

BECOMING THE GOOSE THAT LAYS GOLDEN EGGS: PROTECTING U.S. INTELLECTUAL PROPERTY IN CHINA THROUGH CHINESE INVESTMENT IN THE UNITED STATES

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INTRODUCTION

In the United States, Sinophobia pervades nearly every aspect of public discourse on intellectual property rights (IPR) in China.¹ Just as it was safer in the 1970s for politicians to blame Detroit's economic woes on Japanese carmakers rather than on substandard manufacturing practices, China's recent economic success has made it a target for the hyperbolic vitriol of contemporary public figures.² For example, former Massa-

1. Aaron Schwabach, *Intellectual Property Piracy: Perception and Reality in China, the United States, and Elsewhere*, 2 J. INT'L MEDIA & ENT. L. 65, 66-68 (2008).

2. *Id.* Though not directly related to intellectual property, the primitive level of discourse surrounding currency valuation typifies Sinophobia in the U.S. Congress. In October of 2011, the U.S. Senate brought to the floor the so-called "China-bashing" or "Anti-China" bill (officially known as the Currency Exchange Rate Oversight Reform Act of 2010, S. 3134, 111th Cong. (2d Sess. 2010)), which was designed to make it more difficult for the Treasury Department to avoid labeling China a "currency manipulator." Liz Peek, *The China Bashing Bill: Ill-Timed and Dangerous*, FISCAL TIMES, Oct. 5, 2011, <http://www.thefiscaltimes.com/Columns/2011/10/05/The-China-Bashing-Bill-Ill-timed-and-Dangerous.aspx#page1>; *And Now, Protectionism: America's Latest Anti-China Bill Tackles a Problem Already Being Solved*, ECONOMIST, Oct. 15, 2011, <http://www.economist.com/node/21532288>; WAYNE M. MORRISON & MARC LABONTE, CONG. RESEARCH SERV., RS21625, CHINA'S CURRENCY POLICY: AN ANALYSIS OF THE ECONOMIC ISSUES 9 (2010) (summarizing the bill and discussing the Treasury Department's treatment of China). Though the economic assumptions underlying this legislation are beyond the scope of this paper, former U.S. Trade Representative Susan Schwab referred to the bill as "clearly one of [the dumbest]" actions available to the Senate, "a signal sending exercise during a political season" likely to raise

achusetts Governor Mitt Romney has stated that China is “stealing our intellectual property They’re stealing our jobs. And we’re gonna [sic] stand up to China.”³ Likewise, Secretary of the Treasury Timothy Geithner implied that China was not a “serious” economy because it failed to implement even basic IPR protections.⁴ Furthermore, when Senate leaders shelved two controversial intellectual property bills, the Stop Online Piracy Act⁵ and the Protect IP Act,⁶ Senator Patrick Leahy stated that “somewhere in China” counterfeiters were “smugly watching” as the U.S. Senate failed to stop overseas criminals from “draining” our economy.⁷ Additionally, the House Ways and Means Committee is currently reviewing a bill that singles out China as an IPR violator and would direct the president to impose duties on Chinese goods equal to the “estimated” revenue loss of U.S. IP holders.⁸

In a speech to executives from the United States and Asia, the usually soft-spoken Barack Obama expressed his impatience, demanding that China “play by the rules” and explained that the United States “‘can’t be expected to stand by’ without getting reciprocity from China on [the issues of] currency, trade and [intellectual property rights].”⁹ This com-

the issue of whether the U.S. is being “protectionist.” *Schwab Sees ‘Boomerang’ Effect from China Currency Bill: Video*, BLOOMBERG (Sept. 29, 2010, 8:08AM), <http://www.bloomberg.com/news/2010-09-29/schwab-sees-boomerang-effect-from-china-currency-bill-video.html>.

3. *Romney Position on China*, 2012 REPUBLICAN CANDIDATES, <http://2012.republican-candidates.org/Romney/China.php> (last visited Sept. 3, 2012) (quoting statements made by Mitt Romney during his 2012 presidential campaign).

4. Michael Martina, *Geithner Slams China’s Intellectual Property Policies*, REUTERS, Sept. 23, 2011, available at <http://www.reuters.com/article/2011/09/23/us-china-geithner-idUSTRE78M15G20110923>.

5. Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011).

6. PROTECT IP Act of 2011, S. 968, 112th Cong. (2011).

7. Jonathan Weisman, *After an Online Firestorm, Congress Shelves Antipiracy Bills*, N.Y. TIMES, Jan. 20, 2012, <http://www.nytimes.com/2012/01/21/technology/senate-postpones-piracy-vote.html>.

8. U.S.-CHINA BUSINESS COUNCIL, 112TH CONGRESS, SECOND SESSION: LEGISLATION RELATED TO CHINA (Aug. 3, 2012), <https://www.uschina.org/public/documents/2012/congress-china-legislation.pdf> (citing, among dozens of other anti-Chinese bills, H.R. 3375, 112th Cong. (2d Sess. 2011)).

9. Margaret Talev & Julianna Goldman, *Obama Tells Hu U.S. ‘Impatient’ with China on Yuan, Intellectual Property*, BLOOMBERG (Nov. 13, 2011, 3:18 PM), <http://www.bloomberg.com/news/2011-11-13/obama-puts-pressure-on-china-as-u-s-asserts-influence-in-asia.html>.

ment is significant not only because it was made by the President of the United States, but also because it confirms that intellectual property protection has joined currency valuation and trade protection in the pantheon of “Major Impediments” to improved U.S.-China relations.¹⁰ By listing these issues together, President Obama implied that a lack of progress on Chinese protection of U.S. IPR will prevent closer bilateral relations on other issues. This attitude spans the U.S. political spectrum and there is little doubt that intellectual property protection is a key contributor to the “trust deficit” that People’s Republic of China (P.R.C.) president-in-waiting Xi Jinping has attempted to address in recent visits to the United States.¹¹

Nor are politicians alone in overemphasizing the extent and importance of Chinese IP infringement. While many authors have documented the tremendous improvements in Chinese IP protection over the last decade,¹² others, despite all evidence to the contrary,¹³ allege that IP protection in China is worse than ever.¹⁴ Unfortunately, the former are often practi-

10. See *id.* (discussing the difficulties that U.S.-China relations face).

11. Jeremy Page & Andrew Browne, *On U.S. Visit, Xi to Address ‘Trust Deficit,’* WALL ST. J., Feb. 10, 2012, <http://online.wsj.com/article/SB10001424052970204642604577212940532481750.html>; *Xi Says Frictions Shouldn’t Define US-China Ties*, REUTERS, Feb. 13, 2012, available at <http://uk.reuters.com/article/2012/02/13/china-usa-xi-idUSL4E8DD0V220120213> (last updated Feb. 13, 2012, 5:14 AM GMT).

12. For a discussion of increasing IP protection in China, see, for example, Benjamin Bai, *China IP Strategies: Don’t Go to China Without Them!*, ALLEN & OVERY (July 20, 2011), <http://www.allenoverly.com/AOWeb/binaries/62394.PDF>; Ian McClure, *IP Litigation Statistics from China; But What Do They Tell Us?*, IP PROSPECTIVE (Mar. 9, 2010, 9:25 AM), <http://www.ipprospective.com/patent-prospects/ip-litigation-statistics-from-the-peoples-supreme-court-of-china-but-what-do-they-tell-us?>; Yuqing Lin et al., *A Practical Patent Strategy for U.S. Companies Doing Business in China*, LANDSLIDE, Jan.–Feb. 2011, at 16.

13. See *infra* Part I.

14. See, e.g., Weighou Zhou, Note, *Pirates Behind an Ajar Door, and an Ocean Away: U.S.-China WTO Disputes, Intellectual Property Protection, and Market Access*, 25 TEMP. INT’L & COMP. L.J. 139, 140 (2011) (claiming the problem is worse than before the United States initiated IPR-related WTO complaints against China); Mark Liang, Comment, *A Three-Pronged Approach: How the United States Can Use WTO Disclosure Requirements To Curb Intellectual Property Protection Infringement in China*, 11 CHI. J. INT’L L. 285, 289 (2010) (“China has not significantly changed its IPR enforcement policies . . . [T]he situation is only worsening.”); Donald P. Harris, *The Honeymoon Is Over: The U.S.-*

tioners and constrain themselves to descriptive analysis of Chinese case law and statistics, rarely making policy recommendations.

In contrast, this paper will rely on judicial data and the documented experiences of these IP practitioners in China to, first, show that China has made phenomenal progress in the area of IPR protection, second, illustrate the costs of failing to embrace this progress, and, third, propose a framework to harness China's IPR renaissance for the benefit of U.S. investors and IPR holders. Accordingly, Part I will present statistical and anecdotal evidence of that progress, focusing on Chinese courts as a powerful IPR enforcement tool for domestic enterprises. Part II will show that U.S. distrust of China's commitment to IPR protection, valid or not, is self-destructive. This section will demonstrate that lost revenues due to infringement are dwarfed by the commercial and societal costs of refusing to license certain technologies of great external value, such as "green" technology, to China. Finally, Part III will offer several policy recommendations designed to stimulate Chinese investment in U.S. IP-producing firms, thereby creating savvy Chinese stakeholders to aid in enforcement. Overall, this paper seeks to show that rather than viewing enhanced protection as a prerequisite for closer relations, U.S. officials should view closer relations as means of obtaining enhanced protection.

