible that Confucianism really no longer is a major influence on the Chinese legal system, it is also possible that the responses in this study are from too small a sample to be representative or that the questions were framed inappropriately.

In addition, there did not appear to be clear agreement about exactly what Confucianism means in the context of the intellectual property system. As one respondent commented when questioned about the influence of Confucianism:

³¹¹Endeshaw, *Intellectual Property in China: The Roots of the Problem of Enforcement*, 37.

“I don’t really know about the Confucian part, but I would definitely, for social issues anyway, yeah, they, they have an attitude that yep, copying can be good [uh-huh]. Copying is not necessarily bad. [Uh-huh]

And the whole idea of, um.., you know, of taking something that works, that you maybe didn’t develop yourself and being able to duplicate that and, and, you know, the bottom line here is all about making money. [Yeah] So I don’t know so much if it’s about Confucianism.”³¹²

As this comment suggests, there is some confusion about exactly what Confucianism means and whether it necessarily equates to willingness to copy. This perception is strengthened by the comments of another respondent who explained the influence of Confucianism as follows:

“The principle generally is, let’s say, don’t do something radical, just keep quiet, keep everything in the middle, don’t go to extremes. Let’s say, this is an interpretation of Confucianism in one aspect. So, with the influence of Confucianism over 2000 years, or 2500 years, most of the Chinese people feel the best way to solve conflicts and disputes are not in court. The best way to solve these is in (friends), in neighbourhoods, uh... they don’t like to go to court actually. This is the (bias of them). They seek justice through some relationships, through some friends, through some partnerships, some colleagues and so on.”³¹³

Thus, these two respondents have defined Confucianism quite differently in their interpretation of what it means for the intellectual property protection system in China. The first respondent appears to be suggesting that Confucianism is linked to “an attitude that copying can be good”, whereas the second respondent appears to be defining Confucianism more in terms of the preference for non-legal resolutions to disputes, rather than linking it to an attitude towards copying. Therefore, the use of the concept of ‘Confucianism’ in the literature may be problematic as different respondents clearly interpret Confucianism in different ways and this reflects the uncertainty over the exact role of Confucianism in the contemporary IP system.

³¹² Interview with respondent LAW10.

³¹³ Interview with respondent LAW16.

However, there is evidence to suggest that overall respondents believe that Confucianism is not a major contributing factor to the IP system in China today.

5.1.2.2 The Influence of Socialism

The second element of history and culture that may be influential in the context of China is the influence of socialism. The lack of an emphasis on individual rights may also be attributed to the impact of socialism, as the socialist economic system is based on the notion that property belongs to the state, rather than the individual. Furthermore, as intellectuals have been targeted at various times during the PRC's history, especially during the Cultural Revolution, creators and innovators became reluctant to acknowledge their creations.³¹⁴ Both Confucianism and socialism are thus seen by many observers to have played a major part in the evolution of the contemporary legal system; for example, "although Communism has had a significant influence on the Chinese legal system, the modern system is a product of both traditional culture and Maoism."³¹⁵

As discussed in Chapter 1 above, the development of intellectual property in the PRC has been strongly influenced by socialism, particularly in the years immediately following the establishment of the PRC in 1949. This initial reliance on Soviet legal models in the early 1950s gave way during the 1960s to a more extreme Socialist concept of intellectual property whereby all creations and innovations were properties of the state and the individual had no claim over them. This view was at its height during the Cultural Revolution, but has clearly faded from the legislation and official rhetoric in the years since the beginning of the reform and opening-up. Therefore, how strong an influence is socialism on the contemporary intellectual

³¹⁴ Yu, "The Second Coming of Intellectual Property Rights in China", 18 and discussed above at page 19.

³¹⁵ Kenyon S. Jenckes, "Protection of Foreign Copyrights in China: The Intellectual Property Courts and Alternative Avenues of Protection", *South California Interdisciplinary Law Journal*, 5: 554.

property system? Does it still militate against full compliance with the TRIPS Agreement?

Overall, socialism was not considered to be a highly significant influence on the current IP system by the majority of respondents in this study. The influence of socialism was ranked fifteenth out of the sixteen factors on the questionnaire and on the scale of 0 to 6, scored an average of 1.78. Therefore, it is clear that although it appears that socialism exerted a powerful influence on the intellectual property system in the pre-reform years of the PRC, this influence is perceived to have diminished in recent years. However, there appeared to be some differences of opinion amongst the respondents, with some respondents still attributing much of the ineffectiveness of the current system on the continuing influence of socialism. For example, one respondent from a foreign-invested enterprise in China claimed:

“Socialism is an important cause of the problem.”³¹⁶

On the other hand, most respondents expressed the opinion that the influence of socialism is no longer highly significant;

“I don’t think socialism can be blamed at all, I think maybe (specifically) it could, but in general I don’t think it can be blamed or, you know, said to be a reason for, for the ineffectiveness of the protection of intellectual property here.”³¹⁷

Besides this, several respondents mentioned the influence of socialism in the context of the success of the ruling Communist party; for instance,

“At the end of the day, the traditional Communist party is at threat if there is no innovation.”³¹⁸

This opinion, that further economic reform and development are essential for the future of Communist party rule and in turn, are dependent on increased innovation

³¹⁶ Questionnaire comments from respondent SERVICES01.

³¹⁷ Interview comments from respondent LAW10.

³¹⁸ Interview comments from respondent LAW01.

supported by an effective intellectual property system, was also expressed by several other respondents. Therefore, although the influence of socialism is not significant in the way it was in the pre-reform years of the PRC, it may emerge that socialism is still a significant factor in the contemporary IP system as the government attempts to tread the fine line between maintaining China as a communist country and moving further towards a free market economy. Overall, these key influences of Confucianism and socialism seem to be thought by respondents in this study to have minimal effect on the intellectual property system in China today and thus, the history and culture of China may not play such an important role as suggested by some commentators. However, the low ranking given to the influences of Confucianism and socialism may also reflect limitations with this study in terms of number and range of respondents contacted or the wording of the questions asked.

Notwithstanding the importance placed on cultural factors by many commentators, a note of caution is also sounded in a few instances. It is important to recognise that reliance on cultural factors assumes a cultural homogeneity that rarely exists; “at no time is any society’s culture monolithic.”³¹⁹ Furthermore, it is also argued that overemphasis on cultural factors can be misleading as, “the Chinese obey laws and observe rights if they are persuaded that it will be in their best interest to do so, just as people everywhere do.”³²⁰ Therefore, although historical and cultural values may play a role in China’s implementation of international intellectual property obligations, it is likely that other important factors also exert a strong influence.

³¹⁹ Alford, *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization*, 6.

³²⁰ Thomas Lagerqvist and Mary L. Riley, "How to Protect Intellectual Property Rights in China", Riley, Lee, Lagerqvist and Liu, *Protecting Intellectual Property Rights in China*, (Hong Kong: Sweet & Maxwell Asia, 1997): 4-5.

5.1.3 Physical Size and Physical Variation

The parameters which may impact upon China's compliance with its obligations under the TRIPS Agreement also include basic characteristics of the country such as the size and variation of the country. Clearly China is a huge country, with great variation between the highly developed and industrialised seaboard and the largely rural and underdeveloped western interior. Indeed it has been recognised that, "the sheer size of China's landmass inhibits effective monitoring of compliance with Chinese intellectual property laws."³²¹ This characteristic may affect the implementation of intellectual property protection in China. Moreover, there is also an acknowledgement that certain areas of China, notably Beijing and Shanghai, are better at protecting IP than other smaller cities, or inland areas.

As a matter of fact, one respondent from a multinational operating in China stated:

"It's much better in some areas of China than others - China is not a single country but more like a series of smaller countries!"³²²

Consequently, it is difficult to make sweeping generalisations about the entire intellectual property system in China as there are massive variations between major cities such as Beijing and Shanghai and smaller cities or inland areas. This characteristic of China could be classified as one of the primary parameters of significance under the comprehensive model of compliance applied in this study.

5.1.3.1 The Division between Central and Local Government

In the context of China's physical size and variation, there are various considerations which may influence the operation of the contemporary intellectual property system, one of the most significant of which is the divide between the central

³²¹ Feder, "Enforcement of Intellectual Property Rights in China: You Can Lead a Horse to Water But You Can't Make it Drink", 253.

³²² Questionnaire comments from respondent FOOD02.

and the local levels of government. As China is so large, many local and provincial governments are physically very far away from the central government in Beijing. Thus, even if Beijing shows strong commitment to the protection of intellectual property rights, is that commitment always respected in the provinces?

It has been claimed that, “there is some doubt that the central government has enough influence over the local governments to effectuate their cooperation.”³²³ It has even been asserted that provincial or local level governments “sometimes disregard orders from the national government.”³²⁴ These problems are not new in China; in fact, “perennial problems” of tensions between central and regional authorities and of crosscutting bureaucratic lines “had plagued China since the late Ming dynasty.”³²⁵

These concerns over the ability of local level government to strongly enforce intellectual property rights were also voiced by several respondents. For example, this respondent from a multinational enterprise drew a clear distinction between the central government’s commitment to IP protection and the reality in many provinces:

“The central government starts to realize the importance of IP protection. It starts to realize a better IP protection mechanism is essential for China to move to higher value added service. However, the municipality ((sic)) do not see it the same way.”³²⁶

A luxury goods manufacturer contradicted this perception by identifying:

“Unwillingness from central as well as local authorities,”

³²³ Jenckes, “Protection of Foreign Copyrights in China: The Intellectual Property Courts and Alternative Avenues of Protection”, 569.

³²⁴ Kolton, “Copyright Law and the People’s Courts in the People’s Republic of China: A Review and Critique of China’s Intellectual Property Courts”, 459.

³²⁵ Jonathan D. Spence, *The Search for Modern China*, (New York: W. W. Norton & Co., 1999): 498.

³²⁶ Questionnaire comments from respondent FOOD01.

as the primary factor in the ineffective enforcement they had experienced.³²⁷

However, by distinguishing the central and local authorities, this respondent is also implicitly acknowledging that the different levels of government may not always place the same level of emphasis on enforcing IP rights. Therefore, there seems to be overall agreement amongst various respondents that there may be differences between the policies of the central and local levels of government and that all levels of government need to be fully committed to enforcing intellectual property rights in order for an effective system to be established.

5.1.4 Number of Neighbours

The number of neighbours that a country has is also posited as a factor influencing that country's compliance with their international obligations. In the context of intellectual property obligations, the number of neighbours that China has may have two effects; firstly, in connection with the vast physical size of China, the customs enforcement of IP at China's borders may be an issue and secondly, China may use the example of the intellectual property system in neighbouring countries as a model for development.

5.1.4.1 Customs Enforcement of Intellectual Property

China has a large number of bordering countries; fourteen countries share land borders with China. As a direct result of this, China has a long border to defend against imports and exports of goods which may be infringing intellectual property rights. Customs enforcement of IP is also contained within the TRIPS Agreement at section 4, part III. The US customs authorities estimate that 81% of all IP infringing

³²⁷ Questionnaire comments from respondent FASHION02.

goods seized in 2006 came from China³²⁸ and the Chinese customs authorities declared a total of 1210 infringement cases in 2005, involving goods with a total value of almost 100 million RMB Yuan.³²⁹ Therefore, exports of goods which infringe IP rights are clearly a significant problem for the customs authorities to tackle.

However, customs enforcement of intellectual property rights is highlighted by several respondents as an area of some improvement in the past few years. For instance, one respondent from a multinational company cited:

“Expanded IPR protection channels (like customs protection),”³³⁰

as the key positive change that they had noticed in the IP system in the past few years. Furthermore, two legal respondents cited key regulations expanding the powers of customs authorities in IP enforcement as notable improvements that they had observed.³³¹ Moreover, no respondents specifically criticised the customs personnel as ineffective at IP enforcement. This would suggest that the difficult task facing China’s customs authorities as a result of the number of bordering countries is not a significant factor in the current IP system overall.

5.1.4.2 The Example of IP Systems in Neighbouring Countries

In addition to the impact of China’s lengthy borders on the protection of intellectual property rights, China’s neighbouring countries may also have an impact on the IP system by providing an example for China to follow. Taiwan and Korea are specific examples of countries that may be used a model of comparison for China’s

³²⁸ US Customs and Border Protection, "Seizure Statistics for Intellectual Property Rights", http://www.cbp.gov/xp/cgov/import/commercial_enforcement/ipr/seizure/, accessed January 18th 2007.

³²⁹ General Administration of Customs of the People's Republic of China, "2005 nian zhongguo haiguan zhishichanquan zhifa tongji biao" (Statistics for China Customs IPR Seizures 2005), http://www1.customs.gov.cn/Portals/0/hgzs_zfs/hgzs_zfs_ipr/2005_统计.doc, accessed November 20th 2006.

³³⁰ Follow-up comments from respondent MANU02.

³³¹ Follow-up comments from respondent LAW29T and interview with respondent LAW05.

intellectual property development. This is because, in the 1960s and 1970s, both focused on duplicative imitation of mature technologies from abroad, utilising their highly skilled, but cheap labour force. At this time, lax IPR helped to nurture economic development, especially through reverse engineering.³³²

In the 1980s and 1990s, both Taiwan and Korea began to lose their comparative advantage in the face of rising labour costs and increased competition from second-tier newly-industrialised economies such as Thailand and Malaysia. As a result, both shifted towards more technology intensive industries.³³³ In this ‘creative imitation’ phase of economic development, IPR became more important, for local firms as well as foreign firms. This increased use of innovation in neighbouring countries as an important tool of economic development may have important implications for the development of intellectual property protection in China.

The influence of other countries’ IP systems is mentioned in passing by some respondents, who directly compare China’s IP system to the development of intellectual property protection in neighbouring countries such as Taiwan, Japan and South Korea. For example, it is implicit in this Chinese respondent’s comments that China needs to look at neighbouring countries and their path of economic development:

“A lot of people call China a manufacturing base of the world, but it can start from this base and become other things like, uh... to become a base of creating more technology, innovation. We don’t say we copy the way or approach from Japan or others, but they do really quite good job in the past 20 years or 40 years. We have to learn something from advanced economy.”³³⁴

³³² Linsu Kim, *Technology Transfer and IPRs: The Korean experience*, (UNCTAD-ICTSD Project on IPRs and Sustainable Development, 2003): 17.

³³³ Roger Van Hoesel, *New Multinational Enterprises from Korea and Taiwan: Beyond Export-Led Growth*, (London: Routledge, 1999): 46, 56-7.

³³⁴ Interview with respondent LAW16.

This notion that China should look at neighbouring countries and follow their example of economic development is expressed more definitely by this respondent:

“You can’t (rely on) factories, you’ve got to (adapt), just look at Taiwan, Korea, even building a domestic market, you need to have innovation to go to the next level. Without it (...), every country in Asia, I mean look at Japan, no matter what you think of it or say, it sits there at the edge of Asia like a shining light in terms of economic development.”³³⁵

Thus, it is obvious that China’s neighbouring countries may have an impact on the intellectual property system in China. However, these comments seem to suggest that this role of the neighbouring countries as an example to be applied is more to be desired than one that actually exists today. Therefore, this influence on the IP system may not be highly significant. Overall, China’s neighbouring countries do not appear to play a major role in influencing the intellectual property system, either through the necessary system of customs enforcement, or through providing an example for China to pursue.

5.1.5 The Overall Significance of Parameters

In terms of basic parameters affecting China’s compliance, although the relatively young age of the legal system was felt to be significant, China’s previous behaviour in the IP field was not specifically discussed. Furthermore, contrary to the opinion of many observers, the dual cultural influences of socialism and Confucianism were not judged to be highly significant in contemporary China by respondents in this study, although this suggestion needs further verification. However, the physical size and variation of China as a country is clearly significant as China’s sheer size inhibits enforcement efforts and the gap between central and local government, which exists primarily as a result of China’s vastness, is directly linked

³³⁵ Interview with respondent LAW01.

to inconsistent IP enforcement. The sheer size of China also makes customs enforcement problematic. The number of neighbours may also have a minor impact on compliance through providing a positive model of a relatively effective IP system for China to emulate. In general, China's basic parameters offer several minor influences on the current IP system, but respondents believed that other factors were much more significant overall.

5.2 Fundamental Factors

In addition to basic parameters of the specific country such as the size of the country, there are various fundamental factors which, according to the comprehensive model of compliance being applied, may influence China's overall compliance with the TRIPS Agreement. These include societal attitudes and values, political and institutional factors and economic considerations. These factors will now be considered in the context of China's IP system.

5.2.1 Attitudes and Values

One of the most important categories of fundamental factors in the model of compliance is that of attitudes and values. These influences are strongly linked to the influence of Confucianism and socialism considered under the category of history and culture above at section 5.1.2. Attitudes and values in China may play an especially significant role in influencing the effectiveness of the IP system as much of the new IP system is directly imported from foreign systems. As most intellectual property laws are transplanted straight from foreign legal systems, the framework they impose may not necessarily fit entrenched societal values.³³⁶ This may militate against the successful adoption of TRIPS-compliant laws, as the WTO jurisprudence is well

³³⁶ Qu, *Copyright in China*, ii.

recognised to spring from Western liberal legal systems, as these countries dominated the TRIPS drafting process.³³⁷

5.2.1.1 Lack of the Concept of Individual Rights

Both Confucianism and Socialism have been discussed above in terms of their possible impact on the concept of individual rights in China. It has been suggested by some observers that intellectual property protection is weak in China due to the lack of a strong belief in individual rights, which is felt to exist in other jurisdictions where IPR is more effectively protected. In order to examine this factor in isolation from the concepts of Confucianism and socialism, it was included as a separate factor on the questionnaire. On the whole, it was felt by respondents to be more significant than either Confucianism or socialism, but was still not ranked highly in terms of overall significance. It was scored an average of 3 on the scale of 0 to 6 and was thus ranked tenth out of the sixteen factors overall. However, some respondents did deem the lack of the concept of individual rights to be:

“A fundamental factor- for example, most people will not feel guilty for buying pirated CDs.”³³⁸

Another respondent went further in emphasising the significance of individual rights to the functioning of the intellectual property system in China:

“I think that awareness of individual rights is the driving force behind our society’s protection of intellectual property rights. Without this, it means that the car does not have enough speed and forward momentum ((Bold in original)).”³³⁹

It is clear from these comments that the concept of individual rights is regarded as a crucial factor by some respondents. However, there may be a blurring between this emphasis on the concept of individual rights and public awareness of

³³⁷ As discussed above at page 105.

³³⁸ Email follow-up correspondence with respondent LAW12T.

³³⁹ Email follow-up correspondence with respondent LAW29T.

intellectual property rights more generally. This is evident in the quote above from respondent LAW29T about the importance of “awareness of individual rights” as the “driving force” behind China’s IP protection. The lack of public awareness of intellectual property rights more generally was highlighted by almost all respondents as a crucial factor in the current state of the intellectual protection system in China. Therefore, there did not appear to be a clear distinction between awareness of individual rights and the awareness of intellectual property rights more generally.

5.2.1.2 Lack of Public Awareness of IP Rights

It has rather improbably been claimed that as the concept of intellectual property protection is “unknown to the majority of the Chinese population... many infringers simply do not know that what they are doing is illegal.”³⁴⁰ Although the level of public awareness of intellectual property is nowhere near as low as this comment would suggest, the lack of education regarding intellectual property protection is still regarded as a major problem.³⁴¹ Lack of awareness of IP rights causes problems with implementation of IP protection as the law requires most citizens to both understand and respect the laws in order for them to be effectively implemented.

Generally, respondents highlighted the lack of public awareness of intellectual property rights as the most significant factor in contributing to the current IP system in China. On the scale of 0 to 6, it scored an average of 4.44 and was ranked most significant overall out of the sixteen given factors in the questionnaire. Thus, lack of awareness of IPR is clearly perceived to be a serious problem in the modern IP system

³⁴⁰ Jenckes, "Protection of Foreign Copyrights in China: The Intellectual Property Courts and Alternative Avenues of Protection", 556.

³⁴¹ Kolton, "Copyright Law and the People's Courts in the People's Republic of China: A Review and Critique of China's Intellectual Property Courts", 456.

and many of the respondents' comments reflect this. For example, a common view expressed was that:

"People don't see IPR infringement [as] a disgrace and a very serious problem (the awareness is improving however)."³⁴²

This was echoed by a Chinese respondent, who felt strongly that:

"Public awareness of IPR is not yet widespread, which directly leads to frequent infringements. In many places in China, the concept of IPR lacks public support. Infringers do not feel guilty for their wrongdoings."³⁴³

However, it was noticeable that several of the foreign respondents were sceptical about the true extent of the ignorance of intellectual property rights. One respondent went so far as to call the notion that ineffective IP protection could be attributed to cultural factors:

"Complete crap."³⁴⁴

Other respondents suggested that infringers were well aware of intellectual property rights, but chose to infringe them;

"I don't think, I think the public is aware of IP rights [uh-huh], but they just don't care [uh-huh] and it's not, I think most people, most infringers that I see are aware that they are (crossing) and that they are infringing on other people's rights [uh-huh], but uh..., they deem it necessary [uh-huh]."³⁴⁵

Thus, although lack of public awareness was emphasized by respondents as the key factor behind the ineffectiveness of the modern IP system, this view was not unanimous.

5.2.1.3 Perception that IP Only Benefits Foreigners

A further factor which deserves consideration under the category of attitudes and values is the notion that intellectual property protection only benefits foreigners.

³⁴² Questionnaire comments from respondent MANU02.

³⁴³ Questionnaire comments from respondent MANU01T.

³⁴⁴ Interview with respondent LAW01.

³⁴⁵ Telephone interview with respondent LAW31.

This perception may act as a disincentive for China to enforce intellectual property rights; as China is seen as having little intellectual property of its own, there is a suspicion that intellectual property protection “only fills the coffers of foreign IPR holders with Chinese funds.”³⁴⁶ This unfounded perception that intellectual property protection is more beneficial to foreigners is stated to create resentment in local enforcement agencies and thus generates a powerful deterrent against enforcement.

Overall, this factor was not ranked particularly highly by respondents, scoring an average of 2.42 on the scale of 0 to 6 and ranked fourteenth out of sixteen factors in total. However, there is an interesting contrast between the Chinese and foreign respondents when asked about the significance of this factor. Whilst Chinese respondents only scored this factor with an average of 1.53, foreign respondents scored it with an average of 3.36. It is interesting that this difference emerges in the views of the respondents; Chinese respondents clearly do not consider the perception that IP only benefits foreigners to be of any significance whereas foreign respondents perhaps feel that this perception still affects the operation of the IP system to their detriment. This perception may also be linked to the potential role of domestic Chinese companies to change the IP system in China, a link explicitly made by respondent LAW07, who claimed that:

“Chinese companies’ growth is going to gradually change such situation.”³⁴⁷

5.2.1.4 The Influence of Guanxi

A further element of the Chinese attitudes and values that may affect the operation of the intellectual property system is the influence of guanxi or the use of informal networks or relationships to achieve specific aims. ‘Guanxi’ generally refers

³⁴⁶ Feder, "Enforcement of Intellectual Property Rights in China: You Can Lead a Horse to Water But You Can't Make it Drink", 253.

³⁴⁷ Email follow-up correspondence with respondent LAW07.

to “interpersonal connections”, but more specifically often carries a more pejorative meaning, especially to foreigners, of the unethical use of someone’s authority to obtain political or economic benefit.³⁴⁸ Although *guanxi* is not specifically referred to by most respondents, there are several references made to ‘relationships.’ For instance, one respondent directly attributes his dissatisfaction with the current IP system in terms of these ‘relationships’:

“Generally the efficiency is not very uh... satisfying. I couldn’t understand the reasons, but sometimes it is because China is a (city), is a society full of relationships [Yeah.] OK? So in some of the cases, like IP cases, we could say the legal enforcement people are also, let’s say, indulged with this kind of relationship.”³⁴⁹

Benefiting from an informal connection with an official could be seen as an initial step on the slippery slope to corruption as another respondent makes clear:

“the temptation to corruption is huge and it starts very (simply) I’m sure, (...) a friend who’s a private lawyer, you’re a judge, he’s making a hundred thousand or whatever, and you’re making ten or whatever it is, they’re going to of course treat you [um] to dinner and take you out and say don’t worry about it (...), but it comes to a very fine line of when it crosses to corruption. If you can’t afford a (house) and they say we’ll lend you the money, we’ll work it out later on, you know, and the Chinese are very good at building relationships in that way.”³⁵⁰

This further mention of relationships exemplifies the underlying attitude of many respondents that these ‘relationships’ are at the heart of many interactions throughout the legal system, including the IP system and indeed, many respondents seemed resigned to this fact.

5.2.2 Political and Institutional Factors

In addition to the influence of attitudes and values, the Brown Weiss and Jacobson comprehensive model of compliance also features political/institutional

³⁴⁸ Ying Fan, “Questioning Guanxi: Definition, Classification and Implications”, *International Business Review*, 11: 546.

³⁴⁹ Interview with respondent LAW16.

³⁵⁰ Interview with respondent LAW01.

factors as part of the category of fundamental factors which may influence a country's compliance. The impact of the divisions between central and local government has already been analysed above at section 5.1.3.1 as it arises as a direct consequence of China's physical characteristics. Other political and institutional factors which may be particularly relevant to China include the status of law as policy; a lack of transparency and consistency in the legal system; and a preference for public enforcement mechanisms.

5.2.2.1 *Law as Policy*

A major factor to consider in the context of political and institutional influences on the IP system is the role of law in China generally. Despite committing to establishing a rule of law state in a Constitutional amendment in 1999³⁵¹, there is still evidence to suggest that China follows a rule by law, rather than rule of law system. A legal system based on the rule by law principle sees law as a means by which the state's policies may be implemented, rather than as an end in itself. "Law then becomes a tool of the Party to be used to serve the interests of the people and to attack the enemy."³⁵²

The implications of this instrumentalist model are that "the line between law and policy in China is often said to be blurred"³⁵³, as the law is simply seen as a mechanism for implementing Party policy.³⁵⁴ In other words, enforcement of any particular law is subject to conformity with the government's latest policies. In fact, policies can often have the same effect as formal laws and regulations.³⁵⁵ However, the respondents in this study did not explicitly refer to the overall status of law in

³⁵¹ Full text of the Constitution available at: "Zhonghua renmin gongheguo xianfa" (Constitution of the PRC), http://www.gov.cn/ziliao/flfg/2005-06/14/content_6310.htm accessed August 30th 2005.

³⁵² Peerenboom, *China's Long March toward Rule of Law*, 10.

³⁵³ Donald C. Clarke, "Private Enforcement of Intellectual Property Rights in China", *National Bureau of Asian Research*, 32.

³⁵⁴ Yu, "The Second Coming of Intellectual Property Rights in China", 24.

³⁵⁵ Clarke, "Private Enforcement of Intellectual Property Rights in China", 33.

China and this characteristic of the legal system may be largely academic rather than a concern to the end-users of the contemporary IP system.

5.2.2.2 Lack of Transparency

This blurring between official policy and law may have multiple influences on the operation of the intellectual property system in China. Firstly, this lack of a clear hierarchy of legislation can lead to a lack of transparency in the intellectual property system generally. Overall, respondents had mixed feelings about the continuing influence of a lack of transparency on the intellectual property system in China. On a scale of 0 to 6, lack of transparency scored an average of 3.11 and was ranked ninth out of the sixteen suggested influences.

There were two noticeable opinions on transparency amongst most respondents' more detailed comments. Several respondents cited greater transparency as one of the improvements they have noticed in the IP system in the past few years, in response to question 10 on the questionnaire. These respondents included one member of the Quality Brands Protection Committee (QBPC), who cited as the main change they had observed:

“More transparency on legislation”

and another multinational respondent who simply cited:

“Increased transparency”

as an important change they had witnessed in the IP system.³⁵⁶ One of the legal respondents based in Hong Kong gave more detail on the improvements in transparency they had witnessed:

“Lack of transparency, I think is OK, I mean, the legal system is getting more transparent especially with the Trademark Office now

³⁵⁶ Questionnaire comments from respondents MANU02 and FOOD02.

publishing their internal guidelines, they're making an effort there. [Uh-huh] It is getting better."³⁵⁷

In contrast to these respondents who cited transparency as an area of improvement, other respondents claimed a lack of transparency was still harmful to their interactions with the IP system and that increased transparency would be a considerable improvement. These respondents included a lawyer based in Shanghai who stated that a system of watchdogs would improve the system greatly:

"If we had a system in place that we could trust, that would be, you know, that would be tremendously helpful."³⁵⁸

Another Shanghai-based lawyer went further and said that:

"I think the biggest thing people don't do and the argument about it is I think there needs to be more openness about these problems," because "transparency in every system improves enforcement."³⁵⁹

Consequently, although there is an overall impression that transparency has improved in the past few years, transparency in terms of the way the system is enforced is still stressed as an area that could be improved. Thus, it is crucial to recognise that transparency relates to two separate areas of the IP system, the substantive laws and regulations; and the enforcement of these laws and regulations. Whilst it is generally acknowledged that transparency in terms of the legislative framework is now much better, transparency in the implementation of this framework is still alleged to be poor. This is reflected in the repeated requests by trading partners such as the US that China produce enforcement statistics for intellectual property protection.³⁶⁰

³⁵⁷ Telephone interview with respondent LAW31.

