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Emily Honig
Colby College

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Governmental Resistance in International Intellectual Property Rights

Emily Honig

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The field of intellectual property, roughly defined as "a product of the intellect that has commercial value," is one of the growing fields of international legal debate, as the economies of the world become increasingly interconnected and the world's corporations operate overseas with increasing frequency. The literature in the field of international law and intellectual property rights (IPRs) tends to suggest that states, for political or economic reasons, have little choice but to bow to the wishes of multinational corporations (MNCs) and provide increased protection for IPRs. However, there are a number of cases that show that under certain circumstances, states and governmental bodies are willing and able to push back resist these MNCs and defy the general trend toward greater IPR protection. What are these conditions? When does the balance between meeting MNCs' demands and other concerns shift?

This question arises largely because while the literature in the field does well to explain an overall trend of increased IP protection -- one exemplified by the increased IP protections in the World Trade Organization under the treaty on Trade-Related Aspects of Intellectual Property Rights (TRIPS) -- it fails to explain the exceptions to this trend.


\(^2\) The WTO negotiated its Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) during the Uruguay Round of negotiations, which began in 1986 and concluded in 1994. TRIPS includes protections for an array of different kinds of intellectual property, including copyrights, trademarks, geographical indications, industrial designs, patents, topographies of integrated circuits (i.e. computer chips) and trade secrets. Prior to TRIPS, IP was treated in widely varying ways from country to country; by providing a set of minimum levels of IP protection that each WTO member state must meet by integrating them into its domestic laws, TRIPS aimed at a standardized, common international IP regime. The agreement covers five basic areas: application of basic principles such as non-discrimination and promotion of innovation; common ground rules based on two World Intellectual Property Organization agreements, the Paris Convention and the Berne Convention, which cover different areas of IP, as well as additional rules not covered by these Conventions; adequate domestic enforcement; dispute resolution procedures; and transitional arrangements for the implementation period. Additionally, there are exceptions to the rules meant to ease adherence, such as in the case of public-health crises. TRIPS also features a mechanism for dispute resolution. For more information, see http://www.wto.org/english/tratop_e/trips_e/htm
Much of the literature in this field comes from Susan Sell of George Washington University, who holds that the formation and implementation of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) accord came about at the behest of the United States-based Intellectual Property Committee (IPC), which is composed of the chief executives of twelve large MNCs. Additionally, she argues, the IPC has had much success in influencing international organizations, such as the World Intellectual Property Organization, a UN agency which she argues is currently “little more than a puppet” for the IPR and other pro-IPR groups. Although TRIPS, having been formed as part of the World Trade Organization, is an agreement between states, it has been largely viewed as a response of member states to their particular domestic political situations and the lobbying activities of powerful MNCs. Going one step further, Graham Dutfield of the University College London argues that although developed countries control policymaking in this area and prefer an IPR-protective regime, it is both unrealistic and unfair to expect developing countries to adhere immediately to developed countries’ intellectual property protection standards, as this is overly difficult to enforce and could further inhibit innovation and development. In short, in the view of Sell, Dutfield and many others, in the field of IPR, the role of states has been to respond to the demands of MNCs. This view is representative of one school of thought on international IPRs: the view that the primary push for IPR protections has always come from the corporate world.

On the other hand, Keith Maskus of the University of Colorado at Boulder holds that intellectual property protection is needed by both corporations and states in order to

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3 Sell, 2003, pp. 24-27.
foster innovation and attract capital, and countries with weak IPR regimes suffer from both weaker incentive for innovation and isolation from modern technologies because corporations are unwilling to introduce them. Thus, he argues, IPR protections are necessary for economic development. While Maskus notes that IPR protection can slow development in the short term by introducing costs, he argues that "even among poor economies" a well-structured IP policy is an important condition for business development. 6 Maskus is an example of a second school of thought, one in which IPR protection is a necessary prerequisite for economic development.