I. CHANGING ITS STRIPES: CHINA'S NATURAL PROGRESSION FROM PIRACY TO INNOVATION

Chinese government and society have historically held individual intellectual property rights in low regard.¹⁵ This traditional disdain manifests itself today in the difficulty that foreign investors experience when protecting their IPR in China.¹⁶ However, "[a]s countries move up the developmental ladder," the benefits of recognizing the intellectual property

China WTO Intellectual Property Complaint, 32 FORDHAM INT'L L.J. 96, 97 (2008) ("China has failed miserably to enforce [IPR].").

15. See generally John R. Allison & Lianlian Lin, *The Evolution of Chinese Attitudes Toward Property Rights in Invention and Discovery*, 20 U. PA. J. INT'L ECON. L. 735 (1999) (discussing the historical development of Chinese attitudes toward the protection of intellectual property rights).

16. *Id.*

rights of foreigners begin to outweigh the costs.¹⁷ The following subsections will explain not only this economic phenomenon, but provide evidence that China is currently undergoing just such a change.

A. *Confucianism, Communism, and Cynicism: China's Historical Disdain for Personal Intellectual Property*

Classical Chinese culture perceived IPR in a fundamentally different way than it is understood in modern legal systems, including China's.¹⁸ Some academics go so far as to allege that the concept of IPR did not exist before the introduction of Western legal theory.¹⁹ Indeed, the shared Confucian, Buddhist, and Taoist notion of learning as transmission from master to student, as well as the view of science as a social enterprise, did little to foster the development of individual property rights in ideas.²⁰ Moreover, there is evidence that the legal "right" (权利) of IPR was an English neologism coined in the 1840s, and even then it was only applicable to sovereign states.²¹

Later, the collectively owned work products of the Communist era did little to change this conception of intellectual property.²² Of the various mass campaigns that characterized pre-Reform China, the Cultural Revolution (1966–76) was the most devastating to the development of IPR.²³ Fearing the harsh penalties that were often imposed on scientists, writers,

17. David G. Post, *Some Thoughts on the Political Economy of Intellectual Property: A Brief Look at the International Copyright Relations of the United States*, TEMPLE UNIV. LAW SCH. (Sept. 1998), <http://www.temple.edu/lawschool/dpost/Chinapaper.html>.

18. William O. Hennessey, *Protection of Intellectual Property in China (30 Years and More): A Personal Reflection*, 46 HOUS. L. REV. 1257, 1260, 1269 (2009).

19. *Id.*

20. *Id.* at 1269–70. See also Allison & Lin, *supra* note 15, at 743–44 (discussing the influence of Confucianism on the Chinese understanding of individual intellectual contributions).

21. Hennessey, *supra* note 18, at 1269.

22. Dalila Hoover, *Coercion Will Not Protect Trademark Owners in China, but an Understanding of China's Culture Will: A Lesson the United States Has To Learn*, 15 MARQ. INTELL. PROP. L. REV. 325, 343 (2011).

23. Peter K. Yu, *Piracy, Prejudice, and Perspectives: An Attempt To Use Shakespeare To Reconfigure the U.S.-China Intellectual Property Debate*, 19 B.U. INT'L L.J. 1, 21–22 (2001).

and intellectuals, many Chinese refused to acknowledge their role in creative activity, instead using pseudonyms such as “Red Flag” (红旗) and “Worker-Peasant-Soldier” (工农兵).²⁴ Moreover, the dismantling of major institutions such as China’s legal system necessarily stunted the development of IPR during the decade of the Cultural Revolution.²⁵

Though an understanding of Chinese legal history is required to explain the state of IPR in contemporary China, it is important not to overestimate its predictive value. The claim that traditional Chinese culture and communist doctrine continue to actively militate against the IPR protection today is “likely not supported by the reality on Chinese soil.”²⁶ Following the Communist era’s systematic scouring of traditional culture²⁷ and contemporary China’s embrace of capitalism and increasing Westernization,²⁸ these older norms are currently too insubstantial to prevent the expansion of intellectual property rights. If there ever was, there is certainly no longer a fundamental incompatibility between so-called “Western” and Chinese notions of intellectual property.²⁹ In fact, due to coer-

24. *Id.*

25. Geoffrey T. Willard, *An Examination of China’s Emerging Intellectual Property Regime: Historical Underpinnings, the Current System and Prospects for the Future*, 6 IND. INT’L & COMP. L. REV. 411, 417–18 (1996).

26. Peter K. Yu, *Intellectual Property and Asian Values*, 16 MARQ. INTELL. PROP. L. REV. 329, 342 (2012) (distinguishing the “strong” form of William Alford’s principal argument, that history militates against IPR in contemporary China, and the “weak” form, that history merely explains the lack of indigenous IPR protections in contemporary China, as presented in WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* (1995)).

27. See, for example, GAO YUAN, *BORN RED: A CHRONICLE OF THE CULTURAL REVOLUTION 85–95* (1987) for an account of how the Red Guard implemented the policy of “smashing the Four Olds” (old customs, old culture, old habits, and old ideas).

28. Xiang Ye, *Cultural Invasion and Cultural Protection: Should Chinese Celebrate Christmas* [sic], ASIAN SOC. SCI., Jan. 2010, at 157, 158 (“As for customs and festivals, we Chinese people . . . forget we are Chinese and try to come closer to the [W]estern culture in observing [W]estern festivals and even imitate the [W]estern people, especially U.S. American people’s daily behavior, such as chewing gums, tattooing the body, and hip-hopping.”). See also Nicholas Loubere, *Is China Conforming to a Westernized Global Culture? An Assimilation Theory Analysis of Chinese-Western Cultural Relations*, 7 GRADUATE J. ASIA-PAC. STUD. 70, 80 (2010) for a discussion of whether China has assimilated to Western culture.

29. Yu, *supra* note 26, at 344–45.

cive trade pressure, “legal transplants from [abroad]” have taken root to form a growing “exogenously developed” IPR system.³⁰ Rather than culture, China’s current IPR shortcomings are the result of conscious cost-benefit analysis on the part of officials and private firms.³¹ As the remainder of this section will illustrate, this cost-benefit calculation may change over time. As it stands, China is beginning to exhibit many of the traits of an innovative, IPR-oriented state.

B. *Our Founding Filchers: Developing States’ Natural Progression from Piracy-Based Economies*

The progression of cultures and nations from technological imitators to technological innovators is a well-documented phenomenon.³² For example, the early United States adopted a policy of conspicuous intellectual property theft “to promote the development of infant [domestic] industries.”³³ Over the vocal protests of France and Britain,³⁴ the Founding Fathers refused to extend IP protections to foreigners.³⁵ “Benjamin Franklin, in fact, made his fortune on what we would now call ‘copyright piracy.’”³⁶ Moreover, Samuel Slater—putative father of the American Industrial Revolution—borrowed from British designs³⁷ to an extent that modern IP attorneys would certainly consider infringement.³⁸

30. *Id.*

31. See Russell Flannery, *Foreign Businesses in China Are Increasingly Concerned About the Future*, FORBES, (June 26, 2012, 9:35 AM), <http://www.forbes.com/sites/russellflannery/2012/06/26/foreign-businesses-in-china-are-increasingly-concerned-about-the-future/2/>, for a discussion, with Kenneth Lieberthal, about some of the financial considerations surrounding IPR in China. Lieberthal states that firms are enticed to China by local officials offering cheap financing and easy regulatory approval, only to discover that their technology “walks out the back door.” *Id.* Furthermore, Lieberthal suggests that local officials in many areas of China may be benefited by local firms producing counterfeit products. *Id.*

32. Post, *supra* note 17.

33. *Id.*

34. *Id.*

35. *Id.*

36. Dana Blankenhorn, *Symposium Paper: Would Jefferson File Share?*, 10 VA. J.L. & TECH. 1, 3 (2005).

37. *Economic Growth and the Early Industrial Revolution*, USHISTORY.ORG, <http://www.ushistory.org/us/22a.asp> (last visited Aug. 28, 2012).

38. Dana Blankenhorn, *supra* note 36, at 4.

So what changed? “[B]eginning in the late nineteenth century, America came to have a positive balance of intellectual property payments.”³⁹ As a state progresses towards becoming a net IP exporter, the costs of a weak IPR regime to domestic innovators begin to outweigh the benefits of infringing on foreign IP.⁴⁰ In East Asia, Japan, Korea, Hong Kong, Singapore, and Taiwan underwent similar transformations in the 1970s and 1980s.⁴¹ Japan in particular has “improved considerably” since the 1980s, due in large part to pressure from domestic IP stakeholders.⁴² As it underwent this shift, Japan, a formerly notorious infringer of IPR, was instrumental in establishing the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Anti-Counterfeiting Trade Agreement (ACTA)⁴³ and has even helped China train its own State Intellectual Property Office (SIPO) agents.⁴⁴ There is substantial evidence that China is now undergoing a change similar to that experienced by Japan and the other East Asian economies.⁴⁵

C. *Forcing Innovation: Demographics, Environment and Competition*

Various pressures are forcing China to shift towards an innovative, “value added” economy.⁴⁶ First, as a result of the “one child” policy, China will be the first country to become demographically old before it becomes developed.⁴⁷ To com-

39. *Id.* at 5.

40. Post, *supra* note 17.

41. Peter K. Yu, *Intellectual Property, Economic Development, and the China Puzzle*, in INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS PLUS ERA 173, 202 (Daniel J. Gervais ed., 2007).

42. *Id.* at 354.

43. *Id.* at 354, 370–71.

44. Alexander C. Chen, *Climbing the Great Wall: A Guide to Intellectual Property Enforcement in the People's Republic of China*, 25 AIPLA Q.J. 1, 50–51 (1997).