³⁵⁸ Interview with respondent LAW10.

³⁵⁹ Interview with respondent LAW01.

³⁶⁰ Emma Barraclough, "China Urged to Provide IP Enforcement Data", *Managing Intellectual Property*, (January 30th 2006).

5.2.2.3 Preference for Public Enforcement Mechanisms

The role of law as an instrument for implementing Party policy could also be said to have led to a preference for public rather than private enforcement mechanisms. This remains true for the enforcement of intellectual property, as “IPR enforcement remains largely a government, rather than a private-sector matter”³⁶¹ and as illustrated by the table below.

Table 5-2 Number of cases dealt with by administrative and judicial enforcement in 2004³⁶²

	<u>Copyright Administrative Enforcement</u>	<u>Trademark Administrative Enforcement</u>	<u>Patent Administrative Enforcement</u>	<u>Judicial Enforcement- Criminal Cases</u>	<u>Judicial Enforcement- Civil Cases</u>
2004	9,691	51,851	1,455	385	8,332
Total	Administrative = 62997 cases			Judicial = 8717 cases	

This emphasis on administrative and criminal sanctions for IP infringers reinforces the government’s central role in enforcement, rather than empowering economic actors to enforce their own rights. Furthermore, greater use of private enforcement is strongly advocated by several commentators, “because such a system would not rely... on government policy priorities at any given moment.”³⁶³ By emphasising private enforcement, it is hoped by some commentators that greater consistency could be introduced to the protection of intellectual property.

However, although respondents did raise some problems with the system of criminal enforcement of IP, specifically the thresholds used to decide criminal liability, there was strong praise for the public enforcement mechanisms overall. This

³⁶¹ Pitman B. Potter and Michel Oksenberg, "A Patchwork of IPR Protection", *China Business Review*, 26 (1).

³⁶² Statistics taken from: “<<Zhongguo zhishichanquan baohu de xinjinzhan>> baipishi fa bu” (China White Paper on New Progress in IPR Protection published), available at: http://www.gov.cn/xwfb/2005-04/21/content_321.htm accessed May 13th 2006.

³⁶³ Clarke, "Private Enforcement of Intellectual Property Rights in China", 31.

is reflected in the results regarding the possible influence of over-reliance on public enforcement mechanisms; this factor was ranked twelfth out of the sixteen suggested factors on the questionnaire and scored an average of 2.76 overall for its contribution to the current IP system, on a scale of 0 to 6. Thus, the overall preference for criminal and administrative enforcement in the IP system was not seen as a problem by respondents in this study. In fact, the operation of the administrative system, particularly the Administration of Industry and Commerce (AIC) responsible for trademark infringements, was expressly commended for swift enforcement actions.³⁶⁴

5.2.2.4 *Lack of Consistency*

The lack of a clear distinction between government policy and the law may also contribute to a lack of consistency in the implementation of the system of intellectual property protection in China. Furthermore, consistency is often recognised as a significant problem in the enforcement of intellectual property rights. Enforcement actions are often praised as “waves of coordinated actions, each targeted on specific types of infringement activities.”³⁶⁵ An example of a campaign against piracy being hailed as successful enforcement is provided by the Deputy Director-General of the Copyright Bureau:

“On April 19, 1994, the copyright administration department in Guangdong cooperated with the police, administration departments of industry and commerce, press, and publication departments to mobilize over 4,000 people to carry out raids in twenty cities on illegal compact discs. This started the national campaign against piracy. Ten compact disc factories were closed in the action. In the winter action of 1996, the Guangdong province took strong and resolute measures including offering a large reward of 300,000 Yuan, and digging out twenty-eight

³⁶⁴ Interview with respondent LAW05.

³⁶⁵ Ruichun Duan, “China’s Intellectual Property Rights Protection towards the 21st Century”, *Duke Journal of Comparative and International Law*, 9 (1998-1999), 217. As Director General of the Office of Intellectual Property Executive Conference of the State Council, Duan’s statement can be seen as reflecting the official government’s view of enforcement.

underground production lines in addition to the eight lines dug out before the concentrated action.”³⁶⁶

Although this follows a typically Chinese model of enforcement in ‘crackdowns’, it is at odds with the basic rule of law concept that laws should be enforced consistently. Symbolic crackdowns are also frequently highlighted in the media when intellectual property protection is under international scrutiny, as was the case in the first quarter of 1995, before the Memorandum of Understanding with the United States was signed in March 1995, leading to the suspicion that IP rights are only respected when absolutely necessary for geopolitical reasons.³⁶⁷

On the whole, most respondents in this study did show concern about the impact of inconsistency in the IP system. Out of the sixteen suggested factors included in the initial survey, lack of consistency was ranked fourth and scored an average of 3.8 on a scale of 0 to 6. Thus, consistency is clearly of interest to many of the respondents. This concern with consistency was frequently expressed in terms of frustration with infringers not being pursued consistently:

“Relevant agencies work hard to achieve something during certain period, and thereafter loose up, and this gives the infringer a misleading signal that after the periodical “fire”, their life would become easy.”³⁶⁸

This concern is echoed by a Chinese lawyer who painted the following picture of IP enforcement in China:

“You could say that enforcement is mainly focused on those big cities now, for the middle and smaller cities are not very much to feel this enforcement and sometimes we can also feel that enforcement are not become day-to-day work or day-to-day operation, it’s just a few times in the year. Just a few times in the

³⁶⁶ Zhaokuan Chen, "Administrative Management and Enforcement of Copyright in China", *Duke Journal of Comparative and International Law*, 9 (1998-1999), 252.

³⁶⁷ Endeshaw, *Intellectual Property in China: The Roots of the Problem of Enforcement*, 44-5.

³⁶⁸ Email follow-up comments from respondent MANU02.

year and also a certain period of the year. So this sometimes it's a formality, you feel something like a formality."³⁶⁹

Hence, lawyers and business-people alike share concerns about the impact of inconsistent enforcement of the IP laws and regulations, particularly in terms of strongly enforcing IP rights at certain specified times and not at others; IP enforcement thus becomes a mere "formality."

The final aspect of political and institutional factors that needs to be considered is the continuing influence of the pre-reform structure of government on the intellectual property system today. As the pre-reform command economy was split into vertical sectors, with separate agencies having full control over their sector, but with few links to other sectors, this can still have implications for the bureaucratic structure of power in contemporary China. Specifically, this influence can still be witnessed in the lack of a unified agency for handling intellectual property; weak judicial enforcement compared to administrative enforcement; and local protectionism, which will all be considered in more detail below.³⁷⁰

5.2.3 Economic Factors

It is clear that IP enforcement is uneven because, in many cases, respect for intellectual property is replaced by more urgent economic interests.³⁷¹ This prioritising of economic goals by the government influences the IP system through the close links between law and policy. Furthermore, one of the major reasons behind the overriding importance of economic factors in the implementation of IP law is the nature of the economy itself.

³⁶⁹ Interview with respondent LAW16.

³⁷⁰ See pages 177, 183, and 171.

³⁷¹ Lagerqvist and Riley, "How to Protect Intellectual Property Rights in China", 11.

As discussed in the preceding section, enforcement problems are widely seen as arising from the transition from a centrally planned to a market economy.³⁷² “Certain structural arrangements, suitable to China’s pre-reform economy, are ill-suited to China’s present transition economy and have contributed to the rise of the counterfeit trade.”³⁷³ This is due to the economic system in place before the start of reforms, when “most Chinese enterprises did not heed intellectual property rights because the absence of market competition under a centrally planned economy made the protection of intellectual property rights dispensable.”³⁷⁴

5.2.3.1 *The Role of the Government in the Economy*

Despite reforms introducing market forces into the Chinese economy, the government still has a significant role to play in economic development. The government even now has “multiple roles as regulator, entrepreneur, and law enforcer”, which “may create conflict of interest issues.”³⁷⁵ With such a large degree of control over the commercial sector, it is little wonder that intellectual property protection concerns have taken a back seat to the economic aims of the government. The government’s control over the economy “undermines private property rights—especially the intangible kind. This creates economic instability that makes it difficult for innovation by domestic companies to be rewarded, and thus be sustained.”³⁷⁶

Furthermore, as government ownership of the loss-making state sector still dominates the economy, it can hardly be surprising that the government will try to protect these enterprises at all costs.³⁷⁷ In other words, the problem may not be a lack of power to enforce intellectual property rights; the problem may be a reluctance to

³⁷² Ibid. 3.

³⁷³ Chow, "Counterfeiting in the People's Republic of China", 29.

³⁷⁴ Xiaowen Tian and Vai Io Lo, *Law & Investment in China: The Legal and Business Environments after China's WTO Accession*, (London: RoutledgeCurzon, 2004).

³⁷⁵ Chow, "Counterfeiting in the People's Republic of China", 27.

³⁷⁶ Stevenson-Yang and DeWoskin, "China Destroys the IP Paradigm".

³⁷⁷ Endeshaw, *Intellectual Property in China: The Roots of the Problem of Enforcement*, 151.

initiate enforcement actions. It has been observed that enforcement is “more energetically pursued when governmental interests are at stake.”³⁷⁸ As one commentator succinctly put it, “the instinct to protect what you own is basic.”³⁷⁹

Despite these commentators stating that the economic priorities of the central government are to blame for problems in the IP system, opinions amongst respondents in this study regarding the significance of the government’s role in the economy were somewhat mixed. Out of the sixteen suggested factors on the questionnaire, the role of the government in the economy was ranked eleventh, with an average score of 2.89 on a scale of 0 to 6. This would suggest that most respondents do not share these concerns about the government’s role in the economy.

However, more detailed comments from certain respondents do reflect the notion that there is a certain amount of resentment about unequal treatment for state-owned enterprises (SOEs) and private companies. For example, one Chinese lawyer commented:

“The interests of the state and the SOEs are over-protected and over-emphasised, while private rights are usually neglected. If the state or SOEs breach the IPR of an individual, often they will not be severely punished.”³⁸⁰

These comments reflect the impression of poor enforcement where SOEs are the infringers, but as another respondent notes, unequal treatment may also apply where an SOE is the injured party:

“There’ll be state-owned enterprises that are being killed and yes, they’ve got more methods for enforcing their IPR; the larger you are, the more close to government if you, if you go to your local police and say, we want to investigate this, it happens.”³⁸¹

³⁷⁸ Lagerqvist and Riley, “How to Protect Intellectual Property Rights in China”, 61.

³⁷⁹ Stevenson-Yang and DeWoskin, “China Destroys the IP Paradigm”.

³⁸⁰ Questionnaire comments from respondent LAW15T.

³⁸¹ Interview comments from respondent LAW01.

Thus, it would appear that although government ownership of the economy is not as problematic as suggested by some commentators, a minority of respondents have perceived inequalities between state-owned enterprises and private companies, both in terms of infringements by SOEs not being pursued and infringements against SOEs being vigorously confronted. However, there is not enough evidence to suggest this bias is inherent throughout the IP system.

5.2.3.2 *Local Protectionism*

Local protectionism could also be considered as an economic influence on the implementation of the intellectual property system in China and must be acknowledged as a major issue in the non-enforcement of intellectual property rights.³⁸² However, local protectionism is a complex issue and thus incorporates elements of political factors as well. Even government officials admit that “local protectionism is the real culprit” behind problems in the enforcement system.³⁸³ Local protectionism acts against effective enforcement in various ways, for example, “in most cases, IP owners are required to bring... proceedings in the infringer’s home court, rather than in the jurisdiction where counterfeit products have been sold. This significantly increases the risk of bias.”³⁸⁴

In addition to bias in the courts, local protectionism can also be crucial issue in administrative enforcement. Intellectual property infringement is often part of the local economy, as is the case in Yiwu city in Zhejiang province:

“The trade in counterfeit goods there has been integrated significantly into the legitimate local economy of this city with the consequence that

³⁸² Susan Finder, "The Protection of Intellectual Property Rights through the Courts", Cohen, Bang and Mitchell, *Chinese Intellectual Law and Practice*, (London: Kluwer Law International, 1999): 261.

³⁸³ Duan, "China's Intellectual Property Rights Protection towards the 21st Century", 217.

³⁸⁴ Joseph T. Simone, "China's IPR Enforcement Mechanisms", *China Business Review*, 26 (1), (January/February 1999).

shutting down counterfeiting is functionally equivalent to shutting down the local economy with all of its attendant social and political costs.”³⁸⁵

Although Yiwu city represents an extreme example of the reliance of a local economy on IPR infringements, there are many other places in China where intellectual property infringement does play a major role in the local economy and enforcement agencies in these areas will therefore be extremely reluctant to enforce intellectual property rights, at the expense of their own interests.

On the whole, local protectionism is cited by many respondents as one of the primary problems with the IP system in China. Out of the sixteen potential factors presented to respondents in the questionnaire, local protectionism ranked second only to a lack of awareness as an influence on the intellectual property system, with an average score of 4.13 on a scale of 0 to 6. As the only two factors with average scores above 4, it is clear that both a lack of public awareness of IP rights and local protectionism are major concerns for respondents.

Respondents use the term ‘local protectionism’ to refer to a number of behaviours, including difficulties in initiating cases with local agencies; bias in the enforcement process and trivial penalties for local infringers. As one respondent defined the issue:

“Local protectionism, I think is the code word that people use for all these different types of things.”³⁸⁶

The significance of local protectionism is also highlighted by these comments from a local lawyer in Guangdong province:

“Local protectionism in the intellectual property protection system has a very negative impact. It undermines justice, not just in individual cases, but in the entire legal system. This has an

³⁸⁵ Chow, "Counterfeiting in the People's Republic of China", 41.

³⁸⁶ Interview with respondent LAW01.

adverse impact on China: it's prejudicial to the import of foreign advanced technologies into China."³⁸⁷

Two respondents both working for multinationals in China commented on the impact of local protectionism that they had experienced on their enforcement efforts.

The first respondent commented:

"It is hard to get a good catch, and even when caught, the infringer may not be punished to the severest extent possible."³⁸⁸

This shows that local protectionism impacts not only on the infringers that may be targeted by local operations, but also the level of penalties awarded against local infringers. The second respondent from a multinational manufacturer related their experiences of pursuing two Chinese companies for copying their designs:

"Although we stopped the companies no financial compensation or costs were given. This was because we are a foreign company and the two companies were local. In general if legal proceedings are followed outside one's own area, the legal system in another area favours their own."³⁸⁹

This frustration with the impact of local protectionism on enforcement efforts is echoed by comments by several of the lawyers who responded. For example, one remarked on the difficulties of pursuing large-scale infringers, in contrast to individual infringers:

"They have whole cities that specialise in car parts... You're talking about a whole city you're fighting or a whole region, then it gets really difficult."³⁹⁰

Another local lawyer claimed that:

"The administrative people will prefer to hear the local one's first. Their story. So they are influenced. And then when they hear the other side, from the outsiders from other provinces, uh... in practice, they protect the local people."³⁹¹

³⁸⁷ Follow-up comments from respondent LAW29T.

³⁸⁸ Email follow-up comments from respondent MANU02.

³⁸⁹ Questionnaire comments from respondent MANU03.

³⁹⁰ Telephone interview with respondent LAW31.

³⁹¹ Interview with respondent LAW16.

Consequently, it is clear that local protectionism is a major issue in the system of protection for intellectual property in contemporary China.

5.2.4 The Significance of Fundamental Factors Overall

Fundamental factors have been considered under the headings of attitudes and values, political and institutional factors, and economic factors. There is clearly some overlap between the discussion of attitudes and values relevant to IP in China and the discussion of China's history and culture in the parameters section. However, although the cultural influences of Confucianism and socialism were ranked as insignificant in this study, some aspects of contemporary attitudes and values were highlighted by respondents as important contributors to the current IP system.

The lack of awareness of IP rights was ranked as the most significant contributing factor by respondents, although there was some scepticism over the true extent of ignorance amongst the general public in China. This lack of awareness was linked to a lack of the concept of individual rights in general, identified by a small number of respondents as significant, but overall this factor was less significant than the lack of IP awareness. In addition, several respondents identified 'relationships' as influential, which could be seen as a metaphor for the influence of *guanxi*.

Political and institutional factors were widely discussed by respondents. Lack of transparency was expected to be cited as a major influence on China's TRIPS compliance based on previous observers of China's IP system, but there appeared to be a distinction between transparency regarding the substantive laws and regulations, which was felt to be much improved, and transparency regarding enforcement, which was still felt to be a source of much frustration. Although public enforcement mechanisms are preferred to private enforcement by individual rights holders, this was not felt to be a problem by respondents. On the contrary, public enforcement,

particularly administrative enforcement was often praised by respondents. The final political or institutional factor which was ranked as important by respondents was the lack of consistency; many respondents expressed frustration at the inconsistent prosecution of IP infringers in China.

Economic factors were also found to be significant in influencing overall TRIPS compliance. Local protectionism in particular was identified as a highly significant problem, second only to a lack of awareness of IP rights. Local protectionism was used as a so-called 'code word' to encompass various behaviours such as reluctance to initiate actions, bias in the enforcement process and inadequate penalties awarded against infringers. On the other hand, the dominant role of the government in the economy was not felt to be of great significance, although the unequal treatment of SOEs and private enterprises was isolated as a concern. Thus, overall several fundamental factors were identified by respondents in this study as significant influences upon the effectiveness of the current IP system in China, particularly lack of awareness of IP rights, local protectionism and a lack of consistency and transparency in enforcement actions.

5.3 Proximate Factors

The final category of factors to consider under Brown Weiss and Jacobson's detailed model of compliance is proximate factors. These factors are specific to the system under analysis and incorporate influences such as the capacity of the existing agencies to implement the system effectively and the role of other organisations in pressurising for or monitoring changes in the system.

5.3.1 Administrative Capacity

The legal system in China is basically the product of twenty-five years of rebuilding, as "decimated by the Cultural Revolution and decades of neglect and

abuse, the legal system had to be rebuilt virtually from scratch.”³⁹² Despite the government swiftly reassembling the rudiments of a legal system,³⁹³ systemic problems in the legal system are still the subject of intense criticism.

5.3.1.1 Lack of Trained and Experienced Legal Personnel

Resources are one of the problems haunting the legal system, specifically the lack of trained, experienced legal personnel. A lack of lawyers qualified to deal with intellectual property cases has been identified as one of the major forces preventing full enforcement of intellectual property rights.³⁹⁴ Despite the establishment of specialised intellectual property tribunals from the early 1990s, “Western lawyers cite a lack of legal training amongst judges, interference in lawsuits by local and Communist Party officials, and the susceptibility of judges and court officials to bribes as some of the biggest problems facing the new intellectual property courts.”³⁹⁵

Although these problems stem partly from the position of the legal system in the Chinese political system as a mere instrument of governance, they can also be largely attributed to the professionally under qualified, and in some cases perhaps even incompetent, legal personnel administering the law.³⁹⁶ Clearly, many commentators believe that better trained lawyers and judges are needed to handle intellectual property cases.³⁹⁷

In general, respondents agreed that a lack of trained and experienced legal personnel contributed to problems with the intellectual property system in China.

³⁹² Peerenboom, *China's Long March toward Rule of Law*, 6.

³⁹³ Spence, *The Search for Modern China*, 670.

³⁹⁴ Endeshaw, *Intellectual Property in China: The Roots of the Problem of Enforcement*, 38.

³⁹⁵ Jenckes, "Protection of Foreign Copyrights in China: The Intellectual Property Courts and Alternative Avenues of Protection", 561.

³⁹⁶ Jianfu Chen, "Implementation of Law in China: An Introduction", Chen, Li and Otto, *Implementation of Law in the People's Republic of China*, (Dordrecht, The Netherlands: Kluwer Law International, 2002): 8.

³⁹⁷ Qu, *Copyright in China*, 390.

This factor was ranked seventh out of sixteen potential factors presented to respondents, with an average score of 3.71 on a scale of 0 to 6, where 6 is a major contribution. This concern over the quality of some of the personnel responsible for enforcing the framework of intellectual property laws and regulations was shared by several of the respondents. The following comments are typical of the opinions expressed:

“The government employees’ understanding of intellectual property rights is far from proficient,”³⁹⁸ or:

“You know a lot of it’s the education and the training of the people in the legal system and I think that’s a, you know, very, uh... sufficient point.”³⁹⁹

Accordingly, it is obvious that the knowledge levels of the legal personnel involved in enforcing intellectual property rights may be a significant concern to some respondents.

5.3.1.2 Lack of a Unified IP Agency

Enforcement of intellectual property rights is complicated by the bureaucratic structure of power in China. There is no unified agency to deal with intellectual property; “authority over IPR enforcement in China remains spread across various administrative agencies.”⁴⁰⁰ These agencies include the State Administration of Industry and Commerce (SAIC or AIC) responsible for trademarks, the National Copyright Administration (NCA) responsible for copyright and the State Intellectual Property Office, which is primarily responsible for patents.

³⁹⁸ Follow-up comments from respondent LAW12T.

³⁹⁹ Interview with respondent LAW10.

⁴⁰⁰ Potter and Oksenberg, “A Patchwork of IPR Protection”.

Consequently, there is a considerable lack of communication and coordination, as well as a great deal of rivalry between the various agencies.⁴⁰¹ This bureaucratic muddle has been attributed to the pre-reform socialist economy, which as discussed above at page 168 divided the economy into vertical sectors. Each administrative entity would have full control over its particular sector. However, as intellectual property cuts across multiple sectors, “several authorities will have concurrent enforcement authority over counterfeiting, leading to a series of parallel enforcement mechanisms.”⁴⁰²

Moreover, the overlapping of enforcement authority does not only lead to bureaucratic confusion. It may even actively discourage the agencies from cooperating, as they may lose fines and bonuses if they transfer a case to another agency.⁴⁰³ Therefore, would a unified intellectual property agency resolve some of these bureaucratic issues? It is recognised by a couple of respondents that these multiple agencies can cause problems in IP enforcement. For instance:

“Concurrence of several IPR enforcement authorities, such as TSBs, AICs, Patent offices, copyright offices and PSB leads to be unefficient.”⁴⁰⁴

However, the majority of respondents do not agree that this would be an improvement to the existing framework of agencies. For instance, one respondent pointed out:

“It wouldn’t be workable to just have one [uh-huh] to have one national uh... type of an agency to deal with it, because it’s so diverse you have to break it down and so we do have the copyright, the trademark, the patent, you know, the different organs that deal with it and then under those organs, is generally local, their local

⁴⁰¹ Joseph T. Simone, "China's IPR Enforcement Mechanisms", 14-16.

⁴⁰² Chow, "Counterfeiting in the People's Republic of China", 22.

⁴⁰³ Ibid.

⁴⁰⁴ Questionnaire comments from respondent MANU08.

counterparts that actually deal with it, so the fact that they don't have one IP office dealing with everything I just don't think is..."⁴⁰⁵

Thus, there is recognition that the issue of intellectual property enforcement is too complex to be handled by only one agency. This also relates to China's size; one agency would have to be broken down into smaller regional or local branches anyway. On the whole, unifying the separate agencies into one overall body responsible for intellectual property was not regarded as a priority by respondents. Out of the sixteen factors suggested as factors which contribute to problems in the current IP system in China, the lack of a unified agency was ranked thirteenth by respondents. On a scale of 0 to 6, ranking the significance of the contribution it made, this factor scored an average of 2.76.

5.3.1.3 The Length of the Process

Another barrier that has been identified in the enforcement process is the length of the process. It is claimed that courts are often slow in pursuing their claims; there are "extended waiting periods, so securing relief may be protracted."⁴⁰⁶ There is a feeling that "in practice, remedies are more likely to be forthcoming through the State Administration of Industry and Commerce in the form of raids and confiscation than through the courts."⁴⁰⁷

However, this impression that administrative authorities are not also subject to delays in enforcement may be misleading. Local AICs have also been accused of delaying enforcement actions to give infringers enough time to dispose of infringing goods and machinery used to produce counterfeit products. Therefore, according to

⁴⁰⁵ Interview with respondent LAW10.

⁴⁰⁶ Kolton, "Copyright Law and the People's Courts in the People's Republic of China: A Review and Critique of China's Intellectual Property Courts", 451.

⁴⁰⁷ Ibid. 451, fn.223.

some observers, there can be costly delays in both the civil and administrative enforcement of intellectual property rights.

Conversely, the length of the enforcement process was not felt to be a major concern for the majority of respondents. This factor scored an average of 3.24 on a scale of 0 to 6 representing the contribution it makes to the IP system and ranked eighth out of the sixteen potential factors that were presented to respondents on the questionnaire. Although it is recognised by many respondents that:

“A lot of time and money have to be put into the IP enforcement,”⁴⁰⁸

it is also suggested that this may not always be the case and this is merely a perception that some rights holders have:

“Foreign rights holders are not willing to litigate in order to protect their rights; firstly, because they think it takes too much time and money and secondly, they don’t really believe in China’s courts.”⁴⁰⁹

Consequently, the length of the process may not actually act as a barrier to a rights holder seeking to uphold their rights, but rather as a perception that may discourage some rights holders from initiating the enforcement process in the first place. As a matter of fact, lawyers with a lot of experience in the field of IP actually commend the speed with which some IP enforcement actions can be concluded. For instance, this Chinese lawyer working for a large international law firm commented on the administrative system of IP enforcement:

“One good thing about the administrative approach besides the speediness of resolution will be the fact that you can (seize) the infringing goods or even the tools used to make the infringing goods really quickly and that actually it’s a tangible result.”⁴¹⁰

⁴⁰⁸ Follow-up comments from respondent LAW07.

⁴⁰⁹ Follow-up comments from respondent LAW12T.

⁴¹⁰ Interview with respondent LAW05.

Furthermore, the length of the enforcement process does not appear to be a problem in other areas of IP enforcement either:

“The fact here is the length of the process is much (...) here than you have in most other countries so civil matters in the courts are probably dealt with in six to nine, or one year, [uh-huh] from the outset, you know, and the way that administratively it's dealt with is quite quick [uh-huh].

So that's a positive part of China, I think. It's fairly unique here, that they can deal with things quite quickly.”⁴¹¹

Thus, the length of the enforcement process does not appear to be a major problem in the IP system once an action has been initiated. It is possible that the preparation to start an action is more time-consuming, due to the difficulties of collecting evidence and so on.

5.3.1.4 Inadequate Penalties

A further proximate factor influencing the effectiveness of the Chinese IP system is the level of penalties awarded against infringers. Even if a plaintiff succeeds in an enforcement action, damages awarded to successful plaintiffs have been generally low by western standards.⁴¹² Moreover, these paltry damage awards may not even be sufficient to cover the substantial fees, payable by the plaintiff to the intellectual property court in advance.⁴¹³ Fines and compensation awarded through the administrative enforcement system are also criticised as insufficient, as they are not perceived as high enough to act as a deterrent to infringers.

Inadequate penalties are identified by many respondents as a key area of dissatisfaction with the existing system of intellectual property protection in China. This factor scored an average of 3.96 on a scale of 0 to 6 with 6 representing a major

⁴¹¹ Interview with respondent LAW10.

⁴¹² Clarke, "Private Enforcement of Intellectual Property Rights in China", 40.

⁴¹³ Kolton, "Copyright Law and the People's Courts in the People's Republic of China: A Review and Critique of China's Intellectual Property Courts", 451.

contribution, which shows that it is perceived as having a significant contribution to the ineffectiveness of the current system. Inadequate penalties were also ranked as third overall, out of the sixteen suggested factors which influence the current IP system.

It is clear from respondents' comments that there is a certain amount of dissatisfaction with the current levels of penalties imposed on infringers, as the following typical comments illustrates. The main problem with the IP system is felt to be the:

"Lack of punitive compensation for IP infringement"⁴¹⁴; and:

"The power to produce a ruling is too large, while the punishment is not enough to act as a deterrent."⁴¹⁵

More detail about the effects of inadequate penalties was given by another respondent who explained:

"Although they're starting to impose criminal liability, (those) are hard to get and then, civil liability or remedies awarded by administrative agencies, they're minimal... they basically just come out to make an announcement, to me, they don't have a significant deterrent effect [uh-huh] to the infringers."⁴¹⁶

It is clear from these comments that respondents feel frustrated at the level of penalties awarded against the infringers and appear to feel that appearances in enforcement are more important than actually deterring infringers. Thus, it is apparent that inadequate penalties remains an area of concern in the current intellectual property system and may also be a key area for potential improvement.

⁴¹⁴ Questionnaire comments from respondent LAW03.