Ruth Okediji notes that there is a fine balance between intellectual property rights and international antitrust legislation, with strong implications for the global market. She argues that this balance must be maintained through attention to national economic context. 7 This view represents a third school of thought on IPRs, which takes a longer and more complex view of the processes involved and focuses on the specific situations of individual states. Okediji's approach is similar to the one that will be undertaken in this work; however, while Okediji focuses on national economic factors such as market structure and foreign investment, this paper's focus is more narrowly focused on instances of governmental resistance to a protective global IPR regime and the use of IPRs as a political instrument. My research will attempt to fill what seems to be a gap in the literature by extending and deepening the work of this third school of thought and examining more closely the instances in which governments resist MNCs' demands for intellectual property rights protection; these are instances in which IPRs seem in fact to contract.

7 Okediji, 2003, p. 921.
In sum, my research has led to the conclusion that states will resist the call for IP protection when their interests and preferences collide with those of MNCs. At the same time, though, I argue that the interests and preferences of states are not uniform; that is, states are motivated by different factors – which in turn are shaped by the distinctive political situation in which that state operates. For the purposes of this work, a state’s political situation includes the history and norms in which its politics are embedded, domestic and international economics, domestic constituencies and interest groups, international norms, international interest groups and NGOs. These factors and many others lead states toward certain policy goals. My study shows that although IPR regimes are often described as a unidirectional policy tool – that is to say, that states have no choice but to submit to increasingly protective IPR regimes so as to attract foreign investment or encourage domestic industrial innovation – this is frequently not the case, and IPR regimes are resisted for instrumental reasons as well. IPR resistance is used by states as a policy tool.

In this study, the dependent variable is resistance to protection of foreign corporations’ IP and the independent variables are the interests and preferences that lead states to this resistance. While scholars such as Okediji might propose that such resistance is the result of the particular economies in question, and that in such cases IPR protection has proved to be less than conducive to economic growth, further study has shown that this is not an adequate explanation because the two do not always go hand in hand. Rather, while economic growth is always a priority, it is not a reason unto itself for a state to resist IPRs. It is the state’s particular political situation – which includes its
economic situation – and policy goals that lead it to the conclusion that such resistance will be the most advantageous route to economic growth, political gain or other long-term goals. My work has shown that states are not always acting at the behest of MNCs. States are motivated to resist pressure for increasingly protective IPR regimes and even decrease IPRs when acting in pursuit of their own interests and preferences.

Research Approach and Methods

This research centers on three cases: three instances of states resisting IPRs. In short, the dependent variable in all three of these cases is governmental resistance to intellectual property rights; the independent variable is different from case to case but each has proven to centrally involve the state’s political interests and preferences.

My case selection allows me to use a controlled comparison tool, John Stuart Mill’s Method of Difference, which involves searching for cross-case differences which can account for possible causes of the dependent variable. The process of discerning these differences centrally involves careful examination of the independent variables in each of these cases. This is accomplished through process tracing, which is the exploration of the “chain of events by which initial case conditions are translated into case outcomes.” In this case, that is accomplished through careful examination of firsthand documentation such as WTO TRIPS notifications, the European Commission case files, newspaper and journal articles, and primary source material including interviews with observers in the countries involved, with officials responsible for the rulings and with officers of the corporations implicated.

8 Van Evera, 1997, p. 68.
9 Ibid., p. 64.
The first of the three cases that will be discussed in this paper is that of the tension between pharmaceutical companies and developing countries, specifically the instance of AIDS drugs in South Africa in 2001. In this case, the pharmaceutical companies filed a complaint under TRIPS, but they eventually dropped it because developing countries cited a provision in TRIPS for the granting of compulsory licenses in the case of public health emergencies. This was affirmed in the Doha Round of WTO negotiations, which included a specific declaration urging the use of these provisions in public health crises in developing countries. More recent declarations have affirmed this provision. However, pharmaceutical corporations have argued that this compulsory licensing will put their intellectual property at risk, jeopardize their profits in all countries (not just in those that grant compulsory licenses), and that reduced profit will reduce the incentives for innovation. On the surface, the South African government is driven by a need to protect its economy from the ravages of AIDS on its workforce.