45. See *infra* Part I.F.

46. Andrew Delios & Xufei Ma, *China Is Undergoing a Transformation. . . Yet Again*, IVEY BUS. J., Jan.–Feb. 2010, <http://www.iveybusinessjournal.com/topics/global-business/china-is-undergoing-a-transformation%E2%80%A6yet-again>.

47. Sui-Lee Wee, *China Risks Getting Old Before It Gets Rich*, REUTERS, Apr. 27, 2011, available at <http://www.reuters.com/article/2011/04/27/us-china-demography-idUSTRE73Q1SC20110427>.

pensate for an aging workforce, China must increase efficiency through technological innovation.⁴⁸ As director of the Brookings-Tsinghua Center for Public Policy Wang Feng explains: “Indigenous innovation is not just an empty slogan; it is a necessity to ensure that the Chinese economy gets more bang for its buck. The ‘Made in China’ model will not provide sufficient economic returns to support an aging society.”⁴⁹ Second, China is facing profound pollution problems.⁵⁰ Providing its population with sustainable access to water (among other natural resources) will only be possible through a de-emphasis of resource intensive manufacturing.⁵¹ Third, Chinese firms are eager to expand globally, but they recognize that legitimate and innovative IP is necessary to compete abroad.⁵² For example, Chinese companies that aspire to become global household names are understandably disturbed by the fact that 83% of consumers outside of China cannot name a single Chinese brand or company.⁵³ The P.R.C. leadership is well aware of these pressures, and they are using intellectual property law as part of a broader plan to promote innovation.⁵⁴ As David J. Kappos, Director of the United States Patent and Trademark Office (USPTO), remarked: “The leadership in China knows that innovation is its future, the key to higher living standards

48. A.S., *Trade Innovation: Invented Threats*, ECONOMIST, Jan. 3, 2011, http://www.economist.com/blogs/freeexchange/2011/01/trade_innovation.

49. Feng Wang, *Racing Towards the Precipice*, CHINA ECON. Q., June 2012, at 17, 19–20, available at <http://www.brookings.edu/~media/research/files/articles/2012/6/china%20demographics%20wang/demographics%20china%20wang>.

50. Jim Yardley, *Beneath Booming Cities, China's Future Is Drying Up*, N.Y. TIMES, Sept. 28, 2007, <http://www.nytimes.com/2007/09/28/world/asia/28water.html?pagewanted=all>.

51. *Id.*

52. See Maggie Chao et al., *Thanks, But No Thanks' to Made in China?*, KNOWLEDGE@WHARTON (Jan. 3, 2012), <http://knowledge.wharton.upenn.edu/article.cfm?articleid=2902> (citing the pioneering Chinese technology firm Haier as an example of successful expansion into foreign markets through careful avoidance of IP suits).

53. See Laurie Burkitt, *China's Top 50 Brands: Huge at Home, Unknown Abroad*, WALL ST. J., Dec. 13, 2011, <http://blogs.wsj.com/chinarealtime/2011/12/13/chinas-top-50-brands-huge-at-home-unknown-abroad/> (citing research by agencies Millward Brown and WPP).

54. Steve Lohr, *When Innovation, Too, Is Made in China*, N.Y. TIMES, Jan. 1, 2011, <http://www.nytimes.com/2011/01/02/business/02unboxed.html>.

and long-term growth They are doing everything they can to drive innovation, and China's patent strategy is part of that broader plan."⁵⁵ As Director Kappos hinted, China's leadership has rapidly introduced sweeping changes in IPR legislation and administrative planning meant to foster innovation.

D. *Perfect on Paper: China's De Jure Intellectual Property Rights Protection in Accordance with International Best Practice*

Due to the P.R.C. leadership's desire for innovation and international pressure, on paper China has intellectual property rights protection on par with that of the United States. It has acceded to all major international IPR agreements, including the Paris Convention for the Protection of Industrial Property (WIPO), the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention), the Patent Cooperation Treaty (PCT), and the WTO's TRIPS agreement.⁵⁶ Moreover, in its WTO accession agreement China waived the five-year grace period afforded to most developing countries, agreeing instead to immediately reconcile its domestic IP laws with its international obligations.⁵⁷

While enforcement lags, the P.R.C.'s domestic intellectual property laws largely imitate and expand upon their U.S. and European equivalents.⁵⁸ Most Western attorneys find Chinese intellectual property law "comprehensive, systematic and wholly familiar."⁵⁹ With substantial amendments in 1992, 2000, and 2008, the Patent Law of the P.R.C. has increasingly

55. *Id.*

56. Catherine Sun, *Understanding the Evolving and Unique Nature of Chinese IP Law*, in *IP CLIENT STRATEGIES IN ASIA* 89 (Michaela Falls ed., 2009).

57. Rachel T. Wu, Comment, *Awaking the Sleeping Dragon: The Evolving Chinese Patent Law and Its Implications for Pharmaceutical Patents*, 34 *FORDHAM INT'L L.J.* 549, 556-57 (2011).

58. See Xiangjun Si & Stephanie X. Wang, *Chinese Patent Law and Implementation Amendments Bring Key Changes, Interpretive Challenges*, *INTELL. PROP. & TECH. L.J.*, May 2011, at 17 (explaining that the 2008 Patent Law amendments are for the most part in keeping with international best practice).

59. Amy E. Conroy, Note, *The Gray (Goods) Elephant in the Room: China's Troubling Attitude Toward IP Protection of Gray Market Goods*, 36 *BROOK. J. INT'L L.* 1075, 1094-95 (2011) (alteration in original) (quoting U.K. INTELLECTUAL PROP. OFFICE ET AL., *INTELLECTUAL PROPERTY RIGHTS PRIMER FOR CHINA* 14 (2008)).

come to resemble that of the United States.⁶⁰ Among other recent amendments, China “significantly strengthened its novelty requirement” for patents (the requirement that no identical invention has been disclosed publicly or in a patent application).⁶¹ Now in China, as in the United States, an invention is considered “anticipated by the prior art” if it has been used anywhere in the world, not just anywhere domestically.⁶²

Moreover, in some ways the P.R.C. Patent Law is more flexible than its U.S. analog. For example, while the U.S. Patent Act provides a remedy for infringement by civil action,⁶³ the P.R.C. Patent Law includes both a private cause of action and access to administrative enforcement.⁶⁴ Thus, the State Intellectual Property Office (SIPO) is not only responsible for reviewing patent applications but also has the authority to conduct its own investigations, levy fines, and issue cease-and-desist orders.⁶⁵

E. *Innovation from the Top Down: China’s Long-Term Administrative Planners Attempt a Major Shift*

China’s long-term administrative planning reflects a strong commitment to intellectual property rights. In 2010, China’s State Intellectual Property Office (SIPO) released its

60. Michael Vella, Richard Hung & David Yang, *Beyond the Due Diligence: Patent Protection in China*, NVCA TODAY (Nov. 25, 2008, 4:43 PM), <http://nvcatoday.nvca.org/index.php/beyond-the-due-diligence-patent-protection-in-china.html>.

61. Kimberly N. Van Voorhis & Christie Yang, *Recent Developments in Patent Law Worldwide*, 997 PLI/Pat 405, 412–13 (PLI Patent, Copyright, Trademarks, & Literary Prop., Course Handbook Series No. 24078, 2010).

62. Zhonghua Renmin Gongheguo Zhuanli Fa (中华人民共和国专利法) [Patent Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Dec. 27, 2008, effective Oct. 1, 2009) 2009 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 274 (China) art. 22, [hereinafter Patent Law of the P.R.C.] available at http://english.sipo.gov.cn/laws/lawsregulations/201101/t20110119_566244.html; 35 U.S.C. § 102(a) (2006).

63. 35 U.S.C. § 281 (2006).

64. Patent Law of the P.R.C. art. 60 (“If a dispute arises as a result of exploitation of a patent without permission of the patentee, that is, the patent right of the patentee is infringed . . . the patentee or interested party may take legal action before a people’s court, and may also request the administration department for patent-related work to handle the dispute.”).

65. Wu, *supra* note 57, at 557–58.

National Patent Development Strategy (2011-2020).⁶⁶ According to SIPO deputy commissioner Gan Shaoning, this long-term plan will enable China to “cop[e] with fierce global competition” in the IP marketplace.⁶⁷ The Development Strategy’s targets for 2015, referred to by USPTO Director Kappos as “mind-blowing,”⁶⁸ include two million patent applications annually, the employment of more than 9,000 administrative patent examiners and approximately USD \$16 billion in patent transaction services annually.⁶⁹ To provide some context, by 2015 the United States will have approximately 600,000 annual patent filings and 8,000 patent examiners,⁷⁰ and in 2010 U.S. patent transaction services contributed approximated USD \$500 million to GDP.⁷¹ If SIPO’s objectives are met, by 2015 China will have surpassed the U.S. in several major metrics of technological innovation.

F. *Money Where Its Mouth Is: Empirical Evidence of Effective Intellectual Property Protection in China*

1. *Patent Applications*

While China often experiences difficulty transitioning from paper to practice,⁷² there is strong empirical evidence that it is actually becoming an innovation center. For example, SIPO reports that in 2010 there were 293,000 domestic patent

66. STATE INTELLECTUAL PROPERTY OFFICE OF THE P.R.C., QUANGUO ZHUANLI SHIYE FAZHAN ZHANLUE (全国专利事业发展战略 (2011-2020 年)) [PATENT DEVELOPMENT STRATEGY (2011-2020)] (2010) [hereinafter SIPO NATIONAL PATENT STRATEGY], available at http://www.sipo.gov.cn/gk/gzyd/20111/t20111128_633501.html, translation available at <http://graphics8.nytimes.com/packages/pdf/business/SIPONatPatentDevStrategy.pdf>.