⁴¹⁵ Questionnaire comments from respondent LAW13T.

⁴¹⁶ Interview with respondent LAW05.

5.3.1.5 Weak Judicial Enforcement and Lack of Powers to Enforce Court Judgments

A further consequence of the pre-reform structure of power in China, closely linked to the continuing preference for administrative enforcement of intellectual property rights is weak judicial enforcement. This is a direct consequence of the preference for public enforcement mechanisms discussed above at page 165 and could also be considered as a direct consequence of the developing nature of the entire legal system in China. As the modern legal system has essentially been constructed only since the late 1970s, it is perhaps inevitable that expertise is still lacking in the judicial system.

Overall, respondents did show concern over the judicial enforcement system; weak judicial enforcement was ranked fifth out of the sixteen possible factors contained on the questionnaire. This factor scored an average of 3.76 on a scale of 0 to 6, representing the strength of the contribution this factor makes to the current IP system. It is noticeable that weak judicial enforcement is thus considered to be a much more important aspect in the IP system than the preference for public enforcement mechanisms which is only a minor concern.

In general, launching a case through the judicial system is perceived as more problematic than pursuing a straightforward claim through administrative agencies. An example of this kind of opinion is illustrated by the following comment:

“I think China’s court lack authority and protection of their power.”⁴¹⁷

Strengthening the judicial system of enforcement is also seen as key by several respondents:

⁴¹⁷ Follow-up comments from respondent LAW29T.

“What they need to do, is put more of a, you know, to develop more their civil court system [uh-huh], and their, the civil side of it, because that’s still fairly weak.”⁴¹⁸

One of the main ways that the weakness in the judicial enforcement system is manifested is in the lack of powers that the courts have to enforce their judgments. Estimates suggest that around 50% of all civil judgments cannot be enforced.⁴¹⁹ The primary reason for the non-execution of so many judgments is that the courts have little ‘weaponry’ to back up their commands.⁴²⁰ Without sufficient powers to enforce their judgments, court decisions become increasingly meaningless. In other words, even if a judgment is passed against an infringer, the court lacks powers to compel the infringer to hand over assets. This problem is identified by a number of respondents, all of whom express frustration at the inability of the court to enforce judgments made against infringers:

“Ineffective implementation of court decisions is a problem. Fundamentally speaking, it’s a general lack of credibility. Debtors evade the enforcement of court judgments. If defendants fail to provide assistance in the implementation, the court very rarely resorts to coercive measures and very rarely brings them to justice.”⁴²¹

This frustration with the ineffectiveness of judicial enforcement is also echoed by a respondent from a large Chinese company who makes a suggestion for how the IP system could be improved which explicitly recognises the problems of enforcing court judgments:

“Promote the coexistence of administrative remedies and judicial remedies; however, the latter is often difficult to implement in reality.”⁴²²

⁴¹⁸ Interview with respondent LAW10.

⁴¹⁹ Yahong Li, "Pushing for Greater Protection: The Trend toward Greater Protection of Intellectual Property in the Chinese Software Industry and the Implications for Rule of Law in China", *University of Pennsylvania Journal of International Economic Law*, 23 (4), (Winter 2002), 652.

⁴²⁰ Clarke, "Private Enforcement of Intellectual Property Rights in China", 39.

⁴²¹ Follow-up comments from respondent LAW29T.

⁴²² Questionnaire comments from respondent MANU01T.

On the whole, respondents did show concern over the lack of effective powers used to enforce court judgments; this factor scored an average of 3.73 on a scale of 0 to 6, similar to the score for weak judicial enforcement in general. Out of the sixteen suggested factors, it was ranked as sixth most significant by respondents. This overall weakness in the judicial system has even been attributed to a reluctance to create a truly independent judiciary despite official commitment to this:

“No-one wants to give the court that power because if the courts have power, you’re creating an independent judiciary and not completely, but you know, you’re creating more-, the more power you give judges, the closer you get to an independent judiciary and that is not what the Communist Party wants. They want a judiciary that resolves disputes, but is still under the control of the Party.”⁴²³

Accordingly, although the weakness of judicial enforcement is usually attributed to the immature nature of the legal system in China, these comments go further and suggest that the judicial system is deliberately enfeebled for political reasons. Whatever the reason, it is clear that the judicial system of intellectual property enforcement is still problematic, despite recent improvements and a lot of room remains for further improvements.

5.3.2 Knowledge and Information

In addition to China’s administrative capacity to deal with intellectual property enforcement, the comprehensive model of compliance applied in this study contains other proximate factors which also need to be considered. Knowledge and information is another key area of proximate factors that may influence China’s compliance with the TRIPS Agreement. There is a clear overlap between the impact of knowledge and information on TRIPS compliance and the discussion above at section 5.3.1.1 concerning the lack of trained and experienced personnel in China’s IP system.

⁴²³ Interview with respondent LAW01.

5.3.2.1 Expertise of Personnel

Several respondents share a belief that some IP personnel lack the knowledge to be able to effectively enforce intellectual property rights. The personnel in question could include legal personnel such as lawyers and judges, but also include prosecutors and the police; administrative personnel in agencies such as the AIC and NCA; and customs personnel responsible for enforcing IP at the border.

Comments concerning the knowledge levels of IP personnel were expressed by respondents when discussing the problems in the system, influences on the current system, as well as potential improvements that could be made to the IP system. For example, the consequence of judges lacking detailed knowledge of intellectual property is explained as follows:

“If people don’t understand IP laws, there’s a (price), if you’re a judge and you don’t understand patent law and there’s all this political pressure and stuff around you, you can be convinced pretty easily by someone who says black is white or white is black.”⁴²⁴

In other words, lacking sufficient knowledge of the legal basis for intellectual property could either leave the judge more open to reaching inconsistent decisions or not reaching the correct decision at all.

This lack of knowledge is explained by a different respondent, who attributes the continuing lack of expertise to a lack of experienced teachers at university level:

“A lot of them have not historically had the opportunity of receiving training with regard to IP, for example, (university) might offer some IP course, but have those people teaching those courses had any experience with IP work? [Um]

They might only have book learning, so you get professors experienced at teaching, but I don’t know how extensive their experience is with regard to IP.”⁴²⁵

⁴²⁴ Interview with respondent LAW01.

⁴²⁵ Interview with respondent LAW05.

Thus, so-called ‘book learning’ of intellectual property is distinguished from real-life ‘experience’ and is seen as insufficient to allow for true understanding of the system in action. This issue of inexperienced teachers may also stem from the developing nature of the Chinese legal system; as there were virtually no lawyers at the end of the Cultural Revolution and the start of the reform period, there are not yet any senior professionals to pass their experiences onto trainee lawyers and other professionals. Furthermore, increasing the knowledge level of personnel involved in intellectual property enforcement is also seen as crucial by several respondents. For example, one respondent claims it is vital:

“To keep increasing the quality of personnel from related professions.”⁴²⁶

This is echoed by another respondent who sees the key to improvement in the IP system as follows:

“By improving the allocation of human and material resources, especially human resources, the government can equip the Intellectual Property Office with more personnel who understand intellectual property law, to strengthen the fight against IP infringers as a team.”⁴²⁷

Consequently, the knowledge levels of personnel involved in the intellectual property system is acknowledged to be a concern for many respondents.

5.3.3 Leadership

The attitude of the central government in Beijing is acknowledged as key to the effective enforcement of intellectual property rights in China. Indeed, this was recognised as an area of change in recent years by some respondents. In response to questioning regarding changes they have witnessed in the IP system in China in the past few years, one respondent noted:

⁴²⁶ Questionnaire comments from respondent LAW30T.

⁴²⁷ Follow-up comments from respondent LAW29T.

“Attention of the IP right from the government bodies,”⁴²⁸ and another that:

“China’s leaders emphasizes the importance of IPR.”⁴²⁹

There also appeared to be a strong belief amongst respondents that change in the legal system generally and the intellectual property system more specifically was often driven from the attitudes of the central leadership. For instance, one respondent observed that:

“And also in the latest (successions) of the leadership, central leadership, they travel a lot overseas; have a lot of exchange with overseas. Uh... this created the internal desire or drive to open China more and logically, how to open, how to protect IP, I think maybe this is one of the aspects.”⁴³⁰

The logical consequence of this belief that change in the intellectual property system is driven by the leadership is the belief that non-enforcement is also a direct consequence of the policies of the central leadership. Several respondents expressed this idea that the central leadership could effectively enforce intellectual property rights if it chose to:

“And as to... they will... when the economy will actually lose more than they will gain because of that blatant IP infringement, then the central government will actually go into force. [Uh-huh] At the moment, as I’ve said, some industries, they’re not really interested in it. [Uh-huh] I don’t believe that. But I believe that if, if the central government is taking an interest, then something will happen in the whole country [uh-huh].”⁴³¹

Therefore, leadership from the central government is seen as crucial to the effective enforcement of intellectual property rights in China.

⁴²⁸ Questionnaire comments from respondent MANU05.

⁴²⁹ Questionnaire comments from respondent LAW12T.

⁴³⁰ Interview with respondent LAW16.

⁴³¹ Telephone interview with respondent LAW31.

5.3.4 *The Influence of NGOs*

The final category of proximate factors that may influence China's compliance with the TRIPs Agreement is the influence of non-governmental organisations (NGOs). Domestic NGOs are a challenging topic in China due to the political and practical barriers that they face. Specifically, the political culture in China is said not to be conducive to civil society activism.⁴³² Moreover, NGOs may have more relevance to other areas of international obligations in which a state's compliance may be considered; for instance, environmental protection is strongly influenced by pressure from both domestic and international NGOs. However, intellectual property protection does not elicit similar NGO involvement. On the contrary, organisations concerned with intellectual property protection tend to be commercial groups, often consisting of businesses with strong intellectual property rights. Therefore, the influence of NGOs in the intellectual property arena is based on pressure from key groups of companies, both domestic and international.

5.3.4.1 *International Business Organisations in China*

With regard to intellectual property in China, the main organisation pressurising for better protection is the Quality Brands Protection Committee (QBPC). The QBPC is a group of more than 160 multinational companies concerned with counterfeiting in China and their stated aim is "to work cooperatively with the Chinese central and local governments, local industry, and other organisations to make positive contributions to intellectual property protection in the People's Republic of China."⁴³³ Several foreign respondents independently mentioned the QBPC in connection with their views on the intellectual property system in China and this shows that the Committee is fairly well-known amongst practitioners in the IP

⁴³² Yiyi Lu, "The Growth of Civil Society in China: Key Challenges for NGOs" available at <http://www.chathamhouse.org.uk/pdf/research/asia/China.pdf>, accessed February 2005.

⁴³³ Quality Brands Protection Committee, "Factsheet".

field in China. One respondent from a professional services company stated that the QBPC:

“Have been working very hard in China to make the case for IP and design protection, and to get enforcement.”⁴³⁴

One lawyer based in Hong Kong mentioned the role of the QBPC in connection with a client who was struggling to stop infringers of their IP:

“What they do now is they join forces with other car makers and spare part makers... [Uh-huh] through the QBPC.”⁴³⁵

This respondent goes on to explain that through the QBPC, this manufacturer can contact other manufacturers of similar products and join together in enforcement actions, thus saving costs. This role of the QBPC as a network for companies to join together to tackle infringements thus seems to be an important one for some respondents. However, another respondent expressed some frustration at the consistently ‘positive’ approach taken by the QBPC. The QBPC hosts annual award ceremonies where officials are recognised for special achievements in IP enforcement, but this respondent did not agree with this approach, claiming,

“You know you get the QBPC [uh-huh], there have been some people in there talking about blacklists and things like that but (the basic position is) say no, no we can’t do that, we have to reward, we should do it by positive encouragement, you know, like best cases and best officials... (and I’m thinking) this sucks, you see the most corrupt officials in the business getting awards for their great cases and stuff, we should be outing them, you know, as crooks.”⁴³⁶

Accordingly, although the QBPC was praised by some respondents for its role in IP in China, this praise was not universal. It is also noteworthy that the QBPC was only mentioned by foreign respondents and was not commented on by any of the Chinese respondents. Therefore, the QBPC appears to serve a specific purpose of

⁴³⁴ Questionnaire comments from respondent SERVICES02.

⁴³⁵ Telephone interview with respondent LAW31.

⁴³⁶ Interview with respondent LAW01.

bringing multinational companies together and raising awareness of IP issues amongst them, but may not be so successful in a wider role of pressuring for stronger IP enforcement overall.

5.3.4.2 *Domestic Business Organisations in China*

Although formal organisations of domestic businesses are limited in China, the role of Chinese companies in pressing for change in the intellectual property system is recognised as increasingly important. The experience of Taiwan and Korea has been used by several commentators to argue that a combination of *external* and *internal* pressure is truly necessary to bring about genuine change in IPR protection.⁴³⁷ Consequently, many observers believe that if Chinese private companies possessed more intellectual property, stronger IP protection would be sought and obtained.⁴³⁸ Indeed, a few optimistic observers claim to have already witnessed the start of this change towards greater domestic protection for intellectual property:

“Recent discussions... have suggested that Chinese technology developers increasingly favor a stronger IPR regime. As more of these voices are heard, changes to the country’s IPR system will become more responsive to local interests and less driven by the terms of international agreements.”⁴³⁹

More generally, Chinese citizens are beginning to use the courts more and more, instead of the traditional reliance on mediation or administrative agencies. This is also seen as a positive step for the prospects of enhanced enforcement of intellectual property rights.⁴⁴⁰ However, this theory of intellectual property development has been criticised as a form of “historical determinism” that:

⁴³⁷ Maruyama, "US-China IPR Negotiations: Trade, Intellectual Property and the Rule of Law in a Global Economy", 167.

⁴³⁸ Endeshaw, *Intellectual Property in China: The Roots of the Problem of Enforcement*, 79.

⁴³⁹ Potter and Oksenberg, "A Patchwork of IPR Protection".

⁴⁴⁰ Jenckes, "Protection of Foreign Copyrights in China: The Intellectual Property Courts and Alternative Avenues of Protection", 560.

“Developing countries mount a deterministic development ladder, from light assembly to heavy manufacturing and on to high-tech products, and, having achieved this degree of industrialization, they begin to create, and protect IP.”⁴⁴¹

Therefore, the role of Chinese companies is seen as crucial to achieving sustained change in the IP system in China. Although formal organisations of Chinese companies are limited to a few industries, Chinese companies in general are cited by most respondents as one of the key influences on the Chinese legal system. Some respondents assert that this shift towards greater pressure from domestic companies has already taken place. For example, when discussing recent changes in the IP system in China, one respondent declared that:

“Chinese companies are more aware of IP issues and register in mass,”⁴⁴² while another stated that:

“Chinese companies are now suffering from IP problems and are calling for effective protection measures to be available.”⁴⁴³

Pressure from Chinese companies is also cited by several respondents when discussing the future for the intellectual property system in China and is even described as the “main driver” for change by one respondent.⁴⁴⁴ For instance:

“Improved IP protection would mostly benefit foreign companies at present, though it would benefit domestic companies in a long-term view. With the request and demand of IP protection from domestic companies and consumers becoming stronger, the IP protection would be improved more and faster.”⁴⁴⁵

Overall, most respondents declared Chinese companies to be a highly significant influence on the IP system in China, although one respondent was sceptical of the weight that should be attached to their pronouncements:

“[could Chinese companies pressure for [yes] better IP protection?]”

⁴⁴¹ Stevenson-Yang and DeWoskin, “China Destroys the IP Paradigm”.

⁴⁴² Questionnaire comments from respondent SERVICES01.

⁴⁴³ Questionnaire comments from respondent SERVICES02.

⁴⁴⁴ Questionnaire comments from respondent LAW06.

⁴⁴⁵ Questionnaire comments from respondent LAW07.

They could, but (foreign) companies, for example, will have a better, louder voice [uh-huh] because they have more resources and they have more appreciation of IP and they have more experience in how to protect IP so I think they will be better than Chinese companies to push this forward, although I'm not saying that Chinese parties should not bother, should not contribute to this [yeah] (pressure)."⁴⁴⁶

As a consequence, although pressure from Chinese companies is seen as critical for the future of the Chinese intellectual property system, the political structure of government in China may be hindering the impact of their collective voice.

5.3.5 The Significance of Proximate Factors Overall

The proximate factors considered in this study included administrative capacity, knowledge and information, leadership and the influence of NGOs. Of these, administrative capacity was clearly the most significant. Inadequate penalties were identified as a specific concern of many of the respondents, who were frustrated that levels of penalties are inadequate to deter infringers. Weak judicial enforcement and an associated lack of powers to enforce judgments passed by the courts was also a concern to some respondents, which demonstrates that judicial enforcement is still seen as problematic by respondents. However, there was some disagreement over whether the judiciary is weak due to a lack of experience or whether the judiciary is denied full independence and stronger powers for political reasons.

The length of the process was a minor concern to a few respondents. Conversely, the short length of the administrative enforcement process was praised and the civil litigation process was judged to be similar to other countries. In reality, the problem thus may be a perception that the process is too long which deters rights holders from pursuing infringers rather than problems with the length of the

⁴⁴⁶ Interview with respondent LAW05.

enforcement process itself. The lack of a unified IP agency is also linked to the administrative capacity within the IP system, but was not seen as a priority. It was also recognised that any such agency would necessarily be broken down in local or regional branches to be effective.

Arguably the most significant element of administrative capacity which was discussed by respondents was the lack of trained and experienced legal personnel. However, respondents focused more on the quality of the existing personnel rather than citing insufficient quantities of personnel. This is reflected in the discussion of the expertise of personnel under the heading of knowledge and information, and was largely explained by respondents as resulting from the immature nature of the legal system in China.

The influence of NGOs was discussed, but was not significant in the context of IP protection in China. The role of the QBPC was discussed, mostly in positive terms and many respondents urged Chinese enterprises to form similar organisations to press for sustained improvements in the IP system. The attitude of the central leadership was also highlighted as a key recent improvement, but some respondents still claimed that enforcement problems existed as a result of government intransigence and that the government could improve enforcement if it chose to.

5.4 Summary and Conclusion

The various factors influencing compliance with the TRIPS Agreement which are specific to China have been considered under three main headings: basic parameters of China, fundamental factors such as political and institutional factors, and proximate factors such as administrative capacity. Some of the factors identified above are more significant than others. In terms of parameters overall, survey responses indicate that China's previous behaviour and historical and cultural factors

were not felt to be major influences on the current IP system, but the size and number of neighbours of China may have a minor influence on compliance. Therefore, basic parameters should not be ignored in assessing China's compliance, but they are certainly not the most significant influences on the current framework of intellectual property protection and enforcement.

Turning to fundamental factors impacting upon China's TRIPS compliance, these were considered under the headings of attitudes and values, political and institutional factors and economic factors. Overall, several of the fundamental factors were identified as crucial contributing factors to the current IP system in China, particularly the lack of awareness of IP rights, local protectionism and a lack of consistency in enforcement, which were all identified as highly significant by respondents.

Several proximate factors were also identified as key contributors to the current state of the IP system in China. These were, most importantly, the inadequate level of penalties imposed on infringers and the judiciary's lack of strength in dealing with IP issues. In addition, the personnel in the IP system were subject to many comments from respondents, but the focus of these comments was primarily on the quality, rather than the quantity of the personnel. Furthermore, more minor proximate factors identified by respondents which may have a positive influence included the committed attitude of the leadership and the role played by pressure groups such as the QBPC in the IP field.

Overall, a variety of factors were identified and discussed by the respondents. However, these factors may vary in the impact that they have upon the IP system and how easily they may be manipulated. Therefore, it is essential to fully examine the detailed implementation and subsequent compliance with the TRIPS Agreement that

China has demonstrated and the resulting effectiveness of the current system of protection. Consequently, the implementation, compliance and effectiveness of the current system will all be analysed in the following chapter before detailed recommendations can be made about how to change the most significant factors identified above.

6 The Intellectual Property System in China: Implementation, Effectiveness and Compliance with the TRIPS Agreement

China's interactions with the TRIPS Agreement will now be considered in more detail. Under the model of compliance applied in this study, both non-country specific and country-specific factors combine to affect implementation, compliance and effectiveness. These three elements need to be distinguished. *Implementation* refers to the passing of international obligations into formal domestic law. *Compliance* can have different implications; compliance can include compliance with the specific obligations of the treaty, both procedural and substantive, as well as compliance with the spirit of the treaty. Finally, the *effectiveness* of the TRIPS Agreement in tackling the problem of IP infringements must be considered. Effectiveness may also include different aspects: effectiveness in achieving the stated objectives of the treaty, but also in addressing the problems that led to the treaty.

In this chapter, China's compliance with the obligations associated with the TRIPS Agreement will be discussed. China's implementation of the TRIPS Agreement into domestic IP legislation will first be introduced, and then overall compliance with the TRIPS Agreement will be evaluated. Compliance will incorporate both procedural and substantive compliance as well as compliance with the spirit of the treaty. Finally, the effectiveness of the TRIPS Agreement in tackling intellectual property infringements in China will be analysed. Respondents' experiences of the intellectual property system in action will primarily inform this discussion about the effectiveness of the current system.

6.1 China's Efforts to Implement the TRIPS Agreement

According to research conducted on China's pre-WTO entry compliance with TRIPS, China needed to make substantial changes to the law to comply with the TRIPS norms. Almost forty substantive TRIPS requirements were identified, of which China was already compliant with less than half.⁴⁴⁷ Consequently, China needed to take action to comply with the remaining requirements.

The actions required to comply with the remaining provisions included:

- Removing discrimination to uphold the national treatment principle;
- Restricting compulsory licenses;
- Copyright: introducing rental rights and clarifying/enhancing performer rights and broadcast rights;
- Trademarks: establishing protection for well-known marks, clarifying provisions on prior use and ineligible signs;
- Introducing protection for geographical indications;
- Patents: clarifying basic exemptions and coverage of plant and animal varieties;
- Enforcement: sanctions to be enhanced, particularly preliminary injunctions and seizures, as well as levels of damages.
- Ensuring the availability of judicial review.

With such a multitude of changes necessary, it is clear that China faced a major legislative task to fully comply with all the TRIPS standards.

⁴⁴⁷ Maskus, "Intellectual Property Rights in the WTO Accession Package: Assessing China's Reforms".

6.1.1 The Impact of the TRIPS Agreement on the IP System in China

It is immediately clear that China’s IP system has changed dramatically in the past few years in response to the TRIPS Agreement. On the initial questionnaire, respondents were asked if they had noticed any changes in the intellectual property system in China in the past five years. Of the 45 valid responses, 43 stated that they had noticed a change, with only 2 respondents noticing no change. Furthermore, when asked to characterise this change as positive or negative on a scale of -2 to 2 (-2 representing strong negative changes and 2 representing strong positive changes), the changes were ranked 1.26 by respondents, which suggests that respondents felt the recent changes observed were positive. Moreover, it is notable that only one respondent judged recent changes to be negative. The details of the respondents’ answers are in the table below:

Table 6-1 Responses regarding recent changes observed in the IP system

<u>Change Observed</u>	<u>Number of Respondents</u>
-2	1
-1	0
0	4
1	23
2	19

However, the influence of the TRIPS Agreement on the framework of intellectual property protection in China predates WTO accession by several years. Despite not being a full member, China did participate in the Uruguay Round of negotiations as an observer and had used the TRIPS Agreement as a model law to improve the IP legislation throughout the 1990s.⁴⁴⁸ Moreover, the influence of the TRIPS Agreement on the intellectual property system in China is not limited to substantive changes in the formal laws and regulations. Besides the role of TRIPS as a

⁴⁴⁸ Deli Yang, "The Development of Intellectual Property in China", *World Patent Information*, 25 (2), 139.

model for China's legislative improvements of the IP protection system, TRIPS implementation has also raised the prospect of using the formal dispute settlement proceedings provided by the WTO to make "an objective determination on the efficacy of enforcement measures."⁴⁴⁹ This possibility has further increased the emphasis on enforcement of substantive rights that was already being stressed by foreign rights holders and trade partners alike.

Indeed, several respondents did explicitly refer to this function of the WTO, as:

"The threat of the WTO dispute settlement procedures."⁴⁵⁰

Another respondent felt that:

"The dispute resolution mechanism in there probably does have a little bit of fear factor and also (pulling) factor."⁴⁵¹

Thus, the impact of WTO entry in terms of China's TRIPS commitments is multifaceted. Firstly, the TRIPS Agreement is said to have been influential during legal revisions of the 1990s. Secondly, the threat of the dispute resolution mechanism that is part of the WTO framework may also hold a bit of a 'fear factor' for China. More importantly, the TRIPS Agreement led directly to wide-ranging legislative changes in intellectual property protection and finally, there were also important changes in the IP enforcement system directly linked to WTO accession. These important legislative changes and changes to the enforcement system made as part of China's attempts to observe its TRIPS obligations, as well as an outline of the current system of protection, will be presented in the section below.

⁴⁴⁹ Antony S. Taubman, "TRIPS Goes East: Chinese Interests and International Trade in Intellectual Property", Cass, *China and the World Trading System: Entering the New Millennium*, (Cambridge: Cambridge University Press, 2003): 347.

⁴⁵⁰ Follow-up comments from respondent LAW12T.

⁴⁵¹ Interview comments with respondent LAW01.

6.1.2 Implementing the TRIPS Agreement in the IP Legislation

In order to comply with the substantial obligations associated with WTO entry, China undertook a massive overhaul of its intellectual property laws beginning in 1999, before official accession. During the period 1999-2002, many laws and regulations were considerably amended, while others were introduced for the first time. To illustrate this huge legislative effort, a selection of the major laws and regulations passed during this term are outlined in the table below.

<u>Legislation</u>	<u>Date and change</u>
Copyright Law	Amended and came into effect 27 th October 2001 ⁴⁵²
Implementing Regulations of the Copyright Law	Came into force on September 15 th 2002
Decisions on Safeguarding of Security on the Internet	Adopted 28 th December 2000
Regulations on Computer Software Protection	Amended and came into effect 1 st January 2002
Regulations on Publications	Came into effect 1 st February 2002
Regulations on Motion Pictures	Came into effect 1 st February 2002
Regulations on Sound and Video Recordings	Came into effect 1 st February 2002
Patent Law	Amended and came into effect 1 st July 2001 ⁴⁵³
Implementing Regulations of the Patent Law	Came into force on 1 st July 2001
Patent Examination Guidelines	Republished 1 st July 2001
Layout-Designs of Integrated Circuits Protection Regulations (IC Regulations)	Came into force on 1 st October 2001
Implementing Rules of the IC Regulations	Came into force on 1 st October 2001
Regulations on Administration of Imports or Exports of Technologies	Came into force on 1 st January 2002
Rules on Registration of Technology Import or Export Contracts	Came into force on 1 st January 2002
Rules on Technologies prohibited or restricted from importation	Came into force on 1 st January 2002
Rules on Technologies prohibited or restricted from exportation	Came into force on 1 st January 2002
Trademark Law	Amended and came into effect 1 st December 2001 ⁴⁵⁴
Implementing Regulations of the Trademark Law	Came into force on 15 th September 2002
Trademark Examination Guidelines	Revised 17 th October 2002

Figure 6-2 Selection of major laws, regulations and rules amended or passed to comply with TRIPS requirements

In addition to the main period of legislative revision from 1999-2002, the process of review and modification continued after this time in China. For example,

⁴⁵² Promulgated by: “*Zhonghua renmin gongheguo guowuyuan gongbao*” (Gazette of the State Council of the People’s Republic of China), Issue 33, 30th November 2001.

⁴⁵³ Promulgated by: “*Zhonghua renmin gongheguo guowuyuan gongbao*” (Gazette of the State Council of the People’s Republic of China), Issue 4, 10th February 2003.

⁴⁵⁴ “Gazette of the State Council of the People’s Republic of China”, Issue 33, 2001.

according to the State Intellectual Property Office (SIPO), in 2003, “a total of 26 regulations and documents, which were not in accordance with the rules of WTO, were revised or cancelled.”⁴⁵⁵ Some examples of amendments made in the legislation⁴⁵⁶ specifically to implement the provisions of the TRIPS Agreement include the provision of rental and broadcast rights for copyright. The TRIPS Agreement provides a right to prohibit rental of computer programs and movies under Article 11; this was implemented by the Copyright Law 2001 revised Article 10, which provides rental rights. The TRIPS Agreement also provides the right to prevent fixation, reproduction or broadcasting for 20 years, or copyright under Article 14; the amendments to Article 10 of the 2001 Copyright Law include these rights of reproduction, broadcasting and communication.