However, the explanation was and is in reality more complicated, as cheaper and more conventional methods of preventing HIV transmission, such as promotion of condom use, are culturally problematic and would carry a greater political cost for South Africa's president Mbeki. Pushing western pharmaceutical companies for licensing of their products was and continues to be a politically cheaper tack. Additionally, the outcomes of the lawsuits were dramatically affected by the roles taken by domestic and international activist groups; the action of such so-called "transnational activist networks" served to put pressure on the pharmaceutical companies to soften their stance.

and on the South African government to take a stronger stance against the pharmaceutical companies in the name of satisfying in some way the need to address the pressing AIDS problem in South Africa. The South African government was inclined to resist the pharmaceutical companies because it tends to view the West, in general, as largely responsible for the perpetuation of its major problems, including the HIV/AIDS epidemic. However, it has also been too immobilized by a "culture of shame" surrounding the issue to effectively respond; in an effort to retain a complex political base, the government has waited to act until its hand was forced by pressure from NGOs. This case serves as an example of a state pushing against powerful MNCs; in this case, most of the impetus has ultimately come not from the governments but from activist networks that were able to exert intense pressure on both the government and on the pharmaceutical companies such that both parties chose to seek IPR protections less aggressively. In short, the state's self-interest here – the independent variable with which this study concerns itself – lies in the field of social justice and democracy; in a state ravaged by public health concerns, where the government is reluctant to act, the political situation has been such that activist networks have grown and exerted pressure in a politically-motivated absence of unilateral action from the government.

The second case is that of the Chinese government, which generally seems to fail to protect intellectual property by ignoring threats to it. In examples in a number of fields including the automotive industry and audio, video, and book piracy, China fails to enforce IPR, despite its WTO membership, through bureaucratic inactivity. Additionally, many MNCs seeking to do business in China are forced by law to share some of their intellectual property with the Chinese companies they take on as partners. In short, piracy
and counterfeiting run rampant and largely unopposed in China; this runs counter to most predictions for how developing countries will tend to treat IPR protection and demands the question of why a country like China would choose to systematically overlook IP rules. This case will serve as an example of passive governmental resistance to the international IPR regime represented by TRIPS, incited by an economic nationalism that flows from deep-seated resentment over a century of Western colonialism and a half century of Japanese military domination. This nationalism has led the communist state in Beijing to give preference to the nurturing of domestic firms over the protection of the intellectual property rights of non-Chinese corporations.\(^\text{13}\) In the case of China, the underlying independent variable is economic nationalism.

The third of these cases is the ongoing case in the wake of the 2004 decision in which the European Commission (EC) stated that Microsoft was abusing its market position by bundling Windows Media Player with the Windows XP operating system, and ordered that Microsoft unbundle the software and share some of its source code so competitors could write media player software that would work seamlessly with Windows XP. Additionally, the decision stated that Microsoft was failing to make its Windows workgroup networking software interoperable with other workgroup systems and ordered that it release the code that would make these different systems interoperable. Microsoft is currently in the process of appealing the case in the European Court of Justice but has already been required to submit plans for implementing the ruling. Additionally, the EC in August, 2004 launched an investigation into Microsoft’s acquisition of ContentGuard, which produces Digital Rights Management software (which is intended to prevent digital piracy of software, music, audio and video). In both

\(^\text{13}\) Shambaugh, 1996, pp. 194-195.
instances, the EC, acting on behalf of the EU, is pushing against Microsoft in the name of preserving antitrust law in a growing field, in a manner similar to the antitrust case against Microsoft in the United States. However, in this case, European self-interest is less obvious. The original complaint that began the EC investigation came from Sun Microsystems, a software maker based in Santa Clara, CA. Microsoft's main media-player competitor, and the other main corporate proponent of the EC decision, is RealNetworks, based in Seattle, WA. In fact, Microsoft does not at the moment have any major competitors based in Europe. Furthermore, European consumer groups have not been involved in the case, and it appears that they will be only minimally affected by the decision.

This case is in some respects the outlier of the three, as there is no immediately apparent external or internal pressure that has led the EC to resist IPRs in this way and as the case has proceeded contrary to the expectations of Sell and others, who would anticipate that the EC would want to protect IP stringently in order to retain Microsoft's trust and assure nascent European software companies that their programs will be protected. In Europe, norms of powerful European rule of law and strong, self-perpetuating European bureaucracy have resulted in all EC antitrust ruling against Microsoft that happened to have important connotations in the field of international IPRs. The EC invoked these norms not for the gain of European firms or consumers, but in order to further the process of European integration and thereby