67. David J. Kappos, *On Becoming an Even Stronger Patent Powerhouse: China’s National Patent Development Strategy, 2011–2020*, LANDSLIDE, Mar.–Apr. 2011, at 8.

68. Lohr, *supra* note 54.

69. SIPO NATIONAL PATENT STRATEGY, *supra* note 66.

70. This estimate assumes a linear trend line based on USPTO hiring data from 2007–11. See UNITED STATES PATENT AND TRADEMARK OFFICE, PERFORMANCE AND ACCOUNTABILITY REPORT: FISCAL YEAR 2011, at 60, 187 (2011) (providing patent filing and examiner employment data).

71. BRAD KULLBERG, YET2.COM, SELLING PATENTS (2010), <http://www.sunsteinlaw.com/media/kullberg.pdf>.

72. See Flannery, *supra* note 31 (quoting Kenneth Lieberthal who explains that China’s “very good” national IP laws often go unenforced due to decentralized governance, local corruption, and protectionism).

applications in China⁷³—third globally, behind the United States (520,227)⁷⁴ and Japan (344,598).⁷⁵ A report by Thompson Reuters estimates that at current growth rates, Chinese annual patent applications will surpass those of the United States by 2012.⁷⁶ However, critics point out that many of these patent applications are plagiarized or irrelevant.⁷⁷ One commentator even joked that SIPO would approve a patent application for the wheel.⁷⁸ A Ministry of Science and Technology (MOST) study found that while China ranks first in total research personnel and technology exports and third in terms of authorized patents, it was merely twenty-first in overall innovation abilities.⁷⁹ That said, China has risen significantly in “innovation performance,” “innovation resource,” and “knowledge creation” measurements since 2000 and these improvements are expected to continue into the near future.⁸⁰

73. Li Jia, *China's Annual Patent Applications Surge in 2010*, PEOPLE'S DAILY ONLINE (China), Mar. 29, 2011, <http://english.peopledaily.com.cn/90001/90778/98505/7334143.html>. Including the somewhat controversial unexamined utility and design patent applications, China logs more than a million domestic applications annually. STATE INTELLECTUAL PROPERTY OFFICE OF THE P.R.C., APPLICATIONS FOR THREE KINDS OF PATENTS RECEIVED FROM HOME AND ABROAD (2010), http://english.sipo.gov.cn/statistics/gnwsznb/2010/201101/t20110125_570592.html.

74. U.S. PATENT AND TRADEMARK OFFICE, U.S. PATENT STATISTICAL CHART, CALENDAR YEARS 1963–2011 (2011), http://www.uspto.gov/web/offices/ac/ido/oeip/taf/us_stat.htm (last visited Sept. 23, 2012).

75. JAPAN PATENT OFFICE, JAPAN PATENT OFFICE ANNUAL REPORT 2011, at 174, http://www.jpo.go.jp/shiryoku_e/toushin_e/kenkyukai_e/pdf/annual_report2011/part5.pdf.

76. EVE Y. ZHOU & BOB STEMBRIDGE, THOMSON REUTERS, *PATENTED IN CHINA: THE PRESENT AND FUTURE STATE OF INNOVATION IN CHINA 9* (2008), <http://ip-science.thomsonreuters.com/press/pdf/tl/WIPTChina08.pdf>.

77. Vivek Wadhwa, *China Could Game the U.S. in Intellectual Property*, BLOOMBERG BUSINESSWEEK (Jan. 10, 2011), http://www.businessweek.com/technology/content/jan2011/tc2011017_509416.htm.

78. Patti Waldmeir, *The Value of Branding Becomes Patent*, FIN. TIMES (London), July 2, 2008, <http://www.ft.com/cms/s/0/3389c83a-4850-11dd-a851-000077b07658,s01=1.html#axzz1crbjTgwm>.

79. *China Ranks 21st on Its Own Global Innovation List*, PEOPLE'S DAILY ONLINE (China), Feb. 25, 2011, <http://english.peopledaily.com.cn/90001/90776/90883/7299451.html>.

80. *Id.*

2. *Infringement Litigation*

The high number of successful IPR infringement suits brought in Chinese courts is the most compelling indicator of change. By 2007 the number of IPR civil infringement cases (patent, copyright, and trademark) filed in Chinese courts far exceeded those in the U.S.—17,877⁸¹ to 10,783,⁸² respectively. While in subsequent years China experienced double digit growth in IPR infringement filings (24,406 in 2008,⁸³ 30,626 in 2009,⁸⁴ 42,931 in 2010,⁸⁵ and 59,612 in 2011⁸⁶), U.S. filings have decreased slightly since 2007 (9,592 in 2008,⁸⁷ 8,365 in 2009,⁸⁸ 8,966 in 2010,⁸⁹ and 9,940 in 2011⁹⁰).

81. *China's Intellectual Property Protection in 2007*, INTELLECTUAL PROP. PROTECTION IN CHINA (Apr. 18, 2008, 3:22 PM), http://www.chinaipr.gov.cn/policyarticle/policy/documents/200804/237294_2.html.

82. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2007 ANNUAL REPORT OF THE DIRECTOR 207, tbl.C-11 (2008), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2007/front/JudicialBusinesspdfversion.pdf>.

83. *China's Intellectual Property Protection in 2008*, NAT'L INTELLECTUAL PROP. STRATEGY (June 6, 2010, 4:18 PM), <http://www.nipso.cn/onevs.asp?id=9600>.

84. *China's Intellectual Property Protection in 2009*, NAT'L INTELLECTUAL PROP. STRATEGY (June 6, 2010, 4:17 PM), <http://www.nipso.cn/onevs.asp?id=9599> [hereinafter *China's IP Protection 2009*].

85. *China's Intellectual Property Protection in 2010*, STATE INTELLECTUAL PROP. OFFICE OF THE P.R.C. (Apr. 29, 2011), http://english.sipo.gov.cn/laws/whitepapers/201104/t20110429_602312.html.

86. *Chinese Courts See Increase in IPR Cases*, XINHUA, Apr. 17, 2012, http://news.xinhuanet.com/english/china/2012-04/17/c_131533063.htm.

87. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2008 ANNUAL REPORT OF THE DIRECTOR 205, tbl.C-11 (2009), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2008/front/JudicialBusinesspdfversion.pdf>.

88. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2009 ANNUAL REPORT OF THE DIRECTOR 200, tbl.C-11 (2010), available at <http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc=/uscourts/Statistics/JudicialBusiness/2009/JudicialBusinesspdfversion.pdf>.

89. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2010 ANNUAL REPORT OF THE DIRECTOR 203, tbl.C-11 (2011), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/JudicialBusinesspdfversion.pdf>.

90. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2011 ANNUAL REPORT OF THE DIRECTOR 162, tbl.C-7 (2012), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf>.

Thus far, most IP infringement litigation in China has been between domestic firms⁹¹ and for relatively small amounts in controversy.⁹² Between 2007 and 2011, Chinese IPR infringement judgments averaged around USD \$8,600.⁹³ Though these judgment figures are underwhelming, in Chinese infringement suits, plaintiffs win more than 80% of the time (85% in 2007, 77% in 2008, 84% in 2009, 81% in 2010, and 92% in 2011).⁹⁴ The average U.S. win rate fluctuates around 25%,⁹⁵ though most of these cases have multiple millions of dollars at stake.⁹⁶

The cause of China's growing litigiousness is unclear, but some speculate that aggressive enforcement attempts by multinational companies have led to a broader awareness of IP-related issues in China.⁹⁷ Whatever the reason, this phenomenon represents an important step in China's development as an innovating state.

3. *Landmark Cases*

Besides the large numbers of low-stakes domestic infringement suits in China, there are a few high value international cases worth mentioning. First, and perhaps most famous, is the case of *Chint v. Schneider*.⁹⁸ Chint, a Wenzhou based low-volt-

91. For example, in 2009 only 4.4 percent of infringement suits involved a foreign party. *China's IP Protection 2009*, *supra* note 84 (reporting that only 1,361 of 30,626 infringement cases in 2009 involved foreign parties).

92. Joff Wild, *There Is More IP Litigation in China Than Anywhere on Earth*, IAM MAG. (Mar. 8, 2010), <http://www.iam-magazine.com/blog/detail.aspx?g=3a9c9c06-dd4f-4adc-8e2f-5a6eadc847c1&CommentReceived=1>.

93. *CIELA Summary Report: Trend by Year*, CHINA IP LITIGATION ANALYSIS, <http://www.ciela.cn/Search/TrendByYearResult.aspx?pageId=1&ppId=2&language=en&city=&court=&mainType=&subType=&cause=&industry=> (last visited Sept. 26, 2012) [hereinafter *CIELA Summary Report*].

94. *Id.* These rates probably reflect not only the effectiveness of litigation, but also the high levels of blatant infringement in China.

95. *LegalMetric Data of KSR Effect on Patent Owner Win Rates*, LEGALMETRIC (Sept. 12, 2007), <http://www.eworldwire.com/pdf/17609.pdf>.

96. Yury Kapgan & Kathy Yu, *Betting the Company: The Bottom Line in Patent Litigation*, DAILY JOURNAL (L.A. & S.F.), Jan. 3, 2012, http://www.lw.com/upload/pubContent/_pdf/pub4526_1.pdf.

97. Alok Aggarwal & George Sawyer, *Patenting Landscape in China: History, Growth and Utility Model*, 1022 PLI/Par 149, 167 (PLI Intellectual Prop., Course Handbook Series No. 23889, 2010).