Other key revisions to implement the TRIPS Agreement included extending the symbols which may be protected as trademarks and codifying the protection for well-known marks. The signs that may be subject to trademark under the TRIPS Agreement include distinguishing names, letters, numerals and colours; this provision was implemented by the revised Trademark Law 2001 Article 8. The TRIPS Agreement also requires protection for well-known marks without registration in the Member country. Well-known marks were protected in China prior to the revisions of 1999-2002, but this protection was strengthened and formalised by the inclusion of two new Articles in the revised Trademark Law 2001. Articles 13 and 14 prohibit registration of trademarks which are a reproduction, imitation or translation of a well-

⁴⁵⁵ State Intellectual Property Office, "White Paper on the Intellectual Property Rights Protection in China in 2003", http://www.sipo.gov.cn/sipo_English/gftx_e/zscqbhbbs_e/t20040603_29734.htm, accessed 3rd June 2004.

⁴⁵⁶ For details see: *Zhonghua renmin gongheguo zhuanlifa*, *Zhonghua renmin gongheguo shangbiaofa*, *zhonghua renmin gongheguo zhuzuoquanfa* (Patent Law of the PRC, Trademark Law of the PRC, Copyright Law of the PRC), (Beijing: Law Press China, 2002).

known trademark not registered in China and provide criteria for determining whether a trademark is well-known.

The major legislative changes that China undertook in connection with WTO accession are also frequently mentioned by several respondents, when asked to comment on recent changes in the intellectual property system that they have observed. It is noticeable that these comments on specific legislative changes were predominantly made by lawyers, whereas respondents from business tended to focus more on changes in enforcement or attitude that they had observed.

For example, when asked to comment on recent changes they had observed in the IP system in China, one legal respondent described:

Revision of the relevant laws and regulations, such as the copyright law, trademark law, patent law and other IP-related laws and regulations.⁴⁵⁷

The connection between the amendments and China's WTO entry was made more explicitly by other respondents:

A series of IP laws and regulations have been amended to fulfil China's commitment to the WTO. IP-related clauses have been added into various laws and regulations accordingly.⁴⁵⁸

Furthermore, the revision of China's IP laws associated with WTO entry was described as a "milestone"⁴⁵⁹ and finally, a further respondent also linked the substantive amendments to "the requirements of TRIPS."⁴⁶⁰

Therefore, it is clear from the various respondents' comments, as well as the quantity of amendments carried out, that the legislative changes that China has made to comply with the TRIPS Agreement have been substantial.

⁴⁵⁷ Questionnaire comments from respondent LAW07.

⁴⁵⁸ Questionnaire comments from respondent LAW03.

⁴⁵⁹ Questionnaire comments from respondent LAW18.

⁴⁶⁰ Questionnaire comments from respondent LAW12T.

6.1.3 Implementing the TRIPS Agreement in the Enforcement System

In addition to amendments to substantive provisions of the IP legislation, accession to the TRIPS Agreement has also led to changes in the enforcement of IPR in China. The TRIPS Agreement is often said to add teeth to the previous international intellectual property Conventions, such as the Paris Convention and the Berne Convention, which lacked provisions on enforcement standards.⁴⁶¹ Thus, countries could comply with their previous commitments by merely passing a law, even if the law was not applied in practice. Consequently, “one of the key initiatives of the TRIPS Agreement was to resolve the enforcement issues left by the existing IP protection regime.”⁴⁶²

As enforcement provisions of the TRIPS Agreement were deemed to be so crucial by WTO Members,⁴⁶³ it is important to examine some of the specific changes that implementation of the TRIPS Agreement have brought to China’s IP enforcement system. These changes include the availability of judicial review; wider implementation of the national treatment principle; increases in the level of fines; the availability of injunctions; and the use of criminal prosecutions. These changes will now be considered in more detail.

6.1.3.1 a. Judicial Review

One of the main changes that the TRIPS regime has brought to the administrative system specifically is the addition of the possibility of judicial review of final administrative decisions. Under TRIPS Article 41(4), “parties to a proceeding shall have an opportunity for review by a judicial authority of final administrative decisions”. Previously, no independent review was available for appellants from

⁴⁶¹ Andy Y. Sun, "Reforming the Protection of Intellectual Property: The Case of China and Taiwan in Light of WTO Accession", *Maryland Series in Contemporary Asian Studies*, (4), (2001), 26.

⁴⁶² Gregory, "Chinese Trademark Law and the TRIPS Agreement- Confucius Meets the WTO", 338.

⁴⁶³ As discussed above at section 4.2.2.

administrative decisions. The amendments of the specific intellectual property laws undertaken in 2000 and 2001 provide for judicial review of administrative decisions under Articles 33, 49 and 50 of the Trademark Law; Articles 41 and 55 of the Patent Law and Article 55 of the Copyright Law. China is thus now in compliance with Article 41(4). This has had a major impact on the enforcement system overall; as all final administrative decisions are now subject to external scrutiny, authorities are less likely to resort to arbitrary decision-making.

6.1.3.2 b. National Treatment

Another key principle of the TRIPS Agreement is the principle of national treatment under Article 3, “that each member shall accord to the nationals of other members’ treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property.” The formalization of the national treatment principle did lead to some minor legislative changes. For example, Article 18 of the revised Trademark Law 2001 forces foreign enterprises or individuals applying for registration of a trademark or handling other trademark matters to use a State-approved trademark agent. This is arguably in breach of the national treatment principle as domestic applicants can apply directly to the Trademark Office of the SAIC. AICs previously would only accept infringement actions from foreign rights holders through a trademark agent. Although these restrictions have now been relaxed under the influence of the TRIPS Agreement, in practice, many foreign rights holders still use the services of an agent to navigate the enforcement process, which can inflate the cost of bringing an enforcement action.

6.1.3.3 c. Level of Fines and Damages

A further aspect of enforcement in which TRIPS implementation has had an impact is the level of fines imposed by the administrative authorities or damages

awarded by the civil courts. Under Article 41(1) of TRIPS, there is a general obligation that remedies should “constitute a deterrent to further infringements.” However, fines do not appear to have increased significantly since WTO entry, as shown in the table below. Despite a significant increase in the average fine in 2003 from 5761 RMB to 7414 RMB, this dropped back in 2004 to 5499 RMB.

Table 6-3 Fines imposed by the Trademark Office of the SAIC for trademark infringements and counterfeiting, 2002-4⁴⁶⁴

<u>Year</u>	<u>Total Number of Cases</u>	<u>Total Amount of Fines (RMB)</u>	<u>Average Fine (RMB)</u>
2002	23539	135612506	5761
2003	26488	196394094	7414
2004	40171	220884500	5498

Under the Patent Law, Article 58, the administrative authorities can confiscate any illegal earnings and impose a fine of not more than three times the illegal earnings or not more than RMB 50,000. The level of fines for both trademark and copyright infringement are governed by implementing regulations. Article 42 of the Implementing Regulations of the Trademark Law 2001 states that the fine imposed shall be not more than 20% of the illegal business or not more than two times the profit illegally earned. Article 36 of the Implementing Regulations of the Copyright Law 2001 provides the administrative authority with the power to impose a fine not exceeding three times the amount of the illegal business gains, or a maximum of RMB 100,000. Despite these generous limits for levels of fines imposed for IP infringements, there is still evidence to suggest that authorities are reluctant to impose high fines and that the financial penalties imposed do not constitute an effective deterrent in line with the TRIPS provision.

⁴⁶⁴ Compiled from statistics available at: Zhongguo Shangbiao Wang, (Trademark Office)," 2002-2004 nian du quanguo chachu shangbiao qinquan jiamao anjian tongjibiao" (2002-4 National Statistics on Trademark Infringement and Counterfeiting Cases), <http://sbj.saic.gov.cn/english/tjxx/tjxx.asp>, accessed June 12th 2006.

From respondents' comments, it is clear that both fines imposed by administrative authorities and damages awarded by the courts are perceived as still too low. This is evident in the high ranking given to inadequate penalties in the questionnaire as a significant factor contributing to the problems in the current IP system in China as discussed in the previous chapter at page 181.

In terms of damages, it was expressed by different respondents that:

"damages for intentional infringements are far from enough."⁴⁶⁵

This issue was expanded on by a foreign lawyer working for a Chinese firm:

"You can't get damages here very easily, it's so difficult to prove damages so then they just have, you know, a statutory ceiling on most of the damages."⁴⁶⁶

Therefore, the issue of inadequate damages appears to be linked to the issue of evidence. This was reflected in the comments of at least four respondents who all emphasised the need for "a reasonable Evidence Law."⁴⁶⁷ This problem with evidence is due to the burden of proof, which remains on the plaintiff:

"It's a huge problem anywhere in the world, getting evidence in IP cases, but the way the Chinese system is reliant almost exclusively on documentary evidence and will not draw inferences, put(s) the burden of proof on the plaintiff at all times."⁴⁶⁸

Consequently, the issue of low fines and damages is more complex than it initially appears and simply raising the maximum levels available in the primary legislation may not be sufficient to ameliorate this problem. Furthermore, the issue of penalties is also linked to the lack of court powers to compel infringers to meet the terms of any orders as discussed above at page 183.

⁴⁶⁵ Questionnaire comments from respondent LAW28T.

⁴⁶⁶ Interview comments from respondent LAW10.

⁴⁶⁷ Questionnaire comments from respondent LAW18.

⁴⁶⁸ Interview comments from respondent LAW01.

6.1.3.4 d. Availability of Injunctions

Under Article 44 of the TRIPS Agreement, injunctions should be available “to order a party to desist from an infringement”. Prior to WTO entry, China’s intellectual property enforcement system was often criticised for non-compliance with this provision; “for many years a glaring omission in the IP enforcement system in China was the lack of preliminary injunctions.”⁴⁶⁹ However, the main intellectual property laws have now been amended to provide authorities with the power to issue injunctions. In China, preliminary injunctions were first permitted under the Patent Law 2000, Article 61, and subsequently by the amended Trademark Law 2001, Article 57, and the Copyright Law 2001, Article 49.

As these powers are still quite new, there remains some doubt about how willing the courts will be to issue preliminary injunctions. It has been suggested that there are still some teething problems in the new preliminary procedures and that the courts have so far taken a tough stance on the issuing of these orders. However, as these problems are resolved and the courts begin to become accustomed to issuing injunctions, pre-trial injunctions could offer a useful alternative to administrative actions.⁴⁷⁰ Thus, the introduction of these orders is overwhelmingly seen as a positive step for the IP enforcement system in China. “The Supreme People’s Court clarification of these procedures should lead to civil IP cases becoming more common, either as the primary means of enforcement of rights or as an adjunct to administrative enforcement.”⁴⁷¹

⁴⁶⁹ Tim Browning and Carol Wang, “Ten Years of Enforcement in China”, *Managing Intellectual Property*, 136 (Supplement 1), 39.

⁴⁷⁰ Matthew Murphy, “Supreme People’s Court Widens Litigation Options” available at <http://www.managingip.com/default.asp?Page=5&ISS=12532>, accessed September 2004.

⁴⁷¹ Sara Holder, “Preliminary Injunctions for Intellectual Property Infringements in the PRC”, <http://www.iprights.com/publications/articles/article.asp?articleID=163>, accessed November 16th 2005.

Consequently, the effect of the availability of pre-trial injunctions could be the increased use of civil enforcement and the rejection of administrative enforcement as the primary means of enforcing IP rights in China. It is too soon to see this effect, but long-term, it is promising for rights holders to have more enforcement options to consider. Indeed, the introduction of injunctions to the court system is cited by several respondents as one of the key recent changes in the IP system in China. For example, when asked to identify the most significant change, this respondent cited:

“The civil injunction system is introduced to the Chinese legal system.”⁴⁷²

6.1.3.5 e. Criminal Prosecutions

A further area where the TRIPS Agreement may have some impact is the issue of criminal IP enforcement. Article 61 of the TRIPS Agreement provides that criminal procedures should “be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale.” It is undeniable that criminal penalties are available under China’s Criminal Law 1997 for *serious* trademark counterfeiting (Article 213) or copyright piracy (Article 217). However, the relationship between ‘serious’ in China’s Criminal Law and ‘wilful’ in TRIPS is not clear. Despite a Supreme People’s Court interpretation issued in December 2004 which lowered the thresholds for criminal liability, it is not certain that all cases of ‘wilful’ infringement would be classed as ‘serious’. The administrative authorities are supposed to transfer serious infringement cases to be considered for criminal liability under Article 54 of the Trademark Law 2001 and Article 47 of the Copyright Law 2001, in practice, such a transfer is rarely made.

<u>Year</u>	<u>Number of cases transferred to judicial authorities</u>	<u>Total number of cases</u>

⁴⁷² Questionnaire comments from respondent LAW29T.

2002	59	23539
2003	45	26488
2004	96	40171

Figure 6-4 Number of cases transferred from the Trademark Office of the SAIC to judicial organs for criminal liability, 2002-4⁴⁷³

From the table above, it is evident that the TRIPS Agreement has had a minimal impact on the number of cases transferred to judicial authorities for criminal prosecution in the first three years following WTO accession in December 2001. Despite a notable increase in the overall number of cases transferred, the proportion of cases transferred has not grown and has remained constant at around 1 in 400 cases. However, the revised thresholds for criminal liability amended in late 2004 may have an impact on the transfer of cases from administrative to judicial authorities.⁴⁷⁴ This important modification in the regulations was explained as follows:

“In November 2004, the Supreme People’s Court and the Supreme People’s Procuratorate promulgated the <<Provisions concerning the handling of criminal cases of IP infringement to address a number of questions concerning the specific application of the law>>. These provisions aim to make the rules more concrete and easier for the judiciary to operate in order to fight against IP infringers.”⁴⁷⁵

Indeed, this change towards greater use of criminal enforcement for IP infringements was noted by a respondent from a foreign invested enterprise in the manufacturing sector:

“The Chinese government strengthens attack on IP criminals.”⁴⁷⁶

⁴⁷³ Compiled from statistics available at: Zhongguo Shangbiao Wang (Trademark Office), “2004 nian du quanguo chachu shangbiao qinquan jiamao anjian tongjibiao” (Statistics of Trademark Infringement and Counterfeiting Cases Throughout the Country in 2004), <http://sbj.saic.gov.cn/tjxx/TJTableQGCCSBQQ2004.asp>, accessed June 13th 2006.

⁴⁷⁴ As noted in questionnaire comments from respondent LAW28T. Full text of the interpretation taken from: “Gaofa gaojian guanyu banli qinfan zhishichanquan xingshi anjian ju ti ying yong falu ruogan wenti de jieshi (quan wen)” (Transcript of the Supreme People’s Court interpretation of the application of the law to criminal cases of IP infringement), <http://www.china.com.cn/chinese/law/734357.htm>, accessed April 15th 2006.

⁴⁷⁵ Follow-up comments from respondent LAW29T.

⁴⁷⁶ Questionnaire comments from respondent MANU06.

However, criminal enforcement is still seen as problematic in China despite the revised thresholds for liability:

“Criminal thresholds continue to make criminal enforcement difficult.”⁴⁷⁷

This may be because bureaucratic rivalries between the administrative and judicial agencies still exist and may continue to discourage the prompt transfer of cases for criminal prosecution. As the administrative agencies rely directly on revenue from confiscated goods to operate, they are extremely reluctant to transfer cases for criminal prosecution as they would lose the revenue associated with that case.⁴⁷⁸

6.2 Assessing China’s Overall Compliance with TRIPS Obligations

Clearly China has taken significant steps to implement the obligations of the TRIPS Agreement in both the legislative framework and enforcement systems. However, the *implementation* of TRIPS obligations into the domestic legislation is not enough to be in full compliance with the Agreement. Therefore, China’s consequent *compliance* with the specific provisions of TRIPS will now be analysed (see Figure 6-5 below for a summary of China’s compliance with some of the major substantive TRIPS provisions on enforcement). China appears to be in substantive compliance with the majority of its TRIPS obligations. However, there are still a handful of provisions where China’s compliance is in doubt. The most significant provisions under scrutiny involve enforcement measures as these are the primary focus of the TRIPS Agreement.

The first of these areas of possible non-compliance is Article 45(1), which expresses the principle that “the judicial authorities shall have the authority to order

⁴⁷⁷ Questionnaire comments from respondent LAW01.

⁴⁷⁸ Daniel Chow, *A Primer on Foreign Investment Enterprises and Protection of Intellectual Property in China*, (London: Kluwer Law International, 2002): 217.

the infringer to pay the rights holder damages adequate to compensate for the injury the rights holder has suffered.” Compliance with this provision is not easy to assess in China. The Trademark Law Article 56 provides that there are two tests for the amount of compensation awarded: either the profits the infringer has earned or the losses to the rights holder. Article 48 of the Copyright Law is similar: it states that compensation shall be the actual losses suffered or unlawful gains where the actual losses are difficult to calculate. Therefore, although in most cases, the calculation of damages should be based on the actual losses suffered by the rights holder, in practice many rights holders still complain about the inadequacy of damages awarded. Thus, this remains a possible area of non-compliance for China.

The second substantive TRIPS provision on enforcement that China possibly does not comply with is the requirement in Article 61 that criminal penalties should be available “at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale.” Furthermore, “remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent.” This is another difficult area in which to measure China’s compliance. As outlined above at page 205, criminal penalties are available under the Criminal Law 1997 for *serious* trademark counterfeiting (Article 213) or copyright piracy (Article 217). Furthermore, imprisonment and fines are both available as remedies. However, the relationship between ‘serious’ in China’s Criminal Law and ‘wilful’ in TRIPS may be problematic. The other issue of possible non-compliance under Article 61 is whether the penalties provided are sufficient to provide a deterrent.

<u>Art.</u>	<u>TRIPS Provision</u>	<u>Chinese Provisions</u>	<u>TRIPS Compliance</u>
41(2)	No unreasonable time-limits or delays	Cases should be concluded within 6 months, or 3 months for summary cases.	Compliant

41(3)	Decisions should be reasoned and in writing	Judgments issued immediately or within 10 days; must include reasons for judgment.	Compliant
41(4)	Judicial review available for final administrative decisions	Patent Law, Trademark Law and Copyright Law all provide for judicial review of administrative decisions.	Compliant
42	Defendant's right to timely written notice of the claim	Defendant receives complaint within 5 days of filing, must include grounds of complaint.	Compliant
44	Availability of injunctions	Injunctions available from 2000	Compliant
45(1)	Damages should be adequate to compensate for the injury suffered	Calculation of damages usually based on actual losses suffered by the rights holder	Possible non-compliance- issue of inadequate damages
45(2)	Award of damages can include expenses, such as attorney's fees	Reasonable expenses can include investigative costs and legal fees	Compliant
46	Infringing goods can be confiscated and destroyed	Infringing goods can be confiscated	Possible non-compliance- provisions not clear if the goods are destroyed
50(1)	Availability of provisional measures	'Property preservation' orders available	Compliant
51	Customs authorities can suspend the release of infringing goods	Rights holders can apply to the customs authorities to hold infringing goods	Compliant
61	Criminal penalties should be available for wilful trademark counterfeiting or copyright piracy on a commercial scale, sufficient enough to act as a deterrent.	Criminal penalties available under the Criminal Law 1997 for serious counterfeiting and piracy range from 3-7 years imprisonment and fines.	Possible non-compliance- not clear how 'serious' relates to 'wilful' in TRIPS and whether penalties are serious enough to act as a deterrent.

Figure 6-5 Summary of China's compliance with key TRIPS provisions

Assessing China's compliance with TRIPS provisions is not straightforward and Article 64 of TRIPS makes disputes about TRIPS obligations subject to the WTO's dispute resolution procedures. Up until 2006, there had been 24 cases brought to the WTO dispute settlement body concerning the TRIPS Agreement, with four cases dealing with the enforcement provisions in TRIPS. The respondents in these

cases were Denmark and Sweden (for failing to make provisional measures available in the context of civil proceedings involving intellectual property rights) and the European Community and Greece (involving the regular broadcast in Greece of copyrighted motion pictures and television programs without the authorisation of the copyright owners). The complainant in all cases was the US, alleging breach of Article 50 in the case of Denmark and Sweden and breaches of Articles 41 and 61 in the case of Greece. All four cases were eventually resolved through negotiation and the dispute settlement body was notified of the relevant mutually agreed solutions.⁴⁷⁹

These cases demonstrate that it is difficult to establish non-compliance with the TRIPS provisions on enforcement. In all disputes, it is necessary to show clear evidence of systemic failing, not just anecdotal weaknesses. This procedural difficulty is highlighted by the request made in October 2005 by the US, Japan and Swiss governments for China to provide enforcement data to help them to assess China's TRIPS compliance.⁴⁸⁰ This must be borne in mind when considering China's compliance with these provisions.

The difficulties in bringing a formal complaint to the WTO are also illustrated by the USTR's annual reports to Congress on China's WTO compliance. These reports can offer a useful supplementary source of data regarding China's TRIPS compliance as they are largely based upon reports from rights holders in China. Indeed, the USTR's reports confirm that despite efforts to implement TRIPS obligations into domestic legislation being "largely satisfactory... enforcement

⁴⁷⁹ Details on these cases are available at: World Trade Organisation, "Index of Disputes Issues", http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm#trips_enforcement, accessed October 15th 2006.

⁴⁸⁰ Barraclough, "China Urged to Provide IP Enforcement Data".

remained ineffective” (according to the 2003 report).⁴⁸¹ It is noticeable that the tone of these reports grows increasingly bullish in the past two or three years as promised improvements in reducing IPR infringements proved unforthcoming. Indeed, this reflects the notion that initial reforms made by China to comply with WTO obligations generally were substantial, but when further, deeper reforms were required in subsequent years, the pace of reform slowed considerably.

Furthermore, criticisms of the IP system in China initially focused on the poor enforcement system in general and bemoaned the lack of transparency (in the 2003 and 2004 reports), before focusing on the specific problem of the “chronic underutilization of deterrent criminal remedies” (2006 and 2007 reports). This also reinforces the impression that the US was forced to focus on a substantive failing in the IP enforcement system in order to bring a WTO dispute, rather than just rely on reported inadequacies from rights holders.

It is perhaps surprising that China had not been the respondent in a case involving compliance with TRIPS obligations before April 2007, given the publicity surrounding China’s poor intellectual property enforcement. Therefore, this implies that despite the failings in the intellectual property enforcement system in China, it is difficult to compile clear evidence of systemic non-compliance with the TRIPS provisions. Furthermore, the request for consultations of April 2007 makes it clear that the complaint refers to specific failings in the system, rather than mere inconsistencies in enforcement.

⁴⁸¹ The full text of the Annual Reports to Congress on China’s WTO Compliance is available at: www.ustr.gov

6.2.1 Details of the April 2007 Dispute

On 10th April 2007, the US circulated two requests for consultations with China. The first of these concerned measures affecting trading rights and distribution services for certain publications and audiovisual entertainment products.⁴⁸² This dispute is not directly connected with China's obligations under the TRIPS Agreement, rather it concerns commitments made in China's Protocol of Accession. However, the second dispute does specifically concern commitments made under the TRIPS Agreement. The second dispute concerns measures affecting the protection and enforcement of intellectual property rights.⁴⁸³ Within this broad complaint, four separate areas are identified for further consultations. First, that the thresholds for criminal procedures and penalties appear to be inconsistent with TRIPS Articles 41.1 and 61. This has already been discussed above at page 209.

The second element of intellectual property enforcement that is subject to consultations following the US's complaint is that the disposal of goods confiscated by the Customs authorities which infringe IP rights, is inconsistent with TRIPS Articles 46 and 59. This is because the Chinese Customs Regulations would appear to endorse the practice of removing the infringing features of the products and then allowing them to enter channels of commerce instead of destroying them. TRIPS Article 46 on judicial remedies and Article 59 on Customs authorities' remedies make it clear that goods seized may only be destroyed or disposed of outside of the channels of commerce.

The third element of the complaint is that existing Chinese laws and regulations deny copyright and related rights protection and enforcement to works that

⁴⁸² World Trade Organisation, "China- Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products", Document WT/DS363/1, 2007.

⁴⁸³ World Trade Organisation, "China- Measures Affecting the Protection and Enforcement of Intellectual Property Rights: Request for Consultations by the United States", Document WT/DS362/1, 2007.

have not been authorised for publication or distribution within China. In essence, the US alleges that works are not protected by copyright legislation until they are authorised for publication or distribution. This would appear to be inconsistent with TRIPS Article 9.1 which obliges Members to comply with Articles 1 to 21 of the Berne Convention (1971); Article 5(1) of the Berne Convention states that copyright granted to foreign authors should not be subject to any formality. Furthermore, if foreign authors are indeed not granted copyright protection prior to approval of their works, this may also be inconsistent with Article 3.1 of the TRIPS Agreement on the national treatment principle.

The fourth and final element of the US's complaint concerns the unavailability of criminal procedures and penalties for a person who engages in either unauthorised reproduction or unauthorised distribution of copyrighted works. The current Criminal Law and associated regulations appear to subject unauthorised reproduction and distribution to criminal liability, but not only one or the other. This would appear to be inconsistent with TRIPS Articles 41.1 and 61.

Following the circulation of the request for consultations by the United States, several other Members also requested to join the consultations. They include Japan, Mexico, Canada and the European Communities.⁴⁸⁴ Thus, the issue of protection and enforcement of intellectual property rights in China is clearly of concern to many WTO Members, not only the United States. China's reaction to the initiation of these WTO complaints has been strenuous denial and disappointment that the US has deemed this action necessary.⁴⁸⁵

⁴⁸⁴ Japan submitted a request on 24th April 2007 (Document WT/DS362/2), the European Communities, Canada and Mexico all submitted requests on 27th April 2007 (Documents WT/DS362/3, WT/DS362/4 and WT/DS362/5).

⁴⁸⁵ "Shangwubu dui meijiu zhishichanquan wenti suzhu WTO biaooshi yihan" (The Ministry of Commerce expresses regret over the WTO dispute over IPR brought by the US), available at:

The US and China held consultations specifically concerning these issues on June 7-8th 2007, but although “those consultations provided some helpful clarifications but [they] unfortunately did not resolve the dispute.”⁴⁸⁶ The consultations resolved the issue of confusion about whether unauthorised reproduction *and* distribution were necessary for criminal liability to arise, but the other issues remain in dispute. As a result, a Panel has now been appointed to consider the dispute.⁴⁸⁷ Overall, the focus of the United States’ submission is on fairly minor procedural aspects of the intellectual property system in China. Several of the grounds for complaint may simply have arisen from imprecise language in the primary legislation, such as the doubt over whether prohibiting illegal reproduction *and* distribution includes illegal reproduction *or* distribution only. However, the complaint does confirm the need to identify specific failings in the system rather than merely complaining about inadequate or inconsistent enforcement. Moreover, if China does change the IP system in response to this complaint, these changes may certainly make a significant difference to outstanding areas of non-compliance, particularly with regard to the thresholds for criminal liability.

In general, as discussed in the previous section, China appears to be in compliance with the majority of its TRIPS obligations on enforcement. The most significant areas where compliance appears to be in doubt are the issues of damages and the availability of criminal penalties. Assessing compliance in these areas seems to be dependent on how the wording of the relevant articles is interpreted. The difficulties of identifying non-compliance appear to be confirmed by the recent complaint to the WTO dispute resolution body by the United States; criminal

http://int.ipr.gov.cn/ipr/inter/info/Article.jsp?a_no=107297&col_no=774&dir=200708, accessed August 20th 2007.

⁴⁸⁶ According to Document WT/DS362/7, 21st August 2007.

⁴⁸⁷ According to Document WT/DS362/8, 13th December 2007.

thresholds were a target of the complaint as they are fixed and evident, whereas problems of inadequate damages or lack of a deterrent are too imprecise to be the focus of a formal WTO complaint. Consequently, this reflects the problem of judging compliance in general; as a relative concept, distinguishing compliance from non-compliance is a largely subjective process.⁴⁸⁸

6.3 The Effectiveness of the Current System of IP Protection

Having considered the implementation of China's obligations arising from the TRIPS Agreement and compliance with those obligations, the final aspect to assess is the effectiveness of the current system. In this section, the current intellectual property system in post-WTO China will be outlined and then the effectiveness of this system appraised. The effectiveness of the system will be principally judged using responses from the questionnaire and interview comments illustrating respondents' experiences of the IP system in action.

6.3.1 Outline of the Current Intellectual Property System

Following the massive overhaul of the intellectual property protection system associated with WTO entry, the current system of protection offers a myriad of choices for rights holders in China.⁴⁸⁹ The system of intellectual property protection has been described as a "triple IP system, comprising legislative guidance, administrative control and judicial enforcement of IP."⁴⁹⁰ However, it has also been noted that the lines between the categories may be blurred and "any particular

⁴⁸⁸ Chan, *China's Compliance in Global Affairs: Trade, Arms Control, Environmental Protection, Human Rights*, 66.

⁴⁸⁹ As can be seen by the host of IP agencies discussed in Section 1.3 and illustrated by Figure 1-1.