98. Zhengtai Jituan Gufen Youxian Gongsi Su Shinaide Dianqi Diya (Tianjin) Youxian Gongsi

age electronics company sued the French conglomerate Schneider for patent infringement. The Wenzhou Intermediate People's Court ordered Schneider to pay USD \$45 million in damages, the largest IPR infringement award in Chinese courts to date.⁹⁹ These damages were calculated using disgorgement of profit theory,¹⁰⁰ which tends to produce windfall awards for domestic plaintiffs who would never have had direct access to foreign defendants' more lucrative distribution networks even had the infringement not occurred. In 2009, while on appeal at the Zhejiang High People's Court, the case settled for approximately USD \$23 million.¹⁰¹

Other noteworthy cases include *Strix v. Zhejiang Jiatai and Neoplan Bus v. Zhongwei Bus & Coach Group*.¹⁰² In *Strix* the Beijing Intermediate People's Court awarded the British kettle manufacturer USD \$1.4 million in damages.¹⁰³ In *Neoplan*, the same court awarded USD \$3.23 million for the German bus designer's patent infringement claim.¹⁰⁴ A number of practitioners and academics agree that these cases will serve as models for future decisions, resulting in a "snowball" effect.¹⁰⁵

(正泰集团股份有限公司诉施耐德电气低压(天津)有限公司) [Chint Grp. Corp. v. Schneider Elec. Low-Voltage (Tianjin) Ltd.], 2006 Wenmin San Chuzi 135 (Wenzhou Interm. People's Ct. Sept. 26, 2007).

99. U.S. INT'L TRADE COMM'N, CHINA: INTELLECTUAL PROPERTY INFRINGEMENT, INDIGENOUS INNOVATION POLICIES, AND FRAMEWORKS FOR MEASURING THE EFFECTS ON THE U.S. ECONOMY 4-8 (2010).

100. Euan Taylor, George Chan & David S Block, *Protecting IP and Major Cases on the Determination of IP Damage Awards in China*, in IP CLIENT STRATEGIES IN THE ASIA-PACIFIC 133, 140 (Eddie Fourneir ed., 2009).

101. Lin et al., *supra* note 12, at 16.

102. U.S. INT'L TRADE COMM'N, *supra* note 99, at 4-9.

103. Shitelikesi Youxian Gongsi Su Zhejiang Jiatai Dianqi Zhizao Youxian Gongsi (施特里克斯有限公司诉浙江家泰电器制造有限公司) [Strix Ltd. v. Zhejiang Jiatai Elec. Appliance Mfg. Co.], 2010 Gaomin Zhongzi 1409 (Beijing High People's Ct. Oct. 10, 2010).

104. Xiao Hai & Yuan Wei, *Lawsuit Updates*, 2 CHINA PAT. & TRADEMARKS 103, 103-04, <http://www.cpt.cn/uploadfiles/20100316134233126.Pdf> (citing Niaoopulan Qiche Youxian Gongsi Su Zhongtong Xinghua Qiche Xiaoshou Youxian Gongsi, Zhongwei Keche Youxian Gongsi, Zhongda Gongye Jituan Gongsi

(尼奥普兰汽车有限公司诉中通星华汽车销售有限公司, 中威客车有限公司, 中大工业集团公司) [Neoplan Auto. Co. v. Zhongtong Xinghua Auto. Sales Grp.], 2006 Yi Zhongmin Chuzi 12804 (Beijing No. 1 Interm. People's Ct. Jan. 14, 2009)).

105. Lin et al., *supra* note 12, at 17.

There also is consensus that the gradual trend towards high-stakes patent litigation in China will continue.¹⁰⁶

II. TO SPITE OUR FACE: MUTUAL DISTRUST AND MISUNDERSTANDING OF IPR RESULTS IN COSTLY FAILURE TO IMPLEMENT CRITICAL “GREEN” TECHNOLOGY

One of the most serious problems for U.S. IP-producing firms operating in China “is that they often fail to register their IP in China.”¹⁰⁷ Many of these companies are familiar with China’s poor reputation for IPR protection and assume that filing would be futile.¹⁰⁸ This not only amounts to providing Chinese manufacturers with a de facto “royalty-free license,” in certain cases it allows for another party to register the IP themselves.¹⁰⁹ Given this level of cynicism and ignorance towards Chinese IP law, it is unsurprising that U.S. IP-producing firms often withhold key technologies from Chinese manufacturers for fear of unfettered infringement.¹¹⁰

While the cost of Chinese IP piracy to the U.S. economy is difficult to measure,¹¹¹ the cost of hoarding IP in fear of Chinese piracy is immeasurable. In 2009, U.S. firms attributed USD \$48.2 billion in losses to Chinese IP theft.¹¹² Even ignoring the fact that these self-reported figures are probably inflated, \$48.2 billion is a flyspeck compared to the inefficiencies that result when terrified U.S. firms refuse to license patented technologies to Chinese manufacturers.

106. See, e.g., Elizabeth Chien-Hale, *Enforcing Intellectual Property Rights in China*, 1681 PLI/Corp 189 (PLI Corporate Law & Practice, Course Handbook Series No. 14705, 2008) (“[T]he number of intellectual property cases filed in the judicial system has been steadily rising each year.”).

107. Anthony C. Chen, *Benefitting from China’s Booming Market Without Losing Control of Your Crown Jewels: IP Issues for Foreign Business*, in IP CLIENT STRATEGIES IN THE ASIA-PACIFIC, *supra* note 100, at 7.

108. *Id.*

109. *Id.*

110. *The Price of Cleanliness*, *ECONOMIST*, Oct. 22, 2009, http://www.economist.com/node/14678515?story_id=14678515.

111. ORG. FOR ECON. COOPERATION & DEV., *THE ECONOMIC IMPACT OF COUNTERFEITING* 23 (2008), available at <http://www.oecd.org/dataoecd/11/11/2090589.pdf>.

112. U.S. INT’L TRADE COMM’N, *CHINA: EFFECTS OF INTELLECTUAL PROPERTY INFRINGEMENT AND INDIGENOUS INNOVATION POLICIES ON THE U.S. ECONOMY*, at xiv (2011).

While many U.S. industries deliberately withhold “core” technologies from China,¹¹³ this beggar-thy-neighbor cycle of distrust¹¹⁴ is most visible and most costly in the area of “green technology” (green tech).¹¹⁵ No one understands better than China the costs of Chinese greenhouse gas (GHG) emissions. The majority of China’s manufacturing and urban population centers are located on flat, coastal real estate that will be the first to flood if sea levels begin to rise.¹¹⁶ Thus, a relatively small change in sea level would devastate the Chinese economy.¹¹⁷ Accordingly, China has pledged over a quarter trillion dollars in green tech stimulus,¹¹⁸ more than twice the U.S. commitment,¹¹⁹ and has set ambitious goals for national energy efficiency.¹²⁰ While China has made substantial progress in its domestic green tech industry, most of these gains have

113. See Wu Han-Dong, *One Hundred Years of Progress: The Development of the Intellectual Property System in China*, 1 WORLD INTELL. PROP. ORG. J. 117, 121 (2009) (“China has witnessed that those countries and multinational corporations that have stronger self-driven innovation capacities all hold their own core technology research, development and update for the purpose of strengthening national core competitiveness and boosting market competitiveness for enterprises.”).

114. For a detailed description of this phenomenon in the context of U.S.-China green tech licensing, see *The Price of Cleanliness*, *supra* note 110 (explaining that Chinese manufacturers do not trust U.S. green tech developers not to gouge China as they attempt to meet national efficiency standards, while those same U.S. developers do not trust China to protect licensed green tech IP).

115. By “green technology” I mean any technology that allows energy to be produced with fewer emissions (principally carbon dioxide), or that allows devices—household appliances or industrial equipment—to do similar amounts of work while consuming less energy. Examples of these technologies include renewable energy, low voltage appliances, electric vehicles, carbon sequestration, and “smart grids” for electric utilities.

116. Joanna I. Lewis, *China*, in CLIMATE CHANGE AND NATIONAL SECURITY: A COUNTRY-LEVEL ANALYSIS 9, 11 (Daniel Moran ed., 2011).

117. *Id.*

118. *China to Invest 2 Trln Yuan in Green Economy: Report*, XINHUA, Sept. 25, 2011, http://news.xinhuanet.com/english2010/china/2011-09/25/c_131158314.htm.

119. Steve Hargreaves, *\$100 Billion Jolt of ‘Green Stimulus’*, CNNMONEY.COM (Feb. 4, 2009, 1:00 PM), http://money.cnn.com/2009/02/04/news/economy/green_stimulus/.

120. Keith Bradsher, *China Reportedly Plans Strict Goals To Save Energy*, N.Y. TIMES, Mar. 4, 2011, <http://www.nytimes.com/2011/03/05/business/energy-environment/05energy.html?pagewanted=all>.

been in the area of manufacturing, not research.¹²¹ In light of the United States' "leading university system," "entrepreneurial culture," and venture capital markets, China is likely to remain dependent on U.S. green tech innovation into the foreseeable future.¹²² On the other hand, financing for test-bed projects or other forms of implementation often isn't available outside of China.¹²³ As a result of this mutual dependence, China expects U.S. green tech developers to gouge China in its time of need, and the United States expects Chinese manufacturers to misappropriate transferred green tech.¹²⁴

This licensing gridlock harms the United States as well. Not only does a failure to license cause U.S. innovators to lose royalty revenues, it also means that China, the world's largest GHG emitter,¹²⁵ will be less able to reduce its own emissions. Moreover, this gridlock means that future green tech products will only be available to consumers in the United States (the world's second largest GHG emitter) at increased cost or not at all.

The Natural Resources Defense Council estimates that, if unchecked, "[f]our global warming impacts alone—hurricane damage, real estate losses, energy costs, and water costs"—will place an annual USD 1.9 trillion drag on the U.S. economy.¹²⁶ If the free exchange of green tech could mitigate even a small fraction of these harms, U.S. insistence on improved IPR protection as a prerequisite to closer relations—a policy designed

121. Christina Larson, *America's Unfounded Fears of a Green-Tech Race with China*, YALE ENVIRONMENT 360 (Feb. 8, 2010), http://e360.yale.edu/feature/americas_unfounded_fears_of_a_green-tech_race_with_china/2238/.

122. *See id.* (explaining that while the United States remains dependent on China for many forms of manufacturing, it still maintains a "significant advantage" in innovation due to its "entrepreneurial culture" and "leading university system").

123. *See* Flannery, *supra* note 31 ("[F]inance to do test beds and to scale up in the U.S. . . . often isn't available.").

124. *The Price of Cleanliness*, *supra* note 110.

125. *China Overtakes U.S. in Greenhouse Gas Emissions*, N.Y. TIMES, June 20, 2007, <http://www.nytimes.com/2007/06/20/business/worldbusiness/20iht-emit.1.6227564.html>.

126. FRANK ACKERMAN & ELIZABETH STANTON, NATURAL RES. DEF. COUNCIL, *THE COST OF CLIMATE CHANGE: WHAT WE'LL PAY IF GLOBAL WARMING CONTINUES UNCHECKED*, at iv (2008).

to reduce USD 50 billion of piracy-related losses—is on balance costing the U.S. economy hundreds of billions of dollars.

With this cost in mind, the following section takes a more pragmatic approach to the IP related aspects of U.S.-China relations. It acknowledges that Chinese IP enforcement, while greatly improved, is deeply flawed. At the same time, it recognizes that a more open relationship will not only reap the benefits of increased technological exchange but also ultimately improve protection of U.S. IPR in China.

III. IF YOU CAN'T BEAT 'EM . . . : CO-OPTING THE CHINESE DOMESTIC INNOVATION MOVEMENT FOR THE BENEFIT OF U.S. INNOVATORS

A. *Why Foreign Plaintiffs Face an Uphill Battle*

In light of the astronomical win rates documented in Part I, the first question U.S. investors and policymakers should ask is how to best capitalize on the success of Chinese IPR litigants. In order to answer that question this paper first identifies what generates the disparity between treatment of domestic and foreign IP holders. First and foremost is the “home team” advantage. The growth of “localism” in China (the broad delegation of authority to local government) has decreased judicial independence, increased corruption in monitoring and enforcement agencies, and, perhaps most importantly, hampered Beijing’s ability to enforce national IPR laws.¹²⁷ Since both local SIPO branches and their provincial analogs are funded by the provincial governments, not by Beijing,¹²⁸ they are often unwilling to initiate proceedings that might jeopardize local economic growth.¹²⁹ Similarly, because Chinese courts are legally and professionally beholden to local political actors, they are unlikely to find in favor of foreign plaintiffs.¹³⁰

127. Dina M. Bronshtein, Comment, *Counterfeit Pharmaceuticals in China: Could Changes Bring Stronger Protection for Intellectual Property Rights and Human Health?*, 17 PAC. RIM L. & POL'Y J. 439, 459–61 (2008).

128. Wu, *supra* note 57, at 558–59.

129. *Id.* at 569.

130. *Id.* One study determined that well-connected Chinese firms have a nearly nine percent higher win rate than “unconnected” firms and that this effect is even more pronounced in provinces with less developed judiciaries. Haitian Lu, Hongbo Pan & Chenying Zhang, *Political Connections and Judicial Bias: Evidence from Chinese Corporate Litigations* (Nov. 2011) (unpub-

Second, the evidentiary requirements for parties asserting infringement in Chinese courts can be quite burdensome¹³¹ and there is no discovery process.¹³² Many Chinese courts will “only accept [documentary] evidence in its original form,” and they will sometimes exclude any evidence not obtained in a previous judicial or administrative hearing.¹³³ This can place foreign parties at a disadvantage, as it is difficult to transmit original documents and conduct private investigations from abroad.¹³⁴

Finally, the disparity between foreign and local plaintiffs is not merely theoretical. Judicial statistics confirm that the win rate of foreign IP infringement claimants is around 33% lower than the Chinese national average.¹³⁵ As discussed in Part I, the jurisprudential tools for infringement litigation exist in China;¹³⁶ the problem is getting just and consistent application of those principles to claims by foreign plaintiffs.

lished manuscript), <https://fnce.wharton.upenn.edu/files/?whdmsaction=public:main.file&fileID=1835>.

131. Douglas Clark, *Toward a New IP World Order? Mainland China's Impact on IP Worldwide*, in *IP CLIENT STRATEGIES IN ASIA* 55, (Eddie Fournier ed., 2010); Wu, *supra* note 57, at 560.

132. Chen, *supra* note 107, at 13.

133. Wu, *supra* note 57, at 560.

134. See, e.g., Fengtian Zidongche Chushi Huishe Su Jili Qiche Youxian Gongsi, Beijing Yacheng Weiye Qiche Xiaoshou Zhongxin (丰田自动车株式会社诉吉利汽车有限公司, 北京亚辰伟业汽车销售中心) [Toyota Auto. Joint-Stock Co. v. Geely Auto., Ltd.] 2003 Er Zhongmin Chuzi 06286 (Beijing No. 2 Interm. People's Ct. Nov. 24, 2003) (refusing to admit evidence that over 67% of consumers confused Geely's allegedly infringing trademark with Toyota's). This decision “has universally been condemned as ludicrous.” OWEN NEE, *SHAREHOLDER AGREEMENTS AND JOINT VENTURES: BUSINESS LAWS OF CHINA* 202 (2011).

135. In China, IP plaintiffs win infringement cases around 80% of the time. See *CIELA Summary Report*, *supra* note 93. In contrast, foreign claimants win approximately 60% of the time. Bai, *supra* note 12. Based on statistics released by the Supreme People's Court, some experts calculate a foreign plaintiff win rate as low as 55.2%. Richard Wigley, *Challenging Perceptions: New Statistics from the Supreme People's Court on IPR Lawsuits in the PRC*, *CHINA LAW INSIGHT* (Dec. 29, 2010), <http://www.chinalawinsight.com/2010/12/articles/intellectual-property/challenging-perceptions-new-statistics-from-the-supreme-peoples-court-on-ipr-lawsuits-in-the-prc/>. See also Shengping Yang, *Patent Enforcement in China*, *LANDSLIDE*, Nov.–Dec. 2011, at 48, 48–49 (2011) (foreign plaintiffs in patent litigation prevail around 60% of the time against domestic entities).

136. For example, courts in China have adopted the plaintiff-friendly principle of fault-presumption, requiring the accused infringer to bear the bur-

B. *Creating Chinese IPR Stakeholders To Co-opt the Home Team Advantage*

The intuitive solution¹³⁷ to this disparity in litigation success is to co-opt the “home team” advantage through the creation of Chinese IPR stakeholders.¹³⁸ That is, the United States should encourage the sale of equity in domestic IP-producing firms to Chinese investors. As owners of shares in U.S. innovative firms, Chinese stakeholders will have a vested interest in protecting IPR in order to maximize the value of their investments. Many of these investors, particularly state-owned corporations and ultra-rich Chinese individuals, will not only be able to facilitate infringement litigation, but also effect improvements in Chinese IPR policy. Past a certain point, improvements in IPR protection must “come from within, rather than from foreign pressure.”¹³⁹ This is more than reasoned conjecture: the beneficial changes to China’s IPR regime that have already occurred are the result of the growing influence of “legitimate intellectual property stakeholders” within China.¹⁴⁰ Indeed, while the Communist Party promotion system forces officials to prioritize short-term economic growth and disincentivizes meaningful IPR improvements,¹⁴¹ the existence of local IP stakeholders has the potential to equate IPR with both economic growth and the political success associated with economic growth. As a result, the creation of Chinese IP stake-

den of distinguishing its activities from the protected subject matter. Jeffrey M. Duncan et al., *A Comparison Between the Judicial and Administrative Routes To Enforce Intellectual Property Rights in China*, 7 J. MARSHALL REV. INTELL. PROP. L. 529, 536 (2008).

137. It is intuitive in the sense that it is the most direct course between the status quo and a future in which foreign intellectual property in China is credibly protected. It may seem profoundly counterintuitive to anyone who views direct “reciprocity” on IPR protection as a prerequisite for more open U.S.-China relations (e.g., virtually every U.S. politician). See, e.g., Talev & Goldman, *supra* note 9 (“Obama [stated] . . . that he wants China to ‘play by the rules’ and that the U.S. ‘can’t be expected to stand by’ without getting reciprocity from China . . .”).

138. Peter K. Yu makes the analogous argument that stakeholders in local innovative firms are key to obtaining IPR-friendly legislation in China. Peter K. Yu, *From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China*, 55 AM. U. L. REV. 901, 957–59 (2006).

139. Harris, *supra* note 14, at 169–70.

140. *Id.*

141. LEI WANG, FOREIGN DIRECT INVESTMENT AND URBAN GROWTH IN CHINA 35 (2011).

holders can generate support for U.S. innovators from local Chinese companies and officials.

Accordingly, the U.S. government should, first, stop treating reciprocal intellectual property protection as a prerequisite for closer U.S.-China relations, second, diminish legal barriers to Chinese investment in U.S. IP-producing firms, and, third, actively encourage such investment through bilateral treaties, cooperative organizations, and targeted subsidies.