⁴⁹⁰ Deli Yang and Peter Clarke, "Review of the Current Intellectual Property System in China", *International Journal of Technology Transfer and Commercialisation*, 3 (1), 14.

enforcement measure may partake of the characteristics of more than one category.”⁴⁹¹

Essentially, an intellectual property rights holder has several choices in the method they choose to enforce their rights. Administrative enforcement is often the mechanism chosen, as quick raids of the infringer’s premises can often be accomplished.⁴⁹² There are various bodies responsible for the administrative enforcement of intellectual property. “The Trademark Office under the State Administration for Industry and Commerce (SAIC) is responsible for trademarks, the China Patent Office oversees patent protection, and the National Copyright Administration handles copyright.”⁴⁹³

Judicial enforcement is also an option to pursue. Judicial enforcement can take two forms, civil litigation or criminal prosecutions. Although it is possible to bring a private prosecution of offenders, this method of enforcement is subject to a wealth of problems.⁴⁹⁴ Therefore, civil litigation is more popular. “Any individual or organisation can bring a lawsuit to a people’s court, such as an Intermediate People’s Court. If they do not agree with the judicial verdict of that court, the case can be pursued to a higher court.”⁴⁹⁵ There are four levels of People’s Courts in China, Supreme, Higher, Intermediate and Basic. Specialised intellectual property courts were established at the intermediate level and above from early 1990s. “China’s specialized Intellectual Property Courts were first established in Beijing at both the Intermediate and Higher People’s Court levels on August 5, 1993.”⁴⁹⁶ Following their

⁴⁹¹ Clarke, "Private Enforcement of Intellectual Property Rights in China", 31.

⁴⁹² Chow, "Counterfeiting in the People's Republic of China", 24.

⁴⁹³ Potter and Oksenberg, "A Patchwork of IPR Protection".

⁴⁹⁴ Joseph T. Simone, "China's IPR Enforcement Mechanisms".

⁴⁹⁵ Yang and Clarke, "Review of the Current Intellectual Property System in China", 20.

⁴⁹⁶ Kolton, "Copyright Law and the People's Courts in the People's Republic of China: A Review and Critique of China's Intellectual Property Courts", 436.

introduction, specialised IP courts were rapidly introduced to other areas outside Beijing. Intellectual property disputes were previously heard by civil or economic divisions and the specialised courts were intended to go some way towards countering accusations of poorly trained judicial personnel.

Therefore, there are a host of alternatives available to IP rights holders in China, but there is still some scepticism about how effective these different channels of enforcement actually are at enforcing intellectual property rights. Respondents' experiences of the IP system will be discussed below, in order to analyse how effective these different channels of enforcement are in practice.

6.3.2 The System in Action

The questionnaire and follow-up interviews included discussion of the effectiveness of the current system of intellectual property protection in China. When respondents were asked to rank the current system on a scale from 1 to 6, with 1 representing completely ineffective and 6 representing completely effective, the average rank was 3.3. Unsurprisingly, the system was ranked as neither completely ineffective nor completely effective, with a breakdown of the results as follows:

Table 6-6 Effectiveness of the current IP system as ranked by respondents

<u>Rank of Effectiveness</u>	<u>Number of Respondents</u>
1	2
2	6
3	18
4	18
5	3
6	0
TOTAL	47

Furthermore, when asked whether the main cause of any remaining problems in the current system was poor legislation, poor enforcement, a combination of both,

or neither, of the 44 valid responses collected, poor enforcement was overwhelmingly seen as the main cause.

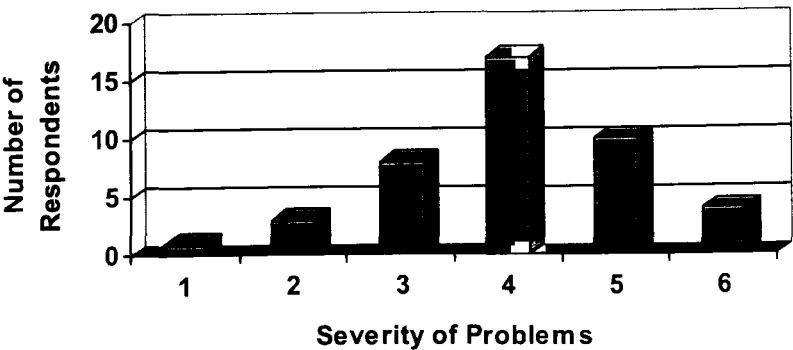
Table 6-7 Main cause of problems in the current IP system as ranked by respondents

<u>Main cause of problems</u>	<u>Number of Respondents</u>
Poor Enforcement	25
Poor Legislation	1
Both	16
Neither	2
TOTAL	44

Thus, these responses confirm the overall judgement that while China’s IP legislation is much improved, problems still remain in the enforcement of these laws and regulations.

Respondents were also asked if they had experienced any problems with the IP system. Only two respondents answered no, out of a total of 47 valid responses, clearly showing that the system may still have problems to resolve. Those 45 respondents who responded that they had experienced problems with the IP system were then asked to rank those problems. On a scale of 1 to 6, where 1 represents not at all serious and 6 represents extremely serious, the average rank for the problems experienced was 4.02. Thus, respondents have experienced considerable problems with the IP system in China. The responses regarding the severity of the problems experienced are detailed in the chart below:

Figure 6-8- Severity of problems in the current IP system as ranked by respondents



As many of the respondents ranked the problems they had experienced as at least moderately severe, it is clear that there may be some problems with the overall effectiveness of the IP system in China. Despite improvements in both the legislative framework of IP protection and the enforcement system, many respondents still complained about certain aspects of the intellectual property system overall.

6.3.3 Respondents' Experiences of the Current System

A few examples of respondents' experiences will now be detailed to evaluate how effective the current system is in practice. The first experience comes from a Chinese lawyer based in Guangzhou:

"I acted in the case of a patent infringement dispute. I represented clients in Guangzhou to take quick and effective action. At my request, the court ordered the preservation of evidence and found evidence of violations and the illegal transfer of profits. However, we hadn't yet gone to trial and the invention patent was quickly declared invalid by the patent re-examination board. I took the case to Beijing to appeal the administrative proceeding of the Patent Re-examination Commission. I met two experts in the field of technology patents, who were both very well prepared; I thought with these experts, we would definitely win the case. However, we lost. This is very common, but not normal. We later heard that we lost because our client is a foreign company. But of course we have no evidence of this."⁴⁹⁷

The experiences of this lawyer highlight several points. Firstly, patent disputes are more often resolved through the courts as they are frequently too complicated for administrative personnel to adjudicate. Secondly, there is still a perception that foreign and local rights holders receive different treatment, although there is no evidence available that there is a systemic bias. Finally, there is also a perception that pursuing a case in a different city may result in a different outcome than if the case is pursued in the 'home' city. This links to the supposed problem of

⁴⁹⁷ Follow-up comments from respondent LAW29T.

local protectionism and also highlights the inconsistency that may exist in enforcement.

The second example of the system in action is taken from a foreign lawyer working for a major law firm in Shanghai:

“I can give you a specific example, (...) to give you an example of the problems we have. We raided a factory in Ningbo? [Uh-huh] They had counterfeits there, we looked into (searching) their records and found another invoice for the same model numbers, so we sued these people for the damages, when the (...) found (...) suing not just for the damages, but (the issue was) how much were the damages, it was actually quite (tragic), because the court gave us damages for the products that had been seized, which I can actually think theoretically, we shouldn’t get damages because they haven’t been sold, [...] but refused to give us damages for the goods which were shipped out, on the basis that the invoice did not say that the products had the trademark on it.”⁴⁹⁸

This second account of the system in action also highlights several problems that may remain in the current IP system in China. First, it confirms the first respondent’s comments regarding different treatment of infringement claims in different cities, echoing the common complaint of local protectionism. Second and perhaps most important, these comments highlight the perception of judicial incompetence, that the judges do not have the training or knowledge to make competent and reasoned decisions. Finally, the problem that damages were awarded for goods not sold, but denied for goods already shipped confirms the comments of several other respondents discussed above at page 207 that the rules regarding evidence are far from satisfactory.

A final example of the system in action comes from a respondent in the services sector:

“One customer who for the 1st time came to China to attend an exhibition had his company name and Chinese website hijacked by

⁴⁹⁸ Interview comments with respondent LAW01.

a Chinese competitor within 1 month of the exhibition. We already told him in advance this might happen. But as usual they didn't heed our suggestion. For them the battle is already lost before they really could enter the Chinese market.”⁴⁹⁹

This third account of the system in action also confirms previous observations. Although this respondent does not explicitly refer to seeking to protect intellectual property rights in China, these comments do reflect the feelings of frustration that were expressed by several of the respondents. Moreover, they highlight the continuing prevalence of the problem of intellectual property infringements and the need for extreme vigilance in seeking to protect IP rights. This would also suggest that a major element of the effectiveness of the system, that of addressing the problem that led to the agreement in question, namely intellectual property infringements, is ineffective as the problem is still pervasive.

Despite these anecdotes concerning the effectiveness of the system in action, there were also positive comments regarding the operation of the IP system, most notably praise for the system of administrative enforcement. For example, this Chinese lawyer working for a major international law firm stated:

“The big advantages between administrative approaches to judicial proceedings are that administrative measures tend to be more expedited and more cost-effective, then they can take, the agencies themselves can take initiative in investigating the infringing activities so that saves costs for the client also.”⁵⁰⁰

Thus, both the speed of administrative action and the lower costs involved for the rights holder are stressed as significant advantages of pursuing infringers through administrative enforcement.

Therefore, overall, despite continuing problems in certain aspects of the system, such as perceptions of local protectionism, poor quality of some judicial

⁴⁹⁹ Questionnaire comments from respondent SERVICES01.

⁵⁰⁰ Interview comments from respondent LAW05.

personnel and inadequate laws regarding evidence, it must be stressed that the system is not completely ineffective. As the mix of comments from respondents shows, although there are some problematic areas particularly linked to the issues of local protectionism and assessment of damages, the system does also have some strong features, particularly the administrative enforcement system. Thus, the effectiveness of the current system would appear to be approaching satisfactory, reflecting the overall judgment of the effectiveness of the system as reasonably effective, according to most questionnaire responses.

6.3.4 Evaluating Effectiveness Overall

According to the comprehensive model of compliance applied in this study, effectiveness needs to be examined both in terms of effectiveness in achieving the stated objectives of the treaty and in addressing the problems that led to the treaty. Therefore, effectiveness will now be considered in the specific context of the stated objectives of the TRIPS Agreement and in addressing the problems that the TRIPS Agreement was seeking to resolve.

6.3.4.1 Effectiveness in the Stated Objectives of the Treaty

The full text of the TRIPS Agreement contains a short preamble before the substantive provisions are detailed. This preamble could be said to encapsulate the objectives of the treaty as summarized in the table below.⁵⁰¹

<i>Desiring</i> to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade; <i>Recognizing</i> , to this end, the need for new rules and disciplines; <i>Recognizing</i> the need for a multilateral framework of principles, rules and disciplines

⁵⁰¹ Adopted from World Trade Organisation, "Agreement on Trade-Related Aspects of Intellectual Property Rights".

dealing with international trade in counterfeit goods;
Recognizing that intellectual property rights are private rights;
Recognizing the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives;
Recognizing also the special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base;
Emphasizing the importance of reducing tensions by reaching strengthened commitments to resolve disputes on trade-related intellectual property issues through multilateral procedures;
Desiring to establish a mutually supportive relationship between the WTO and the World Intellectual Property Organization (referred to in this Agreement as "WIPO") as well as other relevant international organizations;

Figure 6-9 Stated objectives of the TRIPS Agreement

Hence, the stated objectives of the TRIPS Agreement could be summarised under various headings. First, Members aim to reduce distortions and impediments to international trade, and second, to establish a multilateral framework of rules concerning trade in counterfeit goods and to reduce tension by resolving disputes multilaterally. A further aim is to recognize the needs of different national systems in terms of public policy objectives and economic development and finally, to build relationships with WIPO and other international organizations.

Overall, the TRIPS Agreement has been reasonably successful in achieving these objectives. Certainly the Council for TRIPS has worked hard to establish a positive working relationship with WIPO, as well as with other international organisations. In addition, the establishment of a formal set of multilateral rules and disciplines has also been successful. However, perhaps the greatest success in terms of the stated aims of the Agreement, certainly from a Chinese perspective, is in reducing tensions through the establishment of the dispute resolution body. This can

be clearly seen in the diminishing of IP-related trade tensions between China and the US since China acceded to the WTO in 2001.

Tensions between China and the US escalated in the 1990s, as the US grew increasingly impatient at the slow pace of IP reforms, despite China's efforts during the 1980s and early 1990s to establish a framework for the protection of intellectual property. As US impatience reached breaking point, they took drastic action. The US threatened massive trade sanctions under section 301 of the US Trade Act 1974, which empowers the United States Trade Representative (USTR) to identify countries with inadequate intellectual property protection and impose sanctions if necessary. Section 301 action is so serious; it has even been described as the "H-bomb of trade policy."⁵⁰² In November 1991, the United States threatened China "with reciprocal sanctions in the form of 100% tariffs imposed upon a list of \$1.5 billion worth of goods", later scaled down to \$750 million.⁵⁰³

Under this threat of sanctions based on section 301, China narrowly averted an outright trade war by agreeing to a Memorandum of Understanding (MOU) on the Protection of Intellectual Property in January 1992.⁵⁰⁴ To comply with this MOU, China amended the Patent Law in 1992, the Trademark Law in 1993 and passed the Unfair Competition Law in 1993 to protect business secrets. Under the 1992 MOU, China also agreed to join the Berne Convention and the Geneva Convention, which it did on October 15th 1992 and September 1993 respectively. Although the 1992 MOU was successful at establishing a comprehensive framework for intellectual property protection, tensions with the US escalated again in 1994 and both sides threatened

⁵⁰² Yu, "From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century", 138.

⁵⁰³ Feder, "Enforcement of Intellectual Property Rights in China: You Can Lead a Horse to Water But You Can't Make it Drink", 240.

⁵⁰⁴ Endeshaw, *Intellectual Property in China: The Roots of the Problem of Enforcement*, 36.

major trade sanctions. This was contrary to Chinese expectations; “[t]he Chinese expected that the constant stream of laws would... stop or at least, minimise any criticism from foreign investors, particularly the United States... Yet, rather than subsiding, United States critiques only changed direction.”⁵⁰⁵

On June 30th 1994, the USTR cited China as a Priority Foreign Country under the Section 301 provisions and again threatened that if an acceptable agreement could not be reached by December 31st, then 100% tariffs would be imposed on a broad selection of Chinese exports. As negotiations failed to reach a swift conclusion, this deadline was extended to February 26th 1995.⁵⁰⁶ As a consequence, China and the US reached a second agreement in late February 1995, only hours before the deadline, which specifically dealt with “improving the enforcement structure,”⁵⁰⁷ through an agreement letter and a detailed action plan. Despite noted improvements in IP protection following the 1995 Agreement, by April 1996, China was once again designated as a Priority Foreign Country by the USTR, which again triggered the investigation process and associated threat of sanctions. Subsequently, a new Accord was also reached in 1996, just before the deadline of June 18th, which reaffirmed China’s commitments to protecting intellectual property. Specifically, the 1996 Agreement dealt with implementation of the 1995 Action Plan, rather than including new substantive requirements.⁵⁰⁸

⁵⁰⁵ Ibid. 37.

⁵⁰⁶ Feder, "Enforcement of Intellectual Property Rights in China: You Can Lead a Horse to Water But You Can't Make it Drink", 242.

⁵⁰⁷ Yu, "From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century", 146.

⁵⁰⁸ QJ Kong, "Intellectual Property Rights protection in post-WTO China: still an incurable blight on Sino-US trade relations?" *Issues & Studies*, 38 (3), (September 2002), 63.

The United States' policy of pushing for IP reform in China through coercive unilateral action was heavily criticised in the late 1990s.⁵⁰⁹ The cycle of threatened sanctions and negotiated agreements led to hostility among the Chinese people and lost credibility for the US. It has been argued that the 1992 MOU, 1995 Agreement and 1996 Accord are unequal and are merely designed to pressure China into accepting an American model of IP law and that their unequal nature "will prove to be the undoing of the agreement."⁵¹⁰ Therefore, an alternative mechanism for initiating and nurturing intellectual property law reform became necessary by the end of the twentieth century.

The alternative that emerged is the TRIPS framework offered by the WTO, which, as a multilateral trading body, can offer a more credible and sustained alternative to the US' unilateral pressure, without creating such resentment.⁵¹¹ It is clear that in comparison with the repeated pattern of IP-related tensions with the US in the 1990s, since WTO entry in 2001, China has not experienced such intense pressure. Furthermore, the US has followed the processes set down by the WTO dispute resolution body to raise concerns about China's intellectual property system. Thus, the filing of the complaint to the WTO in April 2007⁵¹² could actually be seen as a positive step as it shows that the multilateral dispute resolution mechanism provided by the WTO is diverting disputes which would previously have led to bilateral tensions and possible sanctions. However, the US claims that China has reacted to the filing of this complaint with the WTO by limiting its cooperation and

⁵⁰⁹ For an overview of Sino-US relations with regards to intellectual property see: SJ & Konan La Croix, DE, "Intellectual property rights in China: The changing political economy of Chinese-American interests", *World Economy*, 25 (6), (June 2002), 759-788.

⁵¹⁰ Endeshaw, *Intellectual Property in China: The Roots of the Problem of Enforcement*, 18.

⁵¹¹ M.N. Schlesinger, "Intellectual Property law in China: Part I- Complying with TRIPs requirements", *East Asian Executive Reports*, 19 (1), 19.

⁵¹² Discussed above at page 216.

even blocking the import of US films.⁵¹³ Therefore, the use of the WTO's dispute settlement mechanism has clearly not eliminated all hostility associated with IP-related trade disputes.

On the other hand, although it is a stated objective of the TRIPS Agreement to recognise the needs of different national systems, in practice, national systems that do not accord with some Members' expectations can expect heavy criticism. In the case of intellectual property protection in China, this can clearly be seen in the emphasis placed by trading partners on reforms to increase the use of criminal and civil penalties. As China's legal system has historically relied on administrative enforcement, criminal and civil enforcement are unsurprisingly less developed. China could still be meeting its TRIPS obligations, but because the system does not match the expectations of some WTO Members, it comes under strong pressure to reform the system. Some Members have also criticised the US for pressurising for so-called TRIPS-plus reforms and pressurising developing country Members to comply before the expiration of their transition period.⁵¹⁴ Therefore, in terms of respecting the need for flexibility in implementation, the TRIPS Agreement may not be completely fulfilling its objectives.

Overall, the TRIPS Agreement could be said to be successful in its stated objectives, particularly in providing a multilateral process for dispute resolution and a multilateral framework of rules, as well as providing links with WIPO and other international organisations. However, the Agreement is arguably less successful in its

⁵¹³ Peter Ollier, "China accused of blocking US films", *MIP Week*, December 14th 2007, available at <http://www.managingip.com/Article.aspx?ArticleID=1787489&LS=EMS154047> accessed December 16th 2007.

⁵¹⁴ Mohammed El-Said, "The road from TRIPS-minus to TRIPS, to TRIPS-plus: Implications of IPRs for the Arab world", *Journal of World Intellectual Property*, 8 (1), 53.

stated objective of recognising the needs of different Members, particularly developing country Members, and the need for flexibility in implementation.

6.3.4.2 Effectiveness in Tackling the Problem of Intellectual Property Infringements

The second element of effectiveness that should be considered is the effectiveness of the TRIPS Agreement in tackling the problem that it was drafted to combat, namely the problem of intellectual property infringements. It is difficult to assess the incidence of intellectual property infringements due to the obscure nature of the activity. However, various estimates are made of the extent of the problem globally and this may give some indication of the piracy level overall, although any changes cannot be directly linked to the TRIPS Agreement. For example, the International Intellectual Property Alliance (IIPA) compiles statistics for the level of piracy in specific countries and the estimated losses suffered as a consequence.

Table 6-10 Estimated losses from piracy in China according to the IIPA⁵¹⁵

Year	Estimated losses (in millions of US dollars)
2002	1893.3
2003	2859.2
2004	2530.9
2005	2643.9
2006	2207.0

As Table 6-10 demonstrates, there has not been a significant decrease in estimated losses due to piracy since China acceded to the WTO in 2001. Therefore, it is doubtful that accession to the TRIPS Agreement has been effective at tackling intellectual property infringements in China. However, these figures are in stark contrast to Chinese figures which show a continuing decline in piracy rates and

⁵¹⁵ Source: International Intellectual Property Alliance, "2007 Special 301 Report: People's Republic of China (PRC)", <http://www.iipa.com/pdf/2007SPEC301PRC.pdf>, accessed June 14th 2007.

associated losses. For example, figures from the China Internet Network Information Centre show that pirated software accounted for 24% of the Chinese market in 2006, a 2% decrease from 2005.⁵¹⁶ Officials claim the discrepancy between the low rates found by their study and considerably higher rates estimated by international bodies is largely due to the exclusion of free software in their calculations.

However, despite significant discrepancies in the piracy rates found by international and domestic Chinese bodies, official Chinese estimates still recognise counterfeits as a major part of the Chinese economy, as demonstrated by a July 2003 report by the State Council's Development Research Centre, which estimated the market value of counterfeits in China in 2001 as between \$19 and \$24 billion dollars.⁵¹⁷ In addition, a recent study by the American Chamber of Commerce in Beijing found that "forty percent of companies surveyed said that the volume of counterfeiting of their products in China increased, while only 4 percent saw a decline".⁵¹⁸ Furthermore, as many respondents in this study did not rank the current IP system as highly effective and almost all respondents had experienced problems with the IP system, it is undeniable that problems with effectiveness may still exist, although assessing the level of IP infringements is always going to be a matter of estimation due to the opaque and illegal nature of the activity.

6.4 Summary and Conclusion

This chapter has considered the implementation of the TRIPS Agreement in China, the compliance of China's amended IP system with the TRIPS Agreement, and the effectiveness of this revised system at meeting the stated aims of the TRIPS

⁵¹⁶ Xinhua, "China claims to be repelling software pirates", August 11th 2007, available at http://news.xinhuanet.com/english/2007-08/10/content_6509504.htm accessed October 21st 2007.

⁵¹⁷ USTR, "2003 Report to Congress on China's WTO Compliance", available at http://www.ustr.gov/assets/Document_Library/Reports_Publications/2003/asset_upload_file425_4313.pdf accessed October 17th 2007: 51.

⁵¹⁸ "US business groups say Chinese product piracy rising despite enforcement", *International Herald Tribune*, April 26th 2007.

Agreement and at tackling the problem of IP infringements more generally. In terms of the changes made in response to TRIPS accession, it was found that almost all respondents have noticed a positive change in the IP system in the past five years. In addition, the sheer quantity of laws and regulations amended or enacted during the main period of revision from 1999-2002 illustrates the significant effort that China has taken to implement TRIPS obligations into domestic legislation. It is also clear that TRIPS accession led to major changes in the enforcement system such as the introduction of injunctions and the possibility of judicial review of final administrative decisions and thus, *implementation* of TRIPS provisions in China is satisfactory overall.

However, *compliance* with the TRIPS Agreement is more difficult to assess. Although China appears to be in substantive compliance with the majority of its TRIPS obligations, compliance is in doubt with some provisions, as illustrated by the recent WTO complaint initiated by the US against China. These outstanding areas of possible non-compliance include whether the level of damages awarded is sufficient to compensate the rights holder for damage suffered under TRIPS Article 45(1) and whether the availability of criminal penalties and penalties awarded are sufficient to act as a deterrent under TRIPS Article 61. Ultimately, determination of these areas of TRIPS compliance is a matter of judgement.

Turning to the *effectiveness* of the current system, anecdotes from respondents detailing their experiences with the system in practice highlight some ineffective features of the current enforcement framework. Respondents have experienced local protectionism, judicial incompetence, perceived discrimination against foreign rights holders and problems with evidence. Overall, many respondents expressed frustration with seeking to enforce IP rights in the Chinese system, but some respondents were

also keen to point out certain strengths of the current IP system, particularly in administrative proceedings. Thus, the effectiveness of the current system is extremely difficult to assess; in any jurisdiction, the IP system may not be perfect and minor problems may exist. However, although improvements have obviously been made in China's IP system since WTO accession, significant barriers still exist to inhibit effective enforcement. In general, although the TRIPS Agreement has been largely successful in meeting its aims, the problem of intellectual property infringements has not diminished and consequently, effectiveness is still a problem in the IP system in China.

7 Revisiting the Model and Devising Solutions

7.1 Introduction

The previous three chapters have applied a comprehensive model of compliance to China's implementation of the TRIPS Agreement and the consequent effectiveness of the current IP system in China. Clearly there are both non-country specific factors relating to the TRIPS Agreement itself and the international environment, as well as factors specific to China which impact upon China's overall compliance with the provisions of the TRIPS Agreement.

Consequently, this chapter will first revisit the key concepts of legal development and the comprehensive model of compliance outlined in the literature review and then modify this model for the specific context of China's compliance with the TRIPS Agreement. This will draw together the findings of the previous three chapters. Next, improvements discussed by respondents which can positively influence China's compliance will then be identified and the future for IP protection in China considered. Then, the future for the IP system in China will be explored. Finally, the dynamic processes of change which actually impact upon compliance will be considered from the perspectives of China's intention and capacity to comply with its commitments.

7.2 Analysing IP in China using Key Concepts of Legal Development

In the literature review, several key concepts which have previously been used to analyse the development of law in China were discussed. It is useful to return to these concepts to see how well they can explain the specific development of IP protection in China.

7.2.1 *Legal Transplants*

In the literature review chapter, the first key concept of legal development to be outlined was that of legal transplantation. According to Watson, foreign legal rules can be transplanted into countries with very different traditions, such as the adoption of Roman law in various European nations. However, this does not appear to be the case in the example of IP development, as problems still exist with the implementation and enforcement of the transplanted IP laws in China.

On the other hand, Montesquieu emphasised environmental and social factors as the key barriers to successful legal transplants. Kahn-Freund adapted Montesquieu's work for the twentieth century, by shifting the emphasis to political factors. Do political factors act as the main barrier to successful transplants of TRIPS-complaint laws into China? Although political factors are undoubtedly a contributing factor as the TRIPS Agreement was primarily drafted by key WTO Members sharing liberal democratic backgrounds, many other factors also play a significant role in China's current IP system as discussed in chapter 5. Therefore, existing discussions of legal transplantations are insufficient to completely explain the failure of China's current IP system to fully comply with TRIPS standards.

7.2.2 *Legal Legitimation*

The second key concept of legal development examined in the literature review was that of legal legitimation. According to Haley, the legitimacy of the imported laws is contingent upon the legitimacy of the authority promulgating or enforcing the new rules. Therefore, it is necessary to consider lawmaking and enforcement as separate components to fully understand the process of legal transplantation.

In the case of China's transplantation of TRIPS-compliant IP laws and regulations, it is essential to consider implementation into domestic legislation and enforcement of these laws separately, which would suggest that legitimization is a relevant concept in the development of TRIPS compliance. However, discussion of legal legitimization again focuses on the political authority of the body imposing the legal rules, to the exclusion of other significant non-political factors. Therefore, although the legitimacy of the laws is a significant factor, the concept of legal legitimization alone is inadequate to fully explain China's current IP system and the influence of the TRIPS Agreement.

7.2.3 Selective Adaptation

The third and final key concept of legal development outlined in the literature review was that of selective adaptation. Selective adaptation is the strategy adopted by countries seeking to balance the demands of externally-imposed international norms and pre-existing local legal norms. The initial use of selective adaptation as witnessed in the development of laws in Asia, including IP laws, was that laws were implemented into domestic legislation, but not consistently enforced, if at all. In the specific context of IP development in China, it is clear that IP laws cannot merely be promulgated and not enforced. Particularly since the 1990s, there has been a strong emphasis on enforcement of IP laws, which demonstrates that international partners are much more aware of this previous strategy and mere passing of laws is no longer seen as sufficient. This is reflected in the final text of the TRIPS Agreement which emphasises procedural provisions on enforcement as well as incorporating substantive provisions from existing IP conventions.

Consequently, again selective adaptation is an interesting concept with which to analyse the development of IP protection in China. However, similar to legal

transplantation and legitimation theory, the focus is exclusively on the power of the central government to enforce IP legislation. Although the central government in Beijing does play a key role in the current IP system in China, it would be short-sighted to ignore other key contributing factors. Thus, all three key concepts of legal development considered here are insufficient to fully understand the complex nature of China's compliance with the TRIPS Agreement.

Therefore, theories of compliance, which have not previously been applied specifically to IP development in China, offer a broader perspective on the issue of implementing TRIPS obligations into the domestic legal system. By broadening the factors under consideration, it is possible to construct a more comprehensive model of China's interactions with international norms such as those imposed by the WTO.

7.3 Analysing IP in China using Theories of Compliance

In general, it is widely recognised that operationalising compliance is problematic as there is a need to differentiate between implementation, compliance and effectiveness. This is confirmed by preliminary analysis of China's compliance with the TRIPS Agreement. Although the majority of TRIPS obligations have been implemented into domestic legislation, there is still some uncertainty about whether this constitutes compliance. Furthermore, China may be fully complying with its TRIPS commitments, but the IP system may be ineffective at tackling the underlying problem of infringements. Thus, the issue may not be one of China's compliance, but rather one of the efficacy of the TRIPS Agreement in combating the problem it was designed to resolve. Clearly, wider issues than merely China's TRIPS compliance are involved in analysis of the current condition of IP protection in China. Therefore, existing theories of compliance discussed in the literature review chapter will now be

revisited to assess how well they can explain compliance by China with the TRIPS Agreement.

7.4 Revisiting Existing Theories of Compliance

Henkin was one of the first to consider compliance with international obligations and proposed that states choose whether or not to comply based on calculations of cost and advantage discussed above at page 39. In the context of IP in China, Henkin would thus hold that the Chinese government decides whether to comply with the TRIPS Agreement based on a calculation of associated costs (possible sanctions which may be imposed) versus potential benefits (rapid economic development through imitation). This approach is interesting for focusing on strategic incentives to comply, but faces the same criticism as the key concepts of legal development considered in the preceding section, namely that the narrow focus on the role of the state excludes consideration of other significant factors.

Turning to the approach taken by Franck discussed above at page 40, that legitimacy and fairness, both substantive and procedural, of the specific international obligations may be crucial to ensure compliance. In the case of IP protection in China, following Franck's approach would shift the focus of analysis to the TRIPS Agreement. Clearly, chapter 4 demonstrates that the perceived legitimacy and equity of the TRIPS Agreement can have a major impact on a WTO Member's compliance. However, Franck's approach is also problematic as there is no explanation for how the TRIPS Agreement acquires legitimacy. Furthermore, Franck's theory of compliance could also be considered to be too narrow; by focusing solely on the international obligations in question, country-specific factors relevant to that individual Member are ignored.

As considered at page 41, Chayes and Chayes sought to move away from cost-benefit analysis to a managerial theory of compliance that incorporates a state's capacity to comply as well as their intention to comply. This shift in emphasis is a useful contribution to discussion of China's TRIPS compliance as it is important to recognise that coercion towards China cannot induce TRIPS compliance without corresponding improvements in China's capacity to comply. However, Chayes and Chayes still offer an incomplete model of compliance that cannot fully explain China's compliance with the TRIPS Agreement.

Turning to discussion of legal norms, Koh proposed that legal norms need to be internalised by the recipient country before they can be fully incorporated into the domestic legal system. It could be argued that China has not yet internalised legal norms associated with the WTO, despite interacting with the international trade system in the form of the WTO and its predecessor GATT for almost 20 years. Furthermore, Koh's theory as outlined at page 42 offers an explanation for the distinction between formal implementation into substantive law and acceptance into domestic norms, as this reflects the current condition of the IP system in China, that TRIPS obligations have been adopted but not yet accepted into domestic norms. On the other hand, there is no explanation offered by Koh of the process of internalisation and there seems to be little differentiation between internalisation of relevant norms by the state and by individuals or groups in society.

Guzman focused on reputational considerations as the predominant factor in compliance. Taking this approach, China would choose to comply with the TRIPS Agreement in order to build international reputation. Although it is probable that reputational considerations are important to China, it does not seem an adequate explanation of China's TRIPS compliance and other factors found to be central to

TRIPS compliance in this study are omitted from analysis. More liberal theories of compliance, such as proposed by Slaughter and Moravcsik, move away from a state-centred view of compliance to a 'bottom-up' perspective with individuals and private groups as the key actors. Whilst it is essential to consider the role of individuals and private groups, particularly in IP enforcement, it is also crucial not to ignore the role of the state. The central government still plays a central role in the IP system in China and should not be discounted.

Therefore, the major existing theories of compliance taken separately are insufficient to fully explain the process of compliance with the TRIPS Agreement, although they do raise some important points to consider regarding analysis of China's TRIPS compliance. Consequently, a more comprehensive approach is necessary, incorporating various elements of existing theories of compliance. These should include considerations of the role of the state from neorealist theories and the legitimacy and fairness of the TRIPS Agreement itself from Franck. Moreover, China's capacity to comply with the TRIPS Agreement from Chayes and Chayes and reputational factors from Guzman should be considered. Finally, the significance of the legal norms involved and the need to distinguish between implementation into domestic legislation and full acceptance or internalisation of these associated norms from Koh, as well as the role of individuals and private groups from liberal theorists such as Slaughter and Moravcsik are also essential perspectives to include. All these approaches are incorporated into the comprehensive model of compliance used in this study, which is consequently a more appropriate tool with which to analyse China's TRIPS compliance and which will be revisited below at section 7.6.

7.5 Revisiting Previous Studies of Compliance in China

In addition to concepts of legal development which had previously been used to analyse reforms in the Chinese legal system, the literature review also reviewed existing studies of compliance in China. Early studies of China's compliance, such as the study by Lee of China's compliance with international agreements (page 55) found that once China had committed to an agreement, compliance was likely to follow. The results of this study would support this conclusion, but China's position in the international order is so changed as to render Lee's study practically inapplicable to contemporary TRIPS compliance.

Oksenberg and Economy's study of China's compliance with international environmental agreements (at page 56) found that China succeeded most at implementing obligations when they converged with domestic policy aims. It is true that the perception of IP as benefiting foreign rights holders rather than domestic industries could be said to have impeded stronger IP protection in China. The results from this study also accord with Oksenberg and Economy's finding that codification often took place very swiftly, but that enforcement was the real problem.

Kent's analysis of China's compliance with human rights agreements (above page 59) concurs with Oksenberg and Economy's study that compliance needs to coincide with domestic pressures to be obtained. Kent also recognises the different stages of compliance, which can be witnessed in China's TRIPS compliance; implementation into domestic legislation has not led to full *de facto* compliance at the enforcement level.

Frieman's study of compliance with arms control agreements in China (page 59) echoes Kent's conclusion that external and internal pressures need to converge for compliance to follow, but Frieman also observes that China has been willing to bear

substantial costs in order to participate in the international regime from the inside. This desire could also play a part in China's accession to the WTO, although China has not yet become a 'leader' of developing Member countries as predicted prior to accession in 2001.

Carter's evaluation of trademark enforcement in the 1990s focused on cultural factors and factors inherent in the Chinese legal system (discussed at page 60). However, contrary to Carter's findings, respondents in this study rejected cultural influences such as Confucianism and socialism as significant contributors to the current legal system, although this may be due to limitations in research design rather than an accurate reflection of reality . Chan (page 63) examined various aspects of compliance in China, including international trade, environmental agreements, arms control and human rights and concluded that overall compliance is satisfactory to good, but that certain problem areas remain. Chan also highlighted transparency as a problem area specific to compliance in global trade, a finding which is supported to a certain extent by the results of this study which found that transparency in IP enforcement was a particular issue.

The three-stage theory of IP development (described at page 64) as proposed by various commentators based on developments in other Asian jurisdictions could also be applicable to TRIPS compliance in China, but is clearly too simplistic to offer a complete interpretation of the current IP system. Therefore, the results from this study do largely concur with the main conclusions of existing studies of compliance in China. However, the comprehensive model of compliance applied in this study draws together some of these previous findings into a more complete model of compliance. This comprehensive model will now be revisited in order to modify it for the specific context of TRIPS compliance in China.

7.6 Revisiting the Model

The comprehensive model of compliance applied in this study was initially formulated to account for compliance with international environmental accords. Thus, it is important to consider to what extent this model may be applicable to international intellectual property agreements. Clearly, there are differences in the significance of some key factors. For example, pressure from NGOs was considered crucial to increased compliance in the environmental arena, but NGOs are not as powerful in the IP field. In addition, it is difficult to analyse all factors within the rigid framework of the existing model as many categories or key factors overlap. For example, the lack of consistency in enforcement was considered as a political/institutional factor, but could also be seen as attributable to a lack of administrative capacity in the enforcement system, or to a lack of training amongst the relevant personnel. Similarly, although respondents in this study did not consider cultural factors to be significant, attitudes and values did play a part and it is difficult to distinguish between the direct cultural influences of Confucianism and socialism and their indirect influence on contemporary values in Chinese society.

Therefore, can the basic structure of the model of compliance, incorporating both non-country- and country-specific factors, as well as consideration of implementation, compliance and effectiveness as separate components remain valid for the context of IP protection? It is contended in this thesis that the basic structure of the model *is* applicable to analysis of compliance with international IP agreements, but that several modifications of the key factors are necessary to reflect the different context of compliance. The distinct elements of the model of compliance will be reviewed below in order to outline the specific refinements necessary to the existing model.

7.6.1 Non-country-Specific Factors Affecting Compliance with TRIPS

As discussed in chapter 4, there are a variety of factors which are not specific to China which may influence compliance with the TRIPS Agreement. These factors relate to the characteristics of the TRIPS Agreement itself, characteristics of the activity involved in the Agreement, specifically the problem of intellectual property infringements, and finally factors connected with the international environment. The non-specific factors influencing TRIPS compliance included within the model are those relating to the specific activity of intellectual property infringements; the characteristics of the TRIPS Agreement itself, including both substantive and procedural provisions; and the international environment, including the role of NGOs and the media.

In terms of the characteristics of the activity involved, based on analysis of compliance with environmental agreements, it was previously proposed that the number of actors, the number of countries and any economic incentives involved would all have a significant effect on TRIPS compliance. However, the characteristics of IP infringements are markedly different from environmental actions and thus the characteristics of the activity involved may play a different role in the model of compliance. Specifically, as IP piracy and counterfeiting are global activities, there are both a large number of actors and countries involved in the activity. In addition, economic incentives actually encourage some infringements, as there may be short-term economic gains from IP infringements. Thus, although IP infringements have different characteristics from environmental damage, the specific characteristics involved support the notion that the fewer countries and actors involved in an activity, the easier it may be to encourage compliance with international agreements regulating that activity.

The international environment was one of the most significant influences on compliance with international environmental accords, in contrast to its role in the IP context, where the international environment plays a minimal part. The sole feature of the international environment that was found to play a significant role in TRIPS compliance is the number of countries involved in the WTO process, and thus obliged to comply with the provisions of the TRIPS Agreement. As more and more countries join this regime, the TRIPS Agreement may gain momentum towards compliance. Consequently, the international environment may play a minor, yet positive role in encouraging compliance with the TRIPS Agreement.

The most significant non-country specific factors which have been shown to influence compliance with the TRIPS Agreement are those associated with the TRIPS Agreement itself. As discussed in chapter 4, the drafting history of the Agreement has given rise to a certain degree of resentment amongst developing countries that the TRIPS framework favours developed country Members. This perceived inequity in the TRIPS Agreement makes it less likely that all Members, especially those from developing economies, will be inclined to push for full compliance. The nature of the TRIPS Agreement as a minimum standards agreement also has the unavoidable consequence that the substantive provisions contained within the Agreement lack precision. This imprecision also discourages full compliance from all Members.

The perceived inequity and imprecision of the TRIPS Agreement are the most significant non-country specific factors influencing TRIPS compliance, but there are other minor factors associated with the TRIPS Agreement also affecting compliance. For example, the burden of fulfilling TRIPS' notification obligations and a lack of sufficient cooperation and rewards from developed country Members both act as a disincentive to compliance. However, it should also be recognised that there are

several features of the TRIPS Agreement and the framework associated with the WTO that can offer positive enticements towards compliance. For instance, the Council for TRIPS established by the TRIPS Agreement is recognised as playing an important role in monitoring and encouraging compliance and the WTO dispute resolution process is also an asset of the WTO framework; by encouraging countries to join the multilateral forum of the WTO, they can avoid unilateral actions by powerful trade partners.

Overall, there are various factors influencing compliance with the TRIPS Agreement which are not specific to China. Although the characteristics of IP infringements are unique, in general, they play a similar role in compliance as in other activities governed by international agreements. In contrast, the international environment is much less significant in the context of international intellectual property, perhaps because of the lack of global consensus about the importance of IP protection and the relationship between IPR and economic development. The non-country specific factors which are seen as most significant in the context of compliance with the TRIPS Agreement are summarised below in Figure 7-1.

Non-country Specific Factors Influencing Compliance with the TRIPS Agreement		
	<u>Characteristics of the TRIPS Agreement</u>	<u>Characteristics of the Activity Involved and the International Environment</u>
MAJOR INFLUENCE	<ul style="list-style-type: none"> • Perceived inequity of the TRIPS Agreement • Imprecision of TRIPS provisions 	<ul style="list-style-type: none"> • Short-term economic rewards encourage IP infringements • Large number of actors and countries involved in IP infringements
MINOR INFLUENCE	<ul style="list-style-type: none"> • Burden of notification obligations • Insufficient incentives and cooperation from developed country Members 	<ul style="list-style-type: none"> • Lack of consensus in public opinion • Resentment towards MNCs' pressure for stronger IP protection
POSITIVE INFLUENCE	<ul style="list-style-type: none"> • Role of the Council for TRIPS • Role of the WTO DSB as a multilateral forum for resolving disputes and imposing sanctions 	<ul style="list-style-type: none"> • Number of countries included in the WTO system • Role of international organisations such as WIPO

Figure 7-1- Non-country specific factors influencing compliance with the TRIPS Agreement

7.6.2 Country-specific Factors Affecting Compliance with TRIPS

In addition to the factors affecting TRIPS compliance which are not specific to China, chapter 5 illustrated the factors related to China specifically that influence overall compliance with the TRIPS Agreement. These factors included basic parameters such as the short history of IP in China; fundamental factors such as the political system in China; and proximate factors which include the attitude of the central leadership in Beijing and the overall lack of trained and experienced personnel in the IP system.

The basic parameters of China could be considered as significant factors influencing compliance with the TRIPS Agreement. However, in contrast with previous studies, historical and cultural factors, such as the continuing influence of Confucianism, were largely dismissed by respondents in this study as significant influences on the current IP system in China, however, this finding needs further verification. China's previous behaviour in the IP field was also not perceived to be a significant indicator of present-day compliance. In fact, the only parameters which were found to have a noticeable effect on China's TRIPS compliance were the size of China and China's neighbours. China's sheer size has obvious implications for the enforcement of intellectual property rights; of particular concern is the division that exists between central and local levels of government in China. A more minor consideration is the role of China's neighbours, which may be a positive influence on China's IP system by providing more effective IP systems for China to emulate. Therefore, although China's size is a major influence on the current IP system, particularly IP enforcement, overall the parameters are not highly significant in the model of China's compliance with the TRIPS Agreement.

In contrast to parameters, there are several fundamental factors which are of prime importance for China's TRIPS compliance. Fundamental factors were considered under the headings of attitudes and values, political and institutional factors and economic factors. In terms of attitudes and values, although the cultural influences of Confucianism and socialism were largely rejected as strong influences on the contemporary IP system, the attitudes and values amongst the public in China were seen as important by respondents in this study. In fact, a lack of awareness of IP rights was highlighted as the most significant influence on the current IP system by respondents. This lack of awareness was also linked to a lack of the concept of individual rights as a 'rights culture' is not pervasive in China. The use of relationships or *guanxi* was also felt to be an influence on the operation of the IP system. Overall, attitudes and values in China are more significant influences on the development of the IP system and corresponding TRIPS compliance than the cultural factors which are often blamed by commentators. However, other fundamental factors could be considered to be more significant overall.

Political and institutional factors are major contributors to the development of the current IP system in China. Previous studies had highlighted a lack of transparency as a significant problem, but in contrast, many respondents in this study cited better transparency as a key improvement they had witnessed in the IP system in recent years. However, transparency with regards to enforcement action was still felt to be a problem. The other main political and institutional factor which contributes to the state of the current IP system in China is the lack of consistency in enforcement. Frustration was expressed by many respondents at inconsistent enforcement of IP rights, although many respondents also praised the administrative enforcement system.

Turning to economic factors, local protectionism was one of the most significant factors identified by respondents. Local protectionism almost defies classification; although it is considered here with economic factors, local protectionism is also strongly linked with political and institutional factors and even societal attitudes and values such as the influence of *guanxi*. The final economic factor which was discussed with respondents was the role of the government in the economy. However, this was only a minor concern to most respondents.

Finally, proximate factors also play a crucial role in influencing the compliance of China's current IP system with the TRIPS Agreement. Clearly the most significant aspect of proximate factors analysed in this study was the administrative capacity within the IP system. Specifically, the level of penalties imposed on infringers was seen as inadequate by many respondents and judicial enforcement of IP rights was also seen as in need of improvement, particularly in terms of judicial powers to enforce judgments. The other proximate factor which has a crucial impact on the development of the current IP system is the lack of trained and experienced legal personnel. This lack was expressed as a lack of quality rather than a lack of quantity amongst the relevant personnel in the IP system. These factors are shown below in Figure 7-2.

<u>Parameters</u>	
MAJOR INFLUENCE	Short history of the IP system in China
	Division between central and local government
MINOR POSITIVE INFLUENCE	Role of neighbouring countries as model IP systems
<u>Fundamental Factors</u>	
MAJOR INFLUENCE	Lack of public awareness of IP rights
	Local protectionism
	Lack of consistency in enforcement
MINOR INFLUENCE	Lack of transparency, particularly in enforcement
	Influence of guanxi/’relationships’
	Perceived unequal treatment between SOEs and private companies
<u>Proximate Factors</u>	
MAJOR INFLUENCE	Lack of trained and experienced personnel
	Inadequate penalties
	Weak judicial powers
MINOR INFLUENCE	Complex bureaucratic structure of overlapping IP agencies
	Perception that the enforcement process will be long and costly
POSITIVE INFLUENCE	Role of domestic Chinese companies
	Attitude of the central leadership
MINOR POSITIVE INFLUENCE	Role of NGOs such as the QBPC

Figure 7-2- Factors specific to China influencing compliance with the TRIPS Agreement

7.7 Suggested Improvements to the Current IP System

Given that certain key factors have been highlighted as crucial for influencing China’s overall TRIPS compliance, it is informative to evaluate respondents’ comments regarding possible improvements to the current system which they believe could increase overall compliance and effectiveness of the IP system. On the questionnaire used to make initial contact with the respondents, a number of possible improvements to the IP system were suggested and respondents were asked to choose the improvements that they felt would make the most significant difference to the current system of protection (see Appendix 3 for details). Respondents were free to choose more than one option as appropriate and to add their own comments on possible improvements. The numbers of respondents choosing each option are detailed in the table below. These suggested improvements to the current system will now be considered in more detail.

Table 7-3 Suggested improvements in the IP system as selected by respondents

<u>Suggested Improvement</u>	<u>Number of Respondents</u>
Campaigns for greater public awareness	33
Stronger commitment from central government	21
Greater international cooperation	20
Better training for administrative personnel	20
Better training for legal personnel	16
More money dedicated to IP protection	15
Better training for customs personnel	15
Other	6

7.7.1 Increasing Awareness

Unsurprisingly, given that a lack of public awareness of IP rights was selected as the most significant contributing factor to the current system, campaigns for greater public awareness were highlighted by most respondents as the most important

improvement. This emphasis on increasing awareness of IP rights was reflected in the comments of many respondents. For example, when asked how the current system could be improved, this respondent succinctly answered:

“Awareness of IPR nationally needs to be further promoted.”⁵¹⁹

The benefits of increased awareness of IP rights are obvious; infringements would be minimised and thus the IP system would become more efficient as the resources would be spread less thinly. Furthermore, increased awareness of IP rights by individual rights holders could directly benefit the government by lightening the government’s enforcement burden, as recognised by this respondent:

“China is a country which is led by the executive. As I mentioned earlier, rights holders are highly dependent on the government, in literature and the arts, let alone the general public. Improved awareness will be beneficial to the government, if the government treats the public’s rights awareness as its own policy.”⁵²⁰

However, the difficulties of increasing awareness of IP rights are also recognised by respondents:

“([Kristie]: So what do you think would make them change their minds about buying... counterfeit goods?)) It’s hard to change someone because they don’t have their own (...), if it’s their own IP then they will, they will, I guess protecting IP would be more important, but if they don’t have any IP to protect, they will simply benefit from (these infringers of IP) so it’s difficult to change their mindset.”⁵²¹

In addition, it is not entirely clear exactly what is meant by ‘awareness’ of IP rights: specifically, does awareness refer to awareness of an individual’s rights or of the IP laws and regulations on the statute books or of the IP enforcement system? At least one respondent felt that awareness of the concept of IP rights was sufficient, but that awareness of the enforcement process was lacking:

⁵¹⁹ Questionnaire comments from respondent LAW23T.

⁵²⁰ Follow-up comments from respondent LAW29T.

⁵²¹ Interview comments from respondent LAW05.

“Until recently there has not even been legislation that adequately covers IP protection. Now that this is partially in place, then it is the enforcement procedures and processes that companies and individuals are neither familiar with, or recognise the need for IP protection.”⁵²²

Therefore, although campaigns to increase awareness of IP rights were stressed by a majority of respondents as key to improving the current system of protection, there also appears to be a lack of consensus about exactly what kind of ‘awareness’ is necessary and how best to enhance this awareness.

7.7.2 Stronger Commitment from Central Government

The second suggested improvement that respondents felt was important is a stronger commitment from the central government. The role of the government was explicitly discussed by several respondents, such as this Western respondent from a multinational operating in China who felt that:

“The government’s commitment and ability to enforce IPR are always very important.”⁵²³

In fact, resolve from the central government in Beijing was seen as decisive for enforcement efforts nationwide:

“I believe that if, if the central government is taking an interest, then something will happen in the whole country.”⁵²⁴

However, respondents were vaguer about exactly how stronger government commitment would contribute to a more effective IP system in China. Overall, determination from the central government was discussed in connection with various factors such as tackling the issue of local protectionism and increasing the levels of penalties awarded in IP infringement cases. Thus, although the attitude of the central government was seen as crucial for sustained improvements to the system, the process

⁵²² Questionnaire comments from respondent SERVICES02.

⁵²³ Email follow-up comments from respondent MANU02.

⁵²⁴ Interview comments from respondent LAW31.

of how this commitment would lead to more effective protection was blurred. Therefore, as stated above, there may be a need to broaden efforts to increase government commitment to provincial levels of administration, not just central government.

7.7.3 *Greater International Cooperation*

The third improvement that was suggested by respondents was greater use of international cooperation. Greater international cooperation was stressed as potentially benefiting the IP system in various ways, through moulding the attitude of the government, through improving the expertise of the personnel and through providing positive incentives for consistently enforcing IP laws and regulations:

“In addition, the government may promote cooperation both nationally and internationally, to keep increasing the quality of personnel from related professions, and thus to ensure that the relevant laws and regulations are implemented smoothly.”⁵²⁵

Specifically, greater international cooperation was linked with exchange programmes for professionals and personnel working within the current IP system in China by several respondents:

“I think one of the important things also is we need to send more and more students, or teachers, or legal experts, to go overseas to have more chances to exchange with overseas IP protection experts. To work... this is... if we can exchange ideas, exchange views, people will find better solutions to solve not only problems in China, but also problems concurrently met with the whole world.”⁵²⁶

These comments suggest that such programmes do not only benefit the effectiveness of the IP system in China, but may also have reciprocal benefits for enforcing IP globally. Furthermore, international cooperation was explicitly contrasted with the current confrontational attitude taken by some trading partners such as the US:

⁵²⁵ Questionnaire comments from respondent LAW30T.

⁵²⁶ Interview comments from respondent LAW16.

“Instead of criticizing only, maybe more efforts should be devoted to the countries working together constructively to tackle the problem which will ultimately benefit everyone.”⁵²⁷

Therefore, respondents indicated that they may be more receptive to cooperation from international partners and organisations as opposed to the current criticisms which provoke more resentment than improvements. International cooperation can thus play an important role in improving the IP system in China without creating tension.

7.7.4 Training for Key Personnel

Another area of suggested improvements discussed by respondents is the area of training for key personnel in the intellectual property system. Clearly, expanded training for legal, administrative and customs personnel would aim to overcome the problem of a lack of trained and experienced personnel identified as a substantial contributing factor to the problems in the current system. Many respondents expressed varying degrees of frustration that they felt with the current IP system, particularly in terms of inaccurate decisions being reached by inexperienced personnel.⁵²⁸ In addition, more extensive training may confront the issues of inconsistency in enforcement and inadequate penalties imposed by personnel in the IP system, both of which were also ranked as highly significant contributors to current shortcomings. This link between training and a lack of consistency is made explicitly by this respondent:

“And to provide education [uh-huh] to their legal people, you know, to the court people [uh-huh], to judges and to, to have them understand I think, what, what intellectual property rights are and you know, um... what is an infringement, to have set standards. [uh-huh]

You know one thing, it's just funny, you, you know, go to one (AIC) and he can look at a certain type of infringement and he'll say yeah,

⁵²⁷ As illustrated by questionnaire comments from respondent LAW05, discussed above at page 186.

⁵²⁸ Interview comments from respondent LAW01.

that's clearly an infringement and you'll go to another one somewhere else and they'll say that's not an infringement [uh-huh].”⁵²⁹

The issue of inadequate penalties was also directly discussed in terms of improving the current system of protection through increasing penalties for infringements. Increasing the level of penalties awarded was one of the key suggestions of respondents of how the current system of IP protection could be improved. For instance, a Chinese lawyer suggested that:

“The patent law and trademark law may be amended again; one proposal is to increase the amount of compensation.”⁵³⁰

However, the likelihood of significant increases in the level of penalties issued is called into doubt by a respondent from a Chinese company:

“The Chinese government will not initiate legislation for large amounts of compensation for IPR infringements, due to the fact that China is still far away from other developed countries in terms of economic development, especially innovation and creativity.”⁵³¹

Consequently, although better training for legal, administrative and customs personnel is identified as crucial to improving the current IP system in China, there may be limits to how much training in isolation can achieve. Better training may need to be linked to changes in the allocation of resources and more basic changes in the political system.

7.7.5 More resources allocated to the IP System

Another of the key suggested improvements of the current IP system in China discussed by respondents was the issue of resources. Simply, there is a lingering perception that the IP system, particularly the enforcement system, suffers from a:

“Shortage of manpower and finance.”⁵³²

⁵²⁹ Interview comments from respondent LAW10.

⁵³⁰ Follow-up comments from respondent LAW12T.

⁵³¹ Questionnaire comments from respondent MANU01T.

⁵³² Questionnaire comments from respondent LAW11T.

In particular, the issue of financial resources was discussed by respondents, in connection with the personnel implementing the system in practice:

“More money is a really clear under-resourcing issue... So we need to allocate, say OK, you know, for a specialist IP division and give them money to do the investigations and the cases, it’s very (rare) for any country in the world, to be fair, but that’s what, that’s the sort of resourcing that we need to do.”⁵³³

This linking of the issue of resources to that of improving the standard of personnel operating within the current system was echoed by another respondent:

“By improving the allocation of human and material resources, especially human resources, the government can equip the Intellectual Property Office with more personnel who understand intellectual property law, to strengthen the fight against IP infringers as a team.”⁵³⁴

Therefore, although respondents did suggest that funding of the IP system was an issue, more money is not necessarily an adequate solution to the under-resourcing issue. The issue of resources also includes human resources and is thus closely linked to discussion of training of personnel in the preceding section.

7.7.6 Administrative Changes to the IP System

Administrative changes discussed by respondents included the issue of establishing a more streamlined enforcement system to avoid overlaps and even rivalry between competing IP agencies and the issue of transparency. This could potentially improve China’s capacity to fully comply with its TRIPS commitments. For example, one respondent stated that China should:

“Form a unified, more authoritative system of intellectual property courts, and increase the uniformity of the transparency of law enforcement to reduce local protectionism.”⁵³⁵

However, there was no clear consensus amongst the respondents concerning the formation of a unified intellectual property agency in China. Indeed, as

⁵³³ Interview comments from respondent LAW01.

⁵³⁴ Follow-up comments from respondent LAW29T.

⁵³⁵ Questionnaire comments from respondent LAW25T.

highlighted above at page 178, any such agency would still need to be divided at a local level. Therefore, the main administrative changes in the IP system would be to streamline the bureaucratic processes, specifically transfer of cases between administrative and criminal agencies, and to increase transparency, particularly in enforcement. This need for greater transparency in enforcement was stressed by this Chinese respondent:

“There is a lack of unified information about violations and no nationwide tracking.”⁵³⁶

Thus, unifying enforcement statistics would provide a more transparent approach to tackling the complex problem of local protectionism.

7.7.7 Strengthening the Role of the Judiciary

Although not all respondents suggested strengthening the role of the judiciary as a possible improvement to the current IP system in China, the weaknesses of the judicial enforcement system, as opposed to the strengths of the administrative enforcement system were consistently emphasised by respondents. Therefore, improving the judicial enforcement system could be seen as a way of spreading enforcement actions across the IP system and possibly easing resource problems in the administrative system.