1. *Amending CFIUS Review*

There are currently several barriers to Chinese direct investment in the United States; principal among them is U.S. political review of investment transactions.¹⁴² The Committee on Foreign Investment in the United States (CFIUS) is a nine-member panel composed of presidential appointees from various agencies¹⁴³ that is tasked with reviewing the national security implications of foreign investment transactions.¹⁴⁴ Unfortunately, there is substantial evidence that “national security” has become a pretext for protectionist and anti-Chinese political motivations.¹⁴⁵ The legislation that created CFIUS contains no definition of “national security,”¹⁴⁶ and this ambiguity is often used to pursue illegitimate objectives.¹⁴⁷ This broad power of

142. EUROPEAN COMMISSION, UNITED STATES BARRIERS TO TRADE AND INVESTMENT: REPORT FOR 2006, at 13 (2007), available at http://trade.ec.europa.eu/doclib/docs/2007/february/tradoc_133290.pdf.

143. Including the Departments of Treasury, Justice, Homeland Security, Commerce, Defense, State, and Energy, as well as the Office of the U.S. Trade Representative and the Office of Science and Technology Policy. *Composition of CFIUS*, U.S. DEP'T OF THE TREASURY (Dec. 1, 2010, 8:08 AM), <http://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-members.aspx>.

144. JAMES K. JACKSON, CONG. RESEARCH SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE U.S. (CFIUS) 8–10 (2008).

145. Nin-Hai Tseng, *U.S. to China; Invest in Our Debt, Not Our Companies*, CNNMONEY.COM (Feb. 16, 2011, 5:40 PM), http://money.cnn.com/2011/02/16/news/international/china_us_investments.fortune/index.htm.

146. Stephen Sothmann, *Let He Who Is Without Sin Cast the First Stone: Foreign Direct Investment and National Security Regulation in China*, 19 IND. INT'L & COMP. L. REV. 203, 223–25 (2009).

147. James F. F. Carroll, Comment, *Back to the Future: Redefining the Foreign Investment and National Security Act's Conception of National Security*, 23 EMORY INT'L L. REV. 167, 186–89 (2009) (“[P]rotectionist forces are using Exon-Florio as a political tool and outlet of public unrest, regardless of diplomatic concerns.”).

review is increasingly used to scrutinize, delay, and derail mergers and acquisitions, particularly those originating in China.¹⁴⁸

For example, CFIUS intervened when a Shaanxi-based, state-owned enterprise attempted to acquire a USD \$26.5 million majority stake in Firstgold, a Nevada gold-mining corporation.¹⁴⁹ Ostensibly, CFIUS was concerned with the mines' proximity to a Navy airbase,¹⁵⁰ but it is difficult to imagine how Chinese control of four gold mines 50 miles from an airbase poses a significant threat to national security. Rather, some industry experts interpreted the decision as U.S. resistance to China's "hoarding" of gold.¹⁵¹

CFIUS can even investigate foreign acquisitions post-closing. For example, after Huawei acquired U.S. server technology firm 3Leaf, CFIUS retroactively reviewed the deal, eventually "recommending" that Huawei divest itself of 3Leaf.¹⁵² Huawei reluctantly complied.¹⁵³ CFIUS's concerns allegedly arose because Huawei was founded by a former member of the People's Liberation Army (PLA).¹⁵⁴ Once again, barring more specific information, it is difficult to understand how a corporation presents a significant national security risk simply because it was founded by a PLA veteran.

Even though CFIUS rarely uses its formal authority to block transactions, a few high profile cases¹⁵⁵ have had a dis-

148. José E. Alvarez, *The Return of the State*, 20 MINN. J. INT'L L. 223, 239 (2011).

149. Matthew C. Sullivan, *Mining for Meaning: Assessing CFIUS's Rejection of the Firstgold Acquisition*, 4 BERKELEY J. INT'L L. PUBLICIST 12, 15 (2010).

150. *Id.*

151. *Id.* at 16.

152. *Huawei Backs Away from 3Leaf Acquisition*, REUTERS, Feb. 19, 2011, available at <http://www.reuters.com/article/2011/02/19/us-huawei-3leaf-idUSTRE71I38920110219>.

153. *Id.*

154. *Id.*

155. Other cases include the attempted acquisition of Unocal by CNOOC, Peter Muchlinski, *The Changing Face of Transnational Business Governance: Private Corporate Law Liability and Accountability of Transnational Groups in a Post-Financial Crisis World*, 18 IND. J. GLOBAL LEGAL STUD. 665, 696 (2011), and Sprint's exclusion of Huawei (under threat of CFIUS review) from a large contract. Joann S. Lublin & Shayndi Raice, *Security Fears Kill Chinese Bid in U.S.*, WALL ST. J., Nov. 5, 2010, <http://online.wsj.com/article/SB10001424052748704353504575596611547810220.html>.

proportionate chilling effect on Chinese investors.¹⁵⁶ Placing CFIUS review beyond the influence of political actors—perhaps by granting it a measure of independence or amending its authority¹⁵⁷—would go a long way towards reassuring foreign investors. Ultimately, what matters is the perception of Chinese investors, and at present they have very little about which to feel reassured.¹⁵⁸

2. *Concluding a Specialized Bilateral Investment Treaty*

The U.S. government should not only remove barriers like CFIUS but also should actively encourage Chinese foreign direct investment (FDI) in U.S. IP-producing firms. One way to encourage such investment is through the creation of a specialized bilateral investment treaty (BIT). Though they vary in specific content, BITs guarantee investors of the treaty states international legal protections when investing in the other treaty state (e.g., “fair and equitable treatment,” “national treatment,” “most favored nation treatment,” and protection against “denial of justice,” as well as access to various international arbitration forums).¹⁵⁹ BITs do not necessarily result in increased FDI, but they are most likely to do so when they co-occur with strong economic factors in the host state (e.g., quality of labor, infrastructure, access to natural resources, per capita GDP, and the size and growth of the economy).¹⁶⁰ As the United States is already the world’s top recipient of FDI,¹⁶¹ it

156. Sullivan, *supra* note 149, at 17.

157. Potentially by creating a streamlined approval process, or even a safe harbor, for investment in certain categories of IP-producing firms.

158. See, e.g., Tseng, *supra* note 145 (“The opposition arising from Washington lawmakers is nothing new. And it’s bound to grow . . .”).

159. Carlos J. Bianchi, *A Look at Some Recurring Issues in Investment Arbitration*, DISP. RESOL. J., May–July 2012, at 62, 68.

160. Lisa E. Sachs & Karl P. Sauvant, *BITs, DTTs, and FDI Flows: An Overview*, in THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS, at xxvi, li–lii (Karl P. Sauvant & Lisa E. Sachs eds., 2009) (“In general, the regulatory framework of a host country is at best enabling; once it is permissive, the economic determinants become key, especially market size and growth, skills, resources, and costs.”).

161. ECONOMIST INTELLIGENCE UNIT & COLUMBIA PROGRAM ON INT’L INV., WORLD INVESTMENT PROSPECTS TO 2011: FOREIGN DIRECT INVESTMENT AND THE CHALLENGE OF POLITICAL RISK 9 (2007) [hereinafter WORLD INVESTMENT PROSPECTS], available at http://graphics.eiu.com/upload/WIP_2007_WEB.pdf.

offers an attractive economic environment, and a BIT with China could help generate investment through a more hospitable regulatory environment.

Typically, a BIT covers all forms of investment,¹⁶² but sectoral investment treaties are not unheard of. For example, the Energy Charter Treaty contains broad rights and has been ratified by virtually all of Europe, yet it is limited in scope to energy-related investments.¹⁶³ Moreover, some general BITs include sectoral exceptions to their legal protections.¹⁶⁴ Thus, there is no structural barrier to the United States and China concluding a sectoral BIT limited to important IP-generating sectors such as renewable energy, software development, and entertainment.

Unfortunately, the current U.S.-China BIT negotiation is predicted to be “the most difficult one in history.”¹⁶⁵ However, this difficulty originates in large part from U.S. adherence to the Model BIT.¹⁶⁶ In contrast, a sectoral approach would have the advantage of allowing the United States and China to sell a more limited treaty to their domestic constituents. By focusing on a relatively innocuous and popular area like green technology, the United States and China could demonstrate the advantages of Chinese equity ownership to U.S. IP producers. Often, the most effective international trust building measures are incremental iterations of low-stakes agreements.¹⁶⁷

162. See, e.g., 2004 Model BIT art. 1, available at <http://www.state.gov/documents/organization/117601.pdf> (defining “investment”).

163. Energy Charter Treaty art. 2, Dec. 17, 1994, 2080 U.N.T.S. 100.

164. E.g. Treaty Concerning the Reciprocal Encouragement and Protection of Investment. U.S.-Arg., Protocol, ¶ 2, Nov. 14, 1991, 31 I.L.M. 124, available at http://unctad.org/sections/dite/ia/docs/bits/argentina_us.pdf.

165. KONG QINGJIANG, E. ASIAN INST., US-CHINA BILATERAL INVESTMENT TREATY NEGOTIATIONS, at ii (2010), <http://www.eai.nus.edu.sg/BB507.pdf>.

166. See *id.* at 5 (“Indeed the US model BIT might offer substantial benefits to US businesses, but it is not so for China.”).

167. Arie Nadler & Tamar Saguy, *Reconciliations Between Nations: Overcoming Emotional Deterrents to Ending Conflicts Between Groups*, in THE PSYCHOLOGY OF DIPLOMACY 29, 32 (Harvey J. Langholtz & Chris E. Stout eds., 2004), available at <http://www.humiliationstudies.org/documents/NadlerReconciliationBetweenNations.pdf> (explaining that gradual trust building measures allow nations to “learn to slowly replace the belief that the adversary holds sinister intentions toward them with the belief that its intentions are benign”).

3. *Implementing Targeted Subsidies*

While U.S. subsidies for Chinese firms may be politically unpalatable, they are far more likely to generate jobs domestically than current subsidies (i.e., tax incentives) on U.S. companies that “outsource.”¹⁶⁸ Just as Chinese tax-free “special economic zones” attracted billions of dollars in U.S. FDI beginning in the late 1970s,¹⁶⁹ targeted U.S. subsidies would generate reciprocal FDI and employment in the innovative sectors. As discussed in Part III.B.1 above, due to CFIUS review Chinese investors are understandably wary of committing to FDI in the U.S.¹⁷⁰ Lowering the cost of investing in IP-producing firms through subsidy would increase Chinese investors’ expected profit, encouraging investment despite the perceived risk. These subsidies could take any form, such as tax holidays, tax rate reductions, or entry cost subsidies like research grants, so long as they lower the effective cost of Chinese investment in U.S. innovative firms.¹⁷¹

168. See Gary S. Clendenin, *Allaying the Outsourcing Tempest: A Candid Look at Outsourcing Vis-à-Vis the Future of American Jobs*, 14 U. MIAMI BUS. L. REV. 295, 304–11 (2006) (arguing that tax relief for “offshoring” companies encourages the movement of jobs overseas).

169. Special economic zones in China offered preferential income tax treatment, such as tax holidays and reduced tax rates. WANDA TSENG & HARM ZEBREGS, INT’L MONETARY FUND, *FOREIGN DIRECT INVESTMENT IN CHINA: SOME LESSONS FOR OTHER COUNTRIES* 11–16 (2002).

170. Sullivan, *supra* note 149, at 17 (“CFIUS’s reaction ‘would hold back many thriving Chinese companies from investing in the attractive but politically dangerous American market’ . . .”).

171. The proposition that subsidy encourages FDI is relatively uncontroversial. However, scholars debate the most appropriate form of subsidy, see, e.g., Chia-Feng Yu, Ta-Cheng Chang & Chinn-Ping Fan, *FDI Timing: Entry Cost Subsidy Versus Tax Rate Reduction*, 24 ECON. MODELING 262, 267–68 (2007) (concluding that initial entry cost subsidies encourage more investment per dollar than tax-rate reductions), and the appropriate amount, see, e.g., Eckhardt Bode, Peter Nunnenkap & Andreas Waldkirch, *Spatial Effects of Foreign Direct Investment in US States*, 45 CANADIAN J. ECON. 16, 37 (2012) (“The cost of in terms of forgone taxes and outright subsidies must not exceed the positive externalities . . .”).

4. *Creating Investment Promotion Agencies*

Developing countries have deployed Investment Promotion Agencies (IPA) extensively in order to attract FDI.¹⁷² IPAs play four major roles in attracting investment: facilitation (e.g., assistance with permit approval, provisioning of information), image building, coordination (e.g., forums, seminars, investor matchmaking), and policy advocacy.¹⁷³ While the utility of these features is often overstated in the literature, as they do little to entice investment to countries with poor market conditions, IPAs are an effective method of signaling that a country is open for investment and of correcting misinformation that might lead to market failures.¹⁷⁴ For example, by creating a green tech IPA, the United States would signal to China that it has adopted a new policy and is ready to promote investment in that area. Moreover, an effectively run IPA could dispel some of the fear surrounding the CFIUS process and at a minimum ensure that CFIUS is seen as no more biased or politicized than it really is. Finally, the coordination function of an IPA might be particularly useful to Chinese institutional investors, which typically lack managerial and U.S. legal expertise.¹⁷⁵

5. *Striking While the Iron Is Hot*

Chinese outbound foreign direct investment (OFDI) is “poised to grow markedly in the medium to long term,”¹⁷⁶ if for no other reason than to help China divest itself of its rapidly depreciating foreign exchange reserves.¹⁷⁷ Other major motivations include purchasing advanced technology, circum-

172. Fergus Cass, *Attracting FDI to Transition Countries: The Use of Incentives and Promotion Agencies*, TRANSNAT'L CORPORATIONS, Aug. 2007, at 79, available at http://www.unctad.org/en/docs/iteiit20072a3_en.pdf.

173. *Id.* at 84.

174. *Id.* at 82.

175. Tseng, *supra* note 145.

176. DANIEL H. ROSEN & THILO HANEMANN, PETERSON INST. FOR INT'L ECON., CHINA'S CHANGING OUTBOUND FOREIGN DIRECT INVESTMENT PROFILE: DRIVERS AND POLICY IMPLICATIONS 2 (2009), <http://www.iie.com/publications/pb/pb09-14.pdf>.

177. Alan Wheatley, *Why China Will Keep Investing Abroad*, N.Y. TIMES, July 21, 2009, <http://www.nytimes.com/2009/07/21/business/global/21inside.html?pagewanted=all>. (“[E]very dollar that can be recycled as outbound investment is one dollar less that must be bought and added to reserves.”).

venting trade barriers, and securing natural resources.¹⁷⁸ The Chinese government is actively promoting OFDI by “easing and decentralizing” approval procedures and increasing financing for firms with overseas ambitions.¹⁷⁹ Forcing that investment elsewhere with intimidating approval procedures will cost U.S. firms not only capital but also the opportunity to generate Chinese stakeholders and IPR advocates. Although the United States is the world’s leading recipient of FDI (16.75% of world total),¹⁸⁰ China directs a mere three to four percent of OFDI to U.S. projects,¹⁸¹ making the U.S. only the sixth largest recipient of Chinese OFDI behind Hong Kong, the British Virgin Islands, the Cayman Islands, Australia, and Singapore.¹⁸² Clearly, there is room for improvement.

CONCLUSION

The popular impression of China as a lawless black hole for intellectual property is far from the truth. The Chinese government is under tremendous economic and political pressure to promote innovation, and thus far it has made considerable progress. China’s IP laws are similar to those of the United States and Europe,¹⁸³ it enjoys enormous numbers of domestic IP filings,¹⁸⁴ and it has a robust IP infringement jurisprudence.¹⁸⁵ The historical transition from IP-infringing economy to innovating economy is well documented,¹⁸⁶ and China shows many indicia of being on the cusp of this transition.

178. Sophie Meunier & Justin Knapp, *Coming to America: Top Ten Factors Driving Chinese Foreign Direct Investment*, HUFF POST WORLD (July 31, 2012, 2:11 PM), http://www.huffingtonpost.com/sophie-meunier/china-foreign-investment_b_1705349.html.

179. ROSEN & HANEMANN, *supra* note 176.

180. WORLD INVESTMENT PROSPECTS, *supra* note 161, at 9.

181. Tseng, *supra* note 145.

182. NARGIZA SALIDJANOVA, U.S.-CHINA ECON. & SEC. REVIEW COMM’N, GOING OUT: AN OVERVIEW OF CHINA’S OUTWARD FOREIGN DIRECT INVESTMENT 15 (2011) (citing P.R.C. MINISTRY OF FOREIGN COMMERCE, 2009 STATISTICAL BULLETIN OF CHINA’S OUTWARD FOREIGN DIRECT INVESTMENT (2010)), *available at* <http://www.uscc.gov/researchpapers/2011/GoingOut.pdf>.

183. Vella, Hung & Yang, *supra* note 60.

184. Li, *supra* note 73.

185. Ram Deshpande & Alok Aggarwal, *Patently Speaking: Failure to Heed IP in China Can Be Costly*, LES NOUVELLES, Dec. 2009, at 271, 272 (2009).

186. Yu, *supra* note 41, at 202 (“[S]imilar changes occurred in Japan in the 1970s, and in Hong Kong, Singapore, South Korea, and Taiwan in the 1980s.

Despite this empirical evidence, the United States government is currently attempting to protect the intellectual property of U.S. investors in China through direct confrontation.¹⁸⁷ Predictably, this strategy has had “mixed results.”¹⁸⁸ One frequently overlooked downside to maintaining the current standoff is the cost of the resulting inefficiencies. For example, in the area of green technology, failure to reach cooperative licensing solutions may be costing the United States hundreds of billions of dollars annually in lost revenues and environmental damage.¹⁸⁹ Trust-building has to start somewhere, and the potential risk of inviting China to engage in closer economic ties is grossly outweighed by the cost of failing to do so.

Fortunately, China’s evolving attitude towards IP¹⁹⁰ allows for a new approach: Rather than viewing IPR protection as a prerequisite for closer U.S.-China relations, the U.S. government should view closer relations with China as a *means* of protecting IPR. Chinese IPR holders have experienced tremendous successes in infringement litigation.¹⁹¹ China’s corruption and local protectionism need not be barriers to enforcement of foreign IPR. Rather, Chinese investors with equity in U.S. IP-producing firms will have every incentive to protect that IP from misappropriation, by means both legal and extralegal. Thus, by encouraging reciprocal FDI, the government can help U.S. innovators co-opt the Chinese home team advantage.

At some point in the near future, the development of the Chinese economy will reach a crossover point at which the country will gradually abandon its infamous pirate past . . .”).

187. Taley & Goldman, *supra* note 9.

188. U.S. INT’L TRADE COMM’N, *supra* note 112, at D-5.

189. See discussion *supra* Part II.

190. SIPO NATIONAL PATENT STRATEGY, *supra* note 66; Allison & Lin, *supra* note 15.

191. CIELA *Summary Report*, *supra* note 93.