Furthermore, some respondents did explicitly discuss the role of the judiciary and the need for greater judicial independence:

“The court should have independent judicial power, proper protection of its power in practice, and financial support independent of the national budget. Judges should enjoy high social and economic status.”⁵³⁷

⁵³⁶ Questionnaire comments from respondent LAW11T.

⁵³⁷ Questionnaire comments from respondent LAW24T.

Thus, although the political obstacles to granting greater judicial independence were raised by some respondents discussed above at page 185, there were also some respondents who felt this is a necessary area of reform in the current legal system.

7.7.8 *Legislative changes*

Although the vast majority of respondents emphasised poor enforcement as the main cause of any problems with the current IP system in China, minor changes to the legislation were also discussed in the context of possible improvements to the system. For instance:

“Further improve related legislation, for example, improve the litigation and administrative procedures laws to include discovery procedures.”⁵³⁸

It should perhaps be noted that these suggestions of specific legislative changes which would improve the current IP system came from lawyers practising in this field. However, their suggestions are all valid possible improvements to the substantive framework of laws and regulations. These suggestions include firstly, developing the law of passing off, to assist a rights holder who feels their design has been infringed for example:

“One of the weaknesses that they have here that they have to improve is a lot of their (passing off); they don’t really have anything for that yet. They’ve got that under statute in the unfair practices, unfair competition act [uh-huh] uh... but they, that’s not developed.”⁵³⁹

However, this suggestion may arise from this respondent’s background in a common law system in which passing off is a significant feature of the IP framework of protection. A second suggested legislative improvement is to modify the Lawyers’ Law from 1996 in China:

⁵³⁸ Follow-up comments from respondent LAW07.

⁵³⁹ Interview comments from respondent LAW10.

“I hope and I also wish, the laws, the attorney law will be rectified soon, will be changed soon, because it’s more administrative restriction.”⁵⁴⁰

Arguably, a more significant legislative amendment would be to allow for the enforcing of injunctions and other orders issued by the court. This improvement would alleviate some of the frustration expressed above with the lack of court powers to enforce judgments as discussed previously at page 184:

“If you could (...) the rights holder with that judgment, just like you can in most places in the world, go back to the court and say, bang this guy in jail for us because he’s breached the order, it would be a huge difference, because then we’d start really using the civil system a lot more because there’d be a real remedy at the end of it-; it’s not money-, people don’t ask for much money in most IP cases, it’s an injunction that you can enforce.”⁵⁴¹

Finally, there are some minor legislative changes suggested by respondents which would improve the enforcement process. Specifically, there appears to be a desire to revise the rules of evidence to shift the burden of proof in civil cases and to further amend the rules on transferring cases for criminal liability:

“Civil procedure rules do not allow shifting of burden of proof, which makes it difficult to prove damages. Criminal thresholds continue to make criminal enforcement difficult.”⁵⁴²

Clearly, there are various improvements that respondents feel could be made to the current system of IP protection in China and if successful, these would have a major impact on the IP system. However, even without further far-reaching reforms, respondents remain optimistic about the future of the IP system in China as can be seen below.

7.8 The Future of the IP System in China

Respondents were not specifically asked about the future of IP on the initial questionnaire, but many respondents did comment on their predictions for the

⁵⁴⁰ Interview comments from respondent LAW16.

⁵⁴¹ Interview comments from respondent LAW01.

⁵⁴² Questionnaire comments from respondent LAW01.

development of the system when asked for further comments and in addition, it was a key discussion point in the follow-up interviews carried out. Overall, respondents appeared overwhelmingly positive about the future development of the IP system in China, despite the many problems they had experienced with the current system.

In general, respondents discussed the future of the IP system in connection to four themes: emphasising the role of domestic companies and rights holders in the further development of the system; comparisons (mostly favourable) with lengthy periods of IP development in other countries; emphasis on the timescale of reform; and drawing a close link between further IP reform and continuing economic development in China. These themes are evident in the following sample quotes taken from a variety of respondents.

For example, this international lawyer highlighted the essential need for Chinese rights holders to sustain long-term reforms in the IP system:

Things are improving and will continue to improve, with the main driver being the Chinese companies' desire to be IP creators and licensors and not just IP users and licensees.⁵⁴³

This Chinese respondent gave a very positive overview of the IP system in China, particularly in comparison to the lengthy development of IP protection in developed countries and concluded that:

I believe that China's intellectual property system is gradually improving, but due to its high starting point, China's IP system can achieve the level of the world's greatest countries in a relatively short period of time. For example, the United States and Britain took a century to build today's intellectual property regime, but China may not need a century to achieve this.⁵⁴⁴

⁵⁴³ Questionnaire comments from respondent LAW06.

⁵⁴⁴ Follow-up comments from respondent LAW29T.

Finally, this respondent from a large multinational also expressed optimism about the future of the IP system in China and linked future development explicitly to continued economic development:

I have confidence for the future of China IP system – it will not stop improving while the overall China economy is growing, but I also believe that the IP system can not be in line with that in western countries in short time while the overall economic level is far behind. IP system is an integral part of Chinese social and economic life.⁵⁴⁵

Therefore, despite detailed discussions about the ineffectiveness of the current system, it is important to acknowledge that the majority of respondents were not solely condemning the IP system. Indeed, many were keen to stress the positive elements in the current system and overall were also positive about the future. The final section will now further consider the possible improvements suggested and discussed here in terms of their impact upon China's intention to comply and capacity to comply with the TRIPS Agreement, in order to move towards policy recommendations for future reform efforts.

7.9 Dynamic Processes of Changing Compliance

The preceding sections summarise the most significant factors identified by the documentary data and from respondents' comments as influences on China's current IP system and consequent compliance with the TRIPS Agreement, as well as suggested improvements to the current system. However, a list of these factors alone is not particularly illuminating as to how China's TRIPS compliance has developed over the past few years or how it may change in the future. Therefore, it is necessary to turn to these dynamic processes to understand both the existing compliance with the TRIPS Agreement and possible changes that could increase China's compliance.

⁵⁴⁵ Follow-up comments from respondent MANU02.

The dynamic process of change in compliance over time relates to the two aspects of intention to comply and capacity to comply. These two perspectives can be changed both by internal changes in the country, such as changes in leadership, and by external pressure, for example, offers of financial or technical assistance. In order to describe these dynamic processes of interaction between the factors affecting compliance and China's intention and capacity to comply, it is necessary to first consider: which factors that have been identified as significant for compliance are fixed and which can most easily be manipulated? Which of these factors affect China's intention to comply? And which affect China's capacity to comply?

It is immediately apparent that several of the factors identified in Figures Figure 7-1 and Figure 7-2 above as significant for China's compliance with TRIPS are either fixed or are not easily modified. For example, although the precision of the obligations contained within the TRIPS Agreement was identified as one of the prime characteristics of the Agreement that influenced compliance, these obligations are fixed and could not easily be changed to increase compliance. Similarly, the characteristics associated with the international environment are also fixed or difficult to manipulate. For example, the short-term economic rewards associated with intellectual property infringements are long-standing, but could not be easily minimised to discourage IP infringements.

On the other hand, of the factors identified above as significant influences on China's compliance with the TRIPS Agreement, there are several factors which may be shaped more readily. It is essential to focus on these factors if China's compliance with the TRIPS Agreement is to be maintained and improved further, rather than waste efforts on attempting to manipulate factors which are fixed or of little

consequence. Some of the factors under scrutiny influence China's intention to comply with the TRIPS Agreement and others affect China's capacity to comply.

There are five key factors which most influence China's intention to comply with the TRIPS Agreement. First, increasing awareness of IP rights in general can assist in tackling the problem of a lack of awareness of intellectual property which was identified by respondents as the key cause of problems in the current system. This in turn can increase intention to comply by facilitating the acceptance of the imported norms by society in general, similar to the process of internalisation as described by Koh.

The second factor which can strongly influence intention to comply in China is that of pressure applied to the government. It is undeniable that external pressure from trading partners or international organisations such as WIPO can encourage or maintain government commitment to fully comply with the TRIPS Agreement. However, it has also been recognised by many respondents that external pressure can create resentment in China if too heavily imposed without sufficient recognition of China's achievements in developing a modern IP system to date. Therefore, although it is important to maintain pressure on the Chinese government, it is also important not to overuse this mechanism for change. Indeed, spreading the use of external pressure to include local or provincial level governments should be promoted. As there is a recognised gap between central and local levels of government, pressure applied to the central leadership in Beijing can only achieve so much before creating resentment and consequently, attention should be shifted to lower levels of government which play such a crucial role in IP enforcement.

The third crucial factor affecting China's intention to comply involves the role of domestic Chinese enterprises in supporting sustained improvements in the IP

system. Almost all respondents independently raised the issue of domestic rights holders as one which would be essential for future improvements in the current IP system. Therefore, as domestic Chinese enterprises continue to increase their innovative activity, their role as IP rights holders in China will continue to increase in importance and may act as a tipping point for effective enforcement of existing laws and regulations.

Fourthly, although NGOs in general play a minor role in the issue of intellectual property rights globally, they can have a slight positive effect on intention to comply with the TRIPS Agreement in China. Organisations representing MNCs in China such as the QBPC should maintain their role of supporting enforcement of IP rights and can thus help to maintain the necessary intention to comply. Finally, many respondents highlighted inadequate penalties for infringers as one of their main frustrations with the current system. Increasing the statutory levels of penalties which can be imposed and clarifying guidance on calculating damages should significantly increase intention to comply as it would act as a stronger deterrent to infringers by minimising short-term economic gains from infringements.

In addition to these five key factors which influence China's intention to comply with the TRIPS Agreement, there are also four crucial factors which impact upon China's capacity to comply. Firstly, and perhaps most importantly, most respondents highlighted China's insufficient numbers of trained and experienced personnel in the IP system as a key cause of current problems with effective enforcement. According to respondents' comments, the number of personnel is not so much of an issue as the quality of the personnel involved in IP enforcement. Thus, improving the standard of personnel in the IP system would dramatically improve China's capacity to fully implement its TRIPS commitments.

Secondly, the role of the judiciary in the IP system was frequently reported by respondents as influential on private enforcement of IP rights in China. Although the system of administrative enforcement which dominates the IP system in China received a lot of praise from respondents, in contrast, the system of judicial enforcement is weak. Thus, there is a perceived need to strengthen the role of the judiciary and to increase the independence of the judiciary from political influences. Thirdly, although some commentators had previously called for a unified IP agency to oversee the operation of the IP system in China, this notion was rejected by respondents as impractical. However, it was recognised that there is a certain amount of overlap and bureaucratic competition between the relevant agencies and thus, the system could be streamlined to simplify the bureaucratic structure of IP enforcement and to encourage greater cooperation and case transfer between the different IP agencies.

Finally, at the international level, there is some disquiet from developing country WTO Members that developed country Members are not living up to their promises to provide technical cooperation and technology transfers under the TRIPS Agreement. Increasing incentives such as technology transfer and cooperation from key developed country Members may also have a positive influence on China's overall TRIPS compliance. Overall, there are various key factors which should be the focus for future improvements in China's TRIPS compliance as highlighted above. These factors influence China's intention and capacity to comply, which in turn impact upon overall compliance with the TRIPS Agreement.

This dynamic model of compliance for future reforms of China's IP system is represented in Figure 7-4 below and will form the basis for the implications and policy recommendations arising from this study which will be outlined in the

concluding chapter. The factors are divided into factors influencing China's intention and capacity to comply, but these factors are interactive and this should be borne in mind when considering the operation of this model of compliance.

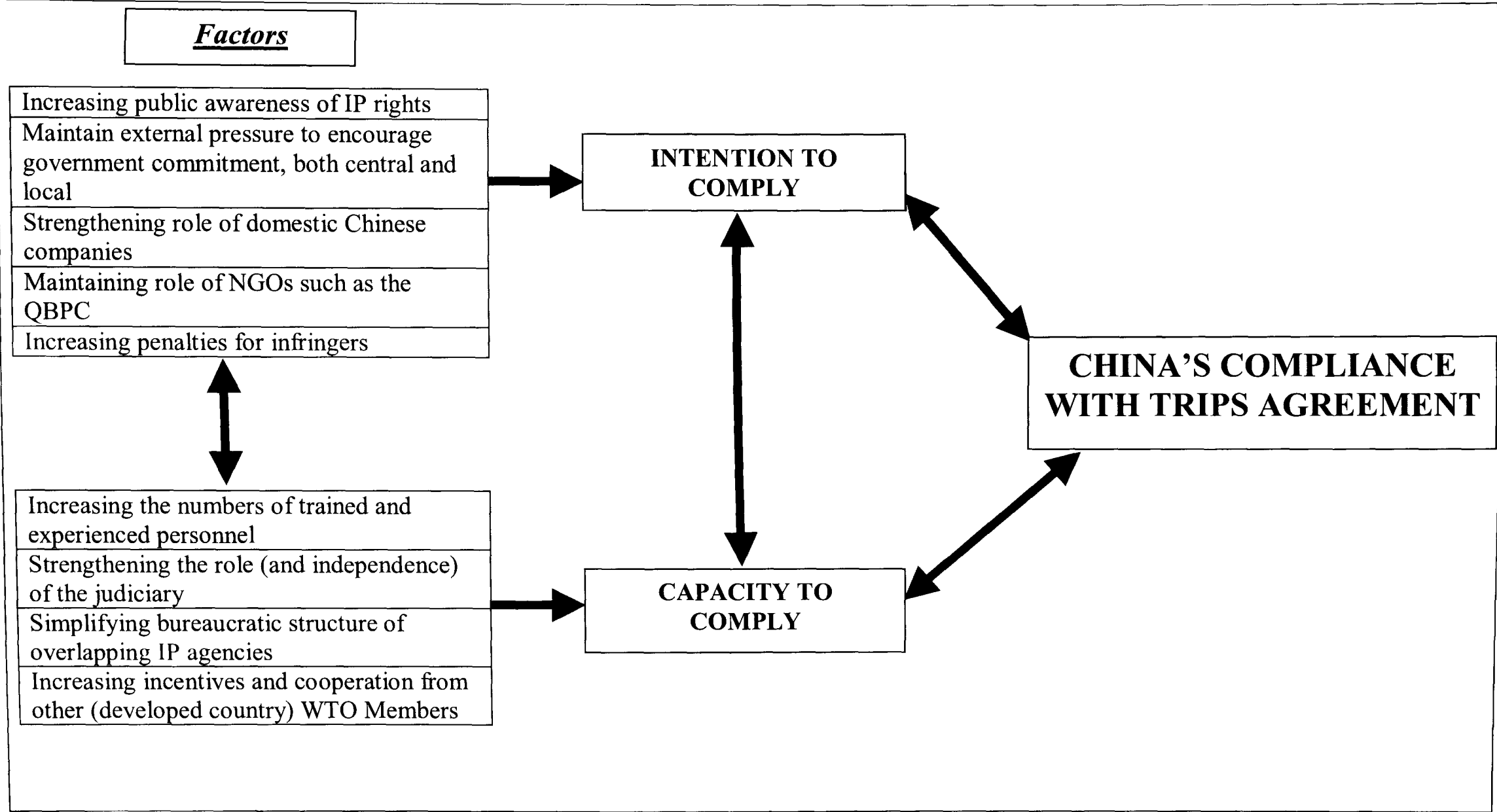


Figure 7-4- Model of China's compliance with the TRIPS Agreement and key influences on China's intention and capacity to comply

7.10 Summary and Conclusion

This chapter first returned to key concepts of legal development outlined in the literature review and previously used to analyse legal reforms in China. Although the concepts of legal legitimation, transplantation and selective adaptation offer some useful insights into the process of adopting imported laws into a domestic legal system, it is clear that these concepts are ultimately insufficient to fully explain the IP system in China. Therefore, theories of compliance have been considered in this study in order to broaden the scope of analysis. However, any analysis of compliance must distinguish between implementation, compliance and effectiveness.

Existing theories of compliance were considered in the context of China's TRIPS compliance, but were judged to be too narrow to fully explain the current system of protection and gap between formal implementation and effective enforcement. Consequently, a more comprehensive model of compliance devised by Brown Weiss and Jacobson and previously applied to international environmental obligations was chosen as the basis for analysis in this study. Under this comprehensive model of compliance, non-country specific factors relating to the international environment, the activity involved and the specific international accord are all of central importance. In the case of the TRIPS Agreement, the major factors influencing compliance were found to be the perceived inequity and imprecision of the Agreement itself, as well as the short-term economic rewards associated with infringements and the large number of actors and countries involved in infringements.

In addition, this study also considered China-specific factors influencing TRIPS compliance in some detail. Overall, China-specific factors were considered under three

headings: parameters, fundamental factors and proximate factors. The most significant parameters were found to be the short history of the IP system in China, as the modern system of protection has only developed since the reform period began in the late 1970s and the division between central and local government. It is also noteworthy that cultural factors which have been stressed by some previous commentators were the least significant influences on the current IP system according to participants in this study. The most significant fundamental factors were found to be the lack of public awareness of IP rights, local protectionism and the lack of consistency in enforcement. The most significant proximate factors were found to be a lack of trained and experienced personnel in the IP system, inadequate penalties and weak judicial powers.

These non-country specific factors and factors exclusive to China combine to produce a situation, as described in Chapter 6, in which China has (almost) fully implemented TRIPS obligations into domestic substantive laws and regulations, but compliance with certain key provisions is difficult to assess and the effectiveness of the system is also doubted by some respondents. Therefore, certain key improvements were discussed by respondents as possible future developments for the current system. These included increasing awareness of IP rights, greater international cooperation, better training for key personnel, increasing resources in the IP system, minor administrative and legislative changes, and strengthening the role of the judiciary. However, it is necessary to divide these potential improvements into those which may influence China's capacity to comply and those which may influence China's intention to comply. It is also crucial to consider the feasibility of these improvements in order to recommend where future reform efforts would best be concentrated.

Thus, the dynamic processes of change in China's compliance over time were considered with nine key factors highlighted as of central importance to future reforms in China's IP system. Of these, five influence China's intention to comply with the TRIPS Agreement, namely: increasing public awareness; maintaining external pressure on the government, but expanding these efforts to include key provincial level governments; strengthening the role of domestic Chinese companies; maintaining the role of organisations such as the QBPC; and increasing penalties for infringers to act as a more effective deterrent.

On the other hand, four factors were identified as crucial influences on China's capacity to comply with the TRIPS Agreement: increasing the quality of the personnel in the IP system; strengthening the role of the judiciary; simplifying the bureaucratic structure of enforcement and particularly increasing relations between agencies; and increasing available incentives and cooperation from other WTO Members. These factors were combined into a concise model of influences on China's TRIPS compliance and form the basis for the policy recommendations arising from this study, which will be considered in the final chapter below.

8 Conclusions

8.1 Introduction

This thesis has examined China's compliance with the TRIPS Agreement through systematic analysis of the current system of IP protection in China. As the previous chapter has shown, existing theories of compliance are insufficient to fully explain China's almost full implementation of TRIPS obligations into domestic legislation, yet inadequate enforcement of the resulting laws and regulations. Thus, a more comprehensive model of compliance must be used to fully comprehend the complex interplay of parameters, fundamental and proximate factors which influence China's TRIPS compliance. Clearly, this amended model has wide-ranging implications, for theories of compliance, for the WTO, for the Chinese government, for foreign governments and for rights holders in China.

This chapter will first summarise the main findings of the preceding chapters before considering these broader policy implications. In this final chapter, questions that arise from this study for further research will also be considered before offering some concluding thoughts.

8.2 Summary of Main Findings

The introductory chapter first outlined the development of intellectual property protection in China and in the international system in order to highlight the importance of the TRIPS Agreement for international IP protection. This chapter also explained why compliance theory is a useful tool with which to analyse the development of IP rights in contemporary China, compared to previous studies of the legal system in China. Finally, this chapter concluded with the key research questions that this thesis aimed to address.

These key questions related to the characteristics of the TRIPS Agreement itself that may affect a WTO Member's compliance; the impact of WTO accession and TRIPS obligations on the IP system in China; China's subsequent compliance with TRIPS commitments; and any outstanding areas of non-compliance and why and how they can be resolved.

Consequently, the second chapter reviewed the literature regarding the key concepts and theories of compliance that were applied in this study and also examined previous work on compliance in China. The chapter concluded that previous studies into China's compliance with its international commitments have focused on China without examining the characteristics of the obligations themselves. Equally, previous studies of compliance have predominantly focused on the specific international accord to the exclusion of country-specific factors affecting compliance. Therefore, it was argued that these two approaches should be combined into a more comprehensive approach to compliance by applying the inclusive model of compliance proposed by Brown Weiss and Jacobson for analysis of compliance with international environmental commitments. This comprehensive model of compliance was thus applied to the context of IP protection in China in the subsequent chapters.

The third chapter outlined the methodology and specific research methods that were used in this study. A qualitative research strategy was designed which combined different methods of data collection: an initial questionnaire; detailed follow-up interviews in a variety of formats; and primary documentary data. The collected data was then codified and analysed using NVivo software. Details of the respondents who participated in the study were also outlined in Chapter 3, with further details available in

Appendix 1. In addition, the methodology chapter examined key issues of concern which arose during this research, including ethical considerations, translation and linguistic issues and the use of computer software.

Following discussion of the theoretical framework applicable to this study and details of my research strategy, Chapter 4 then examined the non-country specific factors influencing compliance with the TRIPS Agreement. The most significant factors were found to be the perceived inequity and imprecision of TRIPS obligations, which arose due both to the drafting history of TRIPS and the nature of the TRIPS Agreement as a minimum standards agreement. The TRIPS Agreement was also found to have other minor characteristics influencing compliance such as the burden of notifications and the lack of sufficient incentives and cooperation which act against full compliance and the role of the TRIPS Council and WTO dispute resolution body which act to encourage compliance.

In terms of other non-country specific factors outside of the TRIPS Agreement, the international environment and the nature of IP infringements as an activity were also considered in the fourth chapter. As a global activity, the sheer number of countries and actors involved in infringements, as well as the short-term financial rewards from piracy all discourage active implementation of TRIPS commitments. In addition, there is a lack of consensus in global opinion and even resentment towards certain developed countries and MNCs over the push for stronger international IP protection which hinder the adoption of higher universal standards of IP.

In addition to general factors influencing TRIPS compliance, there are also various factors specific to China which were considered in chapter 5. These China-

specific factors were considered under the categories taken directly from the comprehensive Brown Weiss and Jacobson model of compliance, namely the headings of parameters, fundamental factors and proximate factors. Parameters such as previous behaviour and historical factors were not found to be significant influences on the contemporary IP system, despite the emphasis by many previous commentators on Confucianism and socialism as primarily responsible for the current system.

In contrast, several fundamental factors were held to be highly significant by respondents including the lack of awareness of IP rights, local protectionism and a lack of consistency in enforcement. Finally, several proximate factors were also identified as key contributors to the current framework of IP protection in China. The most important of these were the inadequate penalties imposed on infringers of IP rights and the lack of effective powers exercised by the judiciary. Furthermore, the quality of personnel in the IP system was also an issue of concern for many respondents.

Chapter 6 considered the operation of the IP system in China in more detail by discussing the separate issues of implementation, compliance and effectiveness of TRIPS obligations in China. Overall, the chapter found that despite far-reaching legislative changes and amendments to implement TRIPS into domestic legislation, particularly during the period 1999-2002, full compliance with the TRIPS Agreement may still be in doubt in a few limited areas, as demonstrated by the recent WTO case launched against China by the US. Furthermore, the effectiveness of the current system is still criticised by many respondents who have experienced the system in action.

Chapter 7 combined these key findings into a concise model of TRIPS compliance in China and suggested where efforts could best be focused in future to

encourage long-term sustained changes to the IP system. In addition, this chapter revisited key concepts of legal development and previous theories of compliance outlined in the literature review chapter in order to analyse them in the context of the development of IPR in China. These existing key concepts and theories were found to be too narrow and thus, a more inclusive approach was advocated to fully comprehend the complex mix of factors affecting the framework of IP protection in contemporary China. The resulting model of TRIPS compliance in China also differentiated between influences upon China's intention to comply and China's capacity to comply, as this distinction is often overlooked by policy-makers. This dynamic model of compliance (shown in Figure 7-4) forms the basis for the policy implications of this study which will now be considered.

8.3 Implications of the Study

8.3.1 Implications for Theories of Compliance

There is an obvious need to move beyond traditional competing theories of compliance which focus on one aspect to the exclusion of other significant factors. For example, following Franck's concept of compliance as arising from legitimacy and fairness in the rules would lead to the conclusion that China chooses whether or not to comply with the TRIPS Agreement on the basis of TRIPS obligations alone. Equally, taking a more neo-realist stance would lead to the conclusion that China chooses whether or not to comply based on any possible sanctions that may be imposed for non-compliance. Clearly, these limited approaches are insufficient to fully explain TRIPS compliance in China and thus a more comprehensive approach is necessary.

Such a comprehensive approach would move beyond the role of the state, which is the preoccupation of traditional theories of compliance, but without discounting the

state as a key actor altogether, as recent liberal theory does. The state still plays a major role in compliance with international obligations, particularly in China, and in the field of IP, the role of the state is considerably more important than that of individuals or NGOs. Consequently, an inclusive model of compliance should incorporate features from several pre-existing theories of compliance to offer a more complete tool with which to analyse compliance with international obligations. This has proved to be the most useful approach to follow in analysing TRIPS compliance and it is proposed that this approach is also applicable to other international agreements.

Equally, this study has implications for the study of the development of law in China. Previous studies of law in China have tended to focus on one key concept of legal development to the exclusion of other concepts and theories. As discussed in the previous chapter, central concepts such as legal legitimation and transplantation, and selective adaptation alone, are insufficient to fully appreciate the complex processes of legal development in China. Thus, one could argue that this approach is limited and needs to be expanded to incorporate consideration of the categories of influential factors used in this study. Consequently, it is proposed that the revised model of compliance outlined in the previous chapter is applicable not only to compliance with other areas of international law, but also to other aspects of law within China.

8.3.2 Implications for the WTO

Under the Doha Development Agenda currently being negotiated by WTO Members, certain revisions to the TRIPS Agreement are being discussed. Specifically, these issues include increasing technology transfer to least-developed countries and the issue of ‘non-violation’ complaints, that is disputes involving the loss of an expected

benefit even though the TRIPS Agreement has not actually been violated, as well as the relationship between TRIPS and public health and possible expansion of the system of geographical indications.⁵⁴⁶

It is crucial at this juncture to urge the WTO to consider the perceived equity in the TRIPS obligations. Clearly, the existing TRIPS Agreement suffers from a perception that it favours developed country Members over the interests of developing country Members and the current negotiations may offer the ideal opportunity to right this perception. Negotiators of the updated TRIPS Agreement should also consider the precision of the obligations when drafting the revisions and amendments to the 1994 Agreement in order to increase compliance.

However, although ideally the updated TRIPS Agreement would be perceived to be equitable to all Members, regardless of their stage of development, and the substantive obligations would be completely precise, in practice, this is unlikely to be achieved. Unfortunately, the nature of the WTO as an international trading system means that it encompasses many issues, not just that of intellectual property. Therefore, TRIPS negotiations are part of a larger game of give and take between Members and can not be considered in isolation and it would thus be highly improbable for major changes to be made to the TRIPS Agreement in isolation. In addition, although the role of the Council for TRIPS has largely been a positive one in encouraging compliance with the TRIPS Agreement, the Council could further pressure developed country members to increase cooperation and technical assistance under Article 67 and to fully comply with Article 68,

⁵⁴⁶ World Trade Organisation, "The Doha Agenda", http://www.wto.org/english/thewto_e/whatis_e/tif_e/doha1_e.htm, accessed February 21st 2007.

regarding technology transfers to less developed Members. These steps would further boost the available incentives for compliance.

In addition, when negotiating China's accession protocol, China's preferred designation as a developing rather than developed country was a contentious issue. However, following WTO accession, China does not wish to be labelled as a developing country due to the implications for cases of alleged anti-dumping. As a result, the WTO needs to consider establishing a clear definition or workable criteria for designating new Members as developed or developing countries consistently in order to avoid such wrangles in the future.

The final implication for the WTO concerns the dispute settlement process. This process seems satisfactory as, contrary to concerns prior to China's accession in 2001, the process has not been swamped by China-related disputes. In fact, the dispute settlement process has offered a useful alternative to the threat of unilateral sanctions by trading partners such as the US, which were prevalent in the 1990s. The dispute settlement process could thus be used to encourage non-Members to join the WTO framework of protection as a way to avoid such disputes. If the dispute settlement process can be used as an incentive to accede to the WTO system, then momentum can be gathered towards global compliance with the TRIPS Agreement.

8.3.3 Implications for Trading Partners

The implications outlined above for the WTO also link closely to the implications for China's powerful trading partners such as the US. Firstly, it is clear from the recent WTO request for consultations from the US to China regarding TRIPS enforcement that it can be difficult to bring a dispute to the WTO dispute settlement body. Anecdotal

weaknesses in the enforcement system are insufficient to initiate an action; the complainant must have clear evidence of systemic failures. Therefore, this reinforces the idea that compliance is difficult to assess objectively and that a more comprehensive model of TRIPS compliance is necessary to understand the complex processes of compliance in different countries.

The second and arguably more important implication for the US is that the prevailing policy of denouncing the Chinese government in an effort to force stronger IP enforcement is unlikely to succeed. External pressure from the USTR and the section 301 mechanism is unlikely to produce sustained improvements in the enforcement system without corresponding internal changes. This is because external pressure may increase central government intention to comply, but without any improvements in the capacity to comply. A more productive long-term strategy to improve TRIPS compliance and IP enforcement in China would be to work with Chinese rights holders, legal personnel and judges to improve their capacity to enforce IP effectively. Ultimately, without domestic rights holders to pressure for IP protection, the system cannot effectively operate to protect IP in the long-term. However, a less confrontational and more cooperative stance from the US may be unforthcoming due to protectionist political pressure from Congress.

Turning to the wider implications for global IPR protection, as shown in chapter 4, the broad membership of the WTO was found to act as a positive influence on the likelihood of TRIPS compliance; it could thus be argued that key trading partners should encourage remaining non-Members to accede to the WTO in order to increase this effect.

8.3.4 Implications for the Chinese Government

Many respondents in this study recognised that the central government in Beijing is strongly committed to enforcing IP rights effectively in China. It is crucial that the Chinese government is praised for this and encouraged to maintain this level of commitment to IP development in the future. However, although the central government may have the intention to fully comply with the TRIPS Agreement, there are issues of capacity that prevent full compliance. On the other hand, despite these issues of capacity which may not be easily resolved, there are minor changes that the government can make to improve the effectiveness of the current IP system.

Two general issues which emerged from respondents' comments on IP enforcement are a lack of consistency and a lack of transparency. Thus, the government could elude complaints about inconsistency by avoiding enforcing IP in 'crackdown' campaigns. With regard to transparency, although transparency of the relevant laws and regulations is now cited by respondents as much improved, transparency concerning enforcement actions is still subject to some criticism. Therefore, the government could further improve transparency by making available detailed enforcement statistics. This could also help in the fight against local protectionism; if local enforcement statistics show a markedly low level of fines, for example, there may be reason to suspect some low-level corruption in that area.

There are also a few minor substantive amendments that the government could consider making to the existing legislation. As discussed in the previous chapter, perhaps the most pressing of these would be improving the civil procedure rules and shifting the burden of proof to the respondent when calculating damages. Finally, the role of Chinese

enterprises is key to sustaining improvements in the IP system in the future. For example, the current restrictive rules governing the formation and operation of NGOs in China could be relaxed to encourage Chinese enterprises to join together to cooperate on IP issues. This would also support the stated aim of developing innovation in contemporary China.

At this juncture, it is imperative for the Chinese government to recognise that the current approach to economic development of relying on low-end manufacturing at the same time as attempting to develop an innovative high-tech sector is ultimately unsustainable. As the flood of recent news stories concerning inferior quality Chinese products shows,⁵⁴⁷ the label 'Made in China' is highly vulnerable to downgrading and consequently, efforts must be made to regulate compliance with quality regulations. In due course, the Chinese government may be forced to realise that prioritising innovative enterprises over protecting imitative manufacturing enterprises is a better strategy for continued economic growth.

A final implication for the Chinese government to consider is that IP protection may not solely be an issue for international trade, but the strength of IPR in the country may also affect inward investment. Although many foreign companies have so far been willing to invest in China in order to gain a share of a potentially lucrative market, it is not evident that foreign companies will be willing to bear considerable losses through IP infringements indefinitely. This may provide further incentive for the government to strengthen IP protection and support the development of more innovative industries.

⁵⁴⁷ See, for example, BBC, "'Brand China' at risk after toy recall", 15th August 2007, available at: <http://news.bbc.co.uk/1/hi/business/6948274.stm> accessed September 14th 2007.

8.3.5 Implications for Rights Holders

The consistent message from respondents seems to be that although the current system of protection is not perfect, it is still effective enough to offer some protection against infringements. The key is for rights holders to seek to engage with the system instead of criticising from outside. Thus, rights holders should be encouraged to initially register their IP rights in China and if infringements subsequently arise, then infringers should be pursued through the various mechanisms offered.

A further implication for rights holders in China is to consider their collective position. In order to pressurise for future improvements in the IP system, rights holders should support the formation of pressure groups or industry associations for Chinese companies, either independently or in cooperation with foreign groups. Thus, there may be scope, for example, for the QBPC to work with domestic holders of well-known trademarks to campaign together for more effective IP protection.

8.4 Key Findings and Questions for Further Research

This study had several intriguing or unexpected findings, which could be confirmed by further research. For example, contrary to several previous studies and many observers of China's legal system, cultural influences such as Confucianism and socialism were not found to be major influences on the current IP system. However, this finding may have several competing explanations: although it is possible that Confucianism and socialism are no longer strong influences, it is also possible that this finding is a result of the small scale of this study or the manner in which the questions were worded. Therefore, a wider scale study would be useful in order to further explore

the continuing relevance of such cultural factors in the contemporary legal system in China.

In addition, a lack of transparency had previously been cited as a major flaw in the current system, whereas respondents in this study actually identified transparency as a key improvement they had recently witnessed. As a consequence, enhanced transparency in the legislative framework could be said to be one of the crucial fundamental changes brought about as a direct result of WTO accession. However, transparency in enforcement actions could still be enhanced and thus, this could also be an area for potential future scrutiny.

The comprehensive model of compliance described in this study was applied to the specific context of assessing China's compliance with the TRIPS Agreement. In order to test the reliability of this amended model and explore it further, further research could apply this model to the context of China's compliance with other international agreements such as environmental accords or arms control treaties. Alternatively, the model could be applied to TRIPS compliance but in other WTO Member countries. This may be a useful tool of analysis in newly acceded WTO Members such as Vietnam; as they also have to comply with TRIPS immediately upon accession, efforts regarding TRIPS implementation, compliance and effectiveness are crucial.

In addition, as a reasonably small-scale initial study, it would be interesting to see if these results would be replicated in a larger scale quantitative study which could test the reliability of the results obtained. Replicating this study's findings with a larger sample would also allay linguistic concerns about the validity of the results obtained through bilingual responses. Alternatively, a more in-depth case study approach could be

taken to examine the IP system in different geographical areas. This study has taken quite a central approach, but it is important to recognise that China (and China's IP system) is not a homogenous environment.

Another key finding of this study concerned the personnel charged with administering the current IP system in China. It is undeniable that previous observers had cited poor personnel as a contributor to problems in the IP system, but many failed to distinguish clearly between the quality and the quantity of IP personnel and further, between incompetence through a lack of training and through outright corruption. Comments from respondents in this study, on the other hand, clearly focus on the quality of the personnel and a lack of sufficient training, although low-level corruption was also mentioned.

Other surprising findings included the discussion of the bureaucratic structure of IP agencies by respondents. It had previously been suggested that a unified IP agency could streamline the enforcement process and minimise bureaucratic rivalries. However, respondents recognised this to be impractical as not only is IP such a broad field, but China is also a huge country to administer from one central agency. There were also a few unexpected differences between local Chinese and international respondents in this study. For example, there appeared to be a clear difference between the respondents in terms of the perception that IP rights only benefit foreigners. Therefore, it might be interesting to explore the differences between domestic and international rights holders in China in terms of their experiences with the system in action. Finally, it must be recognised that many respondents were keen to point out a more balanced picture of the IP system in China, as many critiques of the current system only criticise the remaining

flaws without praising the progress China has already made. On the contrary, the majority of respondents were optimistic about the prospect for future improvements.

8.5 Concluding Thoughts

Clearly, this study has raised some important questions for the study of compliance with international agreements, both in China and within the WTO international trading system. In terms of implications for theory, this study suggests that previous studies of legal development in China have largely overlooked the significance of the specific international obligations, whilst existing theories of compliance have mostly focused on the specific obligations rather than characteristics of the specific country involved. Therefore, it has been argued that by combining the strengths of these previous studies, a more inclusive approach can produce a more comprehensive and valid model of compliance, applicable to the specific context of China's TRIPS compliance.

Turning to policy implications, this study also has significance for various sectors, including the WTO/TRIPS framework itself, China, key trading partners such as the US and individual rights holders themselves. The WTO needs to recognise that future reforms to the international trading system should consider the consequences for compliance of broad trade-related negotiations; namely that Members may agree to certain obligations in order to achieve concessions in another area, but subsequent compliance may be harder to achieve than in single-issue negotiations. This study has also demonstrated that the fairness and precision of the obligations are highly significant factors for compliance.

The previous approach of key trading partners applying unilateral pressure on the central government in order to achieve reform needs to change. Not only does it produce

resentment, a sentiment expressed by several respondents in this study, but it also fails to distinguish between China's intention to comply and capacity to comply. A more cooperative approach focusing on building capacity, particularly in the enforcement framework, and within the judiciary would be more conducive to encouraging long-term sustained improvements in the IP system. In terms of implications for China, it is undeniable that China must be praised for the substantial reform efforts to date; these demonstrate that China will strive to fulfil international obligations as a responsible member of the world order, in addition to confirming the central government recognition of the importance of IPR for future economic development. As well as minor legislative amendments, the Chinese government should be encouraged to move away from the irregular crackdown approach to IP enforcement and to strengthen both consistency and transparency in enforcement, in order to attempt to confront the major problem of local protectionism.

Ultimately, sustained changes to the intellectual property system need internal pressure to succeed and thus, domestic rights holders should be supported in their efforts to monitor and improve the existing system. Overall, China has already made substantial improvements to the system of IP protection and respondents participating in this study remain optimistic about the prospect of future improvements. If cooperative efforts could be focused on improving China's capacity to fully comply with TRIPS, then this process of long-term reform may be hastened.

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Appendices

Appendix 1- Table of Respondents’ Codes and Characteristics

The table below shows the codes and primary characteristics for the 49 respondents in this study. The first column shows their code, the second column shows their nationality, whether they are Chinese or foreign and the third column shows the type of enterprise that the respondent is from, whether a domestic foreign enterprise or a foreign invested enterprise. The final four columns are all based on the respondents’ answers to the survey: whether they deal with IP; whether their enterprise has experienced problems with IP; and if so, how severe are those problems (on a scale of 1 to 6). Throughout, “NA” means not applicable and is used if there was no valid response given to that particular question. In addition, the main form of contact with respondents is also shown in the table as follows:

<u>Symbol</u>	<u>Primary Form of Contact</u>
Q	Questionnaire
F	Face-to-face
T	Telephone
E	Email
L	Letter
Fax	Fax

Respondent Code	Contact	Nationality	Enterprise Status	Time in China?	Deals with IP?	Problems with IP?	Severity of Problems?
LAW01	F, E, T	Foreign	Foreign	More than 10 years	Yes	Yes	5
LAW02	Q	Foreign	Foreign	5-10 years	Yes	Yes	5
LAW03	Q	Foreign	Foreign	5-10 years	Yes	Yes	4
LAW04	Q	Foreign	Foreign	More than 10 years	Yes	Yes	5
LAW05	F, E, T	Chinese	Foreign	More than 10 years	Yes	No	0
LAW06	T	Foreign	Foreign	More than 10 years	Yes	Yes	4
LAW07	E	Foreign	Foreign	More than 10 years	Yes	Yes	4
LAW08	Q	Foreign	Foreign	2-5 years	Yes	Yes	5
LAW09	Q	Foreign	Foreign	2-5 years	Yes	Yes	5
LAW10	F	Foreign	Chinese	More than 10 years	Yes	Yes	0
LAW11T	Q	Chinese	Chinese	More than 10 years	Yes	Yes	4
LAW12T	E	Chinese	Chinese	5-10 years	Yes	Yes	4
LAW13T	E	Chinese	Chinese	More than 10 years	Yes	Yes	4
LAW14T	E	Chinese	Chinese	2-5 years	Yes	Yes	4
LAW15T	Q	Chinese	Chinese	More than 10 years	Yes	Yes	5
LAW16	F	Chinese	Chinese	More than 10 years	Yes	Yes	4
LAW17T	Q	Chinese	Chinese	More than 10 years	Yes	Yes	5
LAW18	Q	Foreign	Chinese	More than 10 years	Yes	Yes	4
LAW19T	Q	Chinese	Chinese	5-10 years	Yes	Yes	4
LAW20T	Q	Chinese	Chinese	More than 10 years	Yes	Yes	4
LAW21T	Q	Chinese	Chinese	More than 10 years	Yes	Yes	3
LAW22T	Q	Chinese	Chinese	More than 10 years	Yes	Yes	2
LAW23T	Q	Chinese	Chinese	More than 10 years	Yes	Yes	4
LAW24T	Q	Chinese	Chinese	More than 10 years	Yes	Yes	4
LAW25T	Q	Chinese	Chinese	2-5 years	Yes	Yes	4
LAW26T	Q	Chinese	Chinese	5-10 years	Yes	Yes	3
LAW27T	Q	Chinese	Chinese	5-10 years	Yes	Yes	3

LAW28T	E	Chinese	Chinese	More than 10 years	Yes	NA	0
LAW29T	E	Chinese	Chinese	More than 10 years	Yes	Yes	3
LAW30T	L	Chinese	Chinese	5-10 years	Yes	Yes	4
LAW31	T, Fax	Foreign	Foreign	NA	NA	NA	NA
MANU01T	F	Chinese	Chinese	More than 10 years	Yes	NA	0
MANU02	E	Foreign	Foreign	More than 10 years	Yes	Yes	5
MANU03	E	Foreign	Chinese	More than 10 years	Yes	Yes	3
MANU04T	L	Chinese	Chinese	More than 10 years	Yes	Yes	1
MANU05	Q	Chinese	Foreign	More than 10 years	Yes	Yes	4
MANU06	Q	Chinese	Foreign	2-5 years	Yes	Yes	2
MANU07	Q	Foreign	Foreign	5-10 years	Yes	Yes	2
MANU08	Q	Chinese	Foreign	More than 10 years	Yes	Yes	6
FASHION01	Q	Foreign	Foreign	2-5 years	Yes	Yes	5
FASHION02	Q	Foreign	Chinese	More than 10 years	Yes	Yes	6
FOOD01	Q	Foreign	Foreign	2-5 years	Yes	Yes	6
FOOD02	Q	Foreign	Foreign	5-10 years	Yes	Yes	5
FOOD03	L	Foreign	Foreign	More than 10 years	Yes	NA	NA
SERVICES01	E	Foreign	Chinese	More than 10 years	Yes	No	3
SERVICES02	E, F, T	Foreign	Foreign	More than 10 years	Yes	Yes	6
AUTO01	Q	Foreign	Foreign	More than 10 years	Yes	Yes	3
PHARM01	Q	Chinese	Chinese	More than 10 years	Yes	Yes	3
IT01	Q	Chinese	Foreign	More than 10 years	Yes	Yes	4

Appendix 2- Cover Letter used for Initial Contact

Survey on Intellectual Property Protection in China

对中国知识产权保护的调查

Dear Sir/Madam, 尊敬的先生/女士

I am a PhD researcher with the University of Nottingham Business School. I am currently researching the enforcement of intellectual property protection in China and any barriers that exist to prevent the effective enforcement of intellectual property rights. 我是一名英国诺丁汉大学商学院的博士研究生。我正在研究中国国内的知识产权保护实施情况，以及存在的妨碍知识产权有效实行的障碍。

As your company is one of China's well-known trademarks, I'm sure that you are concerned about this issue. I would be extremely grateful if you could complete a short questionnaire based on the experiences of your company in China. Completion of this questionnaire should only take 10 minutes. If you are unable to personally complete the questionnaire, I would be grateful if you could pass it to a colleague. Please go to www.nottingham.ac.uk/~lixkm6 in order to complete the questionnaire. If you prefer, please complete the attached document and return it to me either by email, post or fax. 因为您贵司是中国驰名商标之一，您一定注意这个问题。如您能根据贵司在中国的经验完成一份简短的关于中国知识产权保护的调查问卷，我将不胜感谢。完成这份问卷只需花费10分钟。问卷在：

www.nottingham.ac.uk/~lixkm6 或者请完成内寄的问卷。

My research relies on your participation to succeed and your support would be very much appreciated. Any information provided will be treated in strictest confidence. All data provided will be made anonymous and no companies or individuals will be identifiable under any circumstances. Contact details will also be detached from the survey.

我的研究依赖您的参与才能得以顺利完成，您的支持将被感激不尽。您所提供的信息都会被严格保密。所有数据将以匿名显示，并且在任何情势下，无论公司或个人都不会被辨认出来。联系方式也将与本次调查分离。

A summary of the final results will be sent to all participating companies, with a full copy available on request. If you have any concerns or questions about participating in this study, please do not hesitate to contact me using the contact details given below. Further details about me are available at:

<http://www.nottingham.ac.uk/chinese-studies/Staff/Kristie.htm> 最终结果的概要会被送到所有参与调查的公司，如需要您也可获得一份完整的文件。如您对参与该项研究有任何想法，请用以下提供的联系方式直接与我联系，或者请看：<http://www.nottingham.ac.uk/chinese-studies/Staff/Kristie.htm>

Thank you very much for your support. 非常感谢您的支持，并希望尽早收到您的消息。

Yours Sincerely, 您忠诚的

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Appendix 3- Questionnaire on Intellectual Property Protection in China
对中国知识产权保护的调查

The aim of this questionnaire is to evaluate the effectiveness of the intellectual property (IP) system in China and identify ways in which the system could be improved. Your cooperation with this survey is very much appreciated. Please answer the questions in as much detail as possible, according to your firm's experiences in China.
本调查问卷的目的是为了评价知识产权制度在中国的有效性,并据此识别用何种方法可改善该制度。非常感谢您对此调查的合作。请根据贵司在中国的经验,尽可能详细地回答问题。

All information given will be treated as strictly confidential and will be made anonymous. No names or company names will be used under any circumstances.
如前所述, 所有被提供的信息都将被严格保密并以匿名显示。在任何情况下, 个人或公司的名字都不会被使用。

1. Please choose one of the following options to describe the goods or services that your company provides: 贵司提供何种产品或服务?

☐ Agriculture- 农业

☐ Aviation- 航空

☐ Banking, Finance, Insurance- 银行业, 金融, 保险

☐ Education & Training- 教育, 培训

☐ Energy, Utilities, Environment- 能量, 公用事业, 环境

☐ Fashion & Luxury Goods- 流行式样, 奢侈品

☐ Food & Beverage- 食物, 饮料

☐ Leisure, Tourism, Hospitality- 闲暇, 旅行业

☐ Manufacturing- 制造业

☐ Media & Advertising- 传播媒介, 广告

☐ Professional & Business Services- 职业的, 商业的服务行业

☐ Technology, Telecommunications- 工艺学, 电信

☐ Wholesale, Retail- 批发商, 零售商

☐ Other (please specify)- 其他 (请详细描述)
2. How many offices does your company have in China and in which cities are they located? 贵司在中国有多少家办事处, 它们位于哪些城市?

3. If applicable, how many offices does your company have worldwide and in which countries are they located? 如果适用此情形, 贵司有多少家国外的办事处, 它们都分布在哪些国家?

Where are the headquarters of your company? 贵司的总部在哪国家?

☐ China 中国

☐ Worldwide 全世界的

4. How long has your company been operating in China? 贵司在中国开设了多少年?

☐ 0-2 years; 0-2 年

☐ 2-5 years ; 2-5 年

☐ 5-10 years ; 5-10 年

☐ More than 10 years; 10 年以上

5. Is your company involved with intellectual property in China? 贵司是否涉及到在中国的知识产权?

☐ Yes ; 是

☐ No ; 否

☐ Don't Know ; 不知道

6. If yes, what types of IP do you deal with? (Please choose all that are applicable): 如果是, 您所涉及的是何种知识产权? 请选择所有合适的选项)

☐ Patent; 专利权

☐ Copyright; 著作权

☐ Utility Model; 实用新型

☐ Other e.g. Trade secrets; 其他如商业秘密

☐ Industrial Design; 工业设计

☐ Trademark; 商标权

7. Have you noticed any changes in IP protection in China over the past five years? 您是否注意到过去五年知识产权所发生的任何变化?

☐ Yes: 是

☐ No: 否

☐ Don't Know: 不知道

8. If you have noticed a change, would you characterize the change as positive or negative? (-2= negative change, 0= no change, 2= positive change) 如果您已注意到有变化, 请描述该变化是积极的还是消极的?

(-2=消极的变化, 0=没有变化, 2=积极的变化)

☐ -2

☐ -1

☐ 0

☐ 1

☐ 2

9. Would you please give details on any changes observed: 请详细描述您所观察到的变化:

10. What do you think prompted these changes? 你认为是什么促成了这此变化?

11. In your opinion, how effective is the current system of IP protection in China?
(1= completely ineffective; 6= entirely effective) 在您看来，中国现行的知识产权保护体制效力如何？（1=完全没有效率，6=完全有效）

☐ 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐ 6

12. Has your company ever experienced any problems with protecting IP in China?
您有没有在中国遇到过知识产权的相关问题？

☐ Yes; 是
☐ No; 否
☐ Don't Know; 不知道

13. In your opinion, how serious are the problems you have experienced? (1= not at all serious; 6= extremely serious) 您遇到的问题有多严重？（1=根本不严重，6=极度严重）

☐ 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐ 6

14. In your opinion, what is the main cause of any problems that you have experienced? 在您看来，问题产生的主要原因是什么？

☐ Poor legislation- 立法不良
☐ Poor enforcement- 执法不力
☐ Both- 都有
☐ Neither- 都不是
☐ Not sure- 不清楚

15. To what extent do you think the following factors contribute to the current state of the IP protection system in China? 在何种程度上，您认为以下因素造成了知识产权保护的状态？

(0= no contribution; 6= major contribution) (0=没有贡献，6=主要贡献)

Lack of the concept of individual rights in China: 在中国缺乏个人权利概念	0 <input type="checkbox"/>	1 <input type="checkbox"/>	2 <input type="checkbox"/>	3 <input type="checkbox"/>	4 <input type="checkbox"/>	5 <input type="checkbox"/>	6 <input type="checkbox"/>
Influence of Confucianism: 儒教的影响	0 <input type="checkbox"/>	1 <input type="checkbox"/>	2 <input type="checkbox"/>	3 <input type="checkbox"/>	4 <input type="checkbox"/>	5 <input type="checkbox"/>	6 <input type="checkbox"/>
Influence of socialism; 社会主义的影响	0 <input type="checkbox"/>	1 <input type="checkbox"/>	2 <input type="checkbox"/>	3 <input type="checkbox"/>	4 <input type="checkbox"/>	5 <input type="checkbox"/>	6 <input type="checkbox"/>
Lack of public awareness of IP rights: 缺乏知识产权的社会公共意识	0 <input type="checkbox"/>	1 <input type="checkbox"/>	2 <input type="checkbox"/>	3 <input type="checkbox"/>	4 <input type="checkbox"/>	5 <input type="checkbox"/>	6 <input type="checkbox"/>
The role of the government in the economy; 在经济过程中政府的作用	0 <input type="checkbox"/>	1 <input type="checkbox"/>	2 <input type="checkbox"/>	3 <input type="checkbox"/>	4 <input type="checkbox"/>	5 <input type="checkbox"/>	6 <input type="checkbox"/>

Perception that IP only benefits foreigners 感觉知识产权保护只对外国人有利	0 <input type="checkbox"/>	1 <input type="checkbox"/>	2 <input type="checkbox"/>	3 <input type="checkbox"/>	4 <input type="checkbox"/>	5 <input type="checkbox"/>	6 <input type="checkbox"/>
Local protectionism; 方保护主义	0 <input type="checkbox"/>	1 <input type="checkbox"/>	2 <input type="checkbox"/>	3 <input type="checkbox"/>	4 <input type="checkbox"/>	5 <input type="checkbox"/>	6 <input type="checkbox"/>
Over-reliance on public enforcement mechanisms ; 过度依赖公共实施机制	0 <input type="checkbox"/>	1 <input type="checkbox"/>	2 <input type="checkbox"/>	3 <input type="checkbox"/>	4 <input type="checkbox"/>	5 <input type="checkbox"/>	6 <input type="checkbox"/>
Lack of consistency in enforcement ; 实施缺乏一致性	0 <input type="checkbox"/>	1 <input type="checkbox"/>	2 <input type="checkbox"/>	3 <input type="checkbox"/>	4 <input type="checkbox"/>	5 <input type="checkbox"/>	6 <input type="checkbox"/>
Lack of a unified agency for dealing with IP ; 缺乏处理知识产权的统一机构	0 <input type="checkbox"/>	1 <input type="checkbox"/>	2 <input type="checkbox"/>	3 <input type="checkbox"/>	4 <input type="checkbox"/>	5 <input type="checkbox"/>	6 <input type="checkbox"/>
Weak judicial enforcement; 法院执行不力	0 <input type="checkbox"/>	1 <input type="checkbox"/>	2 <input type="checkbox"/>	3 <input type="checkbox"/>	4 <input type="checkbox"/>	5 <input type="checkbox"/>	6 <input type="checkbox"/>
Lack of trained & experienced legal personnel ; 缺乏训练有素且经验丰富的法律从业人员	0 <input type="checkbox"/>	1 <input type="checkbox"/>	2 <input type="checkbox"/>	3 <input type="checkbox"/>	4 <input type="checkbox"/>	5 <input type="checkbox"/>	6 <input type="checkbox"/>
Lack of transparency ; 缺少透明度	0 <input type="checkbox"/>	1 <input type="checkbox"/>	2 <input type="checkbox"/>	3 <input type="checkbox"/>	4 <input type="checkbox"/>	5 <input type="checkbox"/>	6 <input type="checkbox"/>
Length of the process ; 过程太长	0 <input type="checkbox"/>	1 <input type="checkbox"/>	2 <input type="checkbox"/>	3 <input type="checkbox"/>	4 <input type="checkbox"/>	5 <input type="checkbox"/>	6 <input type="checkbox"/>
Inadequate penalties ; 惩罚不当	0 <input type="checkbox"/>	1 <input type="checkbox"/>	2 <input type="checkbox"/>	3 <input type="checkbox"/>	4 <input type="checkbox"/>	5 <input type="checkbox"/>	6 <input type="checkbox"/>
Lack of powers to enforce court judgments ; 执行法院判决时权力缺失	0 <input type="checkbox"/>	1 <input type="checkbox"/>	2 <input type="checkbox"/>	3 <input type="checkbox"/>	4 <input type="checkbox"/>	5 <input type="checkbox"/>	6 <input type="checkbox"/>

16. Could you identify any other factors, apart from those listed above, which also contribute to the current state of the IP protection system in China? 除问题 15 所列的一些因素外, 您能否找出导致中国知识产权保护状态的其他因素?

17. How do you think IP protection in China could be improved? 您认为在中国, 知识产权保护怎样可以得到改善?

- ☐ More money dedicated to IP protection; 投入更多的知识产权保护专项资金
- ☐ Campaigns for greater public awareness; 加强公众意识的宣传活动
- ☐ Better training for legal personnel; 给予法律从业者更好的培训
- ☐ Better training for customs personnel; 给予海关人员更好的培训
- ☐ Better training for administrative personnel; 给予行政管理人员更好的培训
- ☐ Greater international cooperation; 加强国际合作
- ☐ Stronger commitment from central government; 来自中央政府更有力的承诺
- ☐ Other; 其它

(Please give details 请详细描述)

18. What other comments do you have about IP protection in China?

您对中国的知识产权保护还有其它意见吗?

This information will be detached from the survey to ensure confidentiality is maintained. No names or company details will be revealed under any circumstances.
此消息将与调查问卷分离以确保机密性。在任何情况下，个人姓名或公司详细资料都不会被透露

Follow-up Interviews 后续访谈

19. Would you be willing to take part in a follow-up interview? 您愿意参加后续的访谈吗?

- ☐ Yes 是
- ☐ No 否

20. If yes, please indicate which type of communication you would prefer for the follow-up interview: 如果是，请表明在后续访谈中您偏向使用何种类型的交流
(You can choose more than one 可多项选择)

- ☐ Telephone-电话
- ☐ E-mail- 电子邮件
- ☐ Face-to-face- 面对面
- ☐ Mail- 信件
- ☐ Fax- 传真

Contact Details 联系方式

公司名称 Company Name	
联系人姓名 Contact Name	
职务 Position	
地址 Address	
电话号码 Telephone Number	
传真号码 Fax Number	
电子邮箱 E-mail Address	

Thank you very much for your support- your response is invaluable to my research.
非常感谢您的支持，我期待着尽快收到您的回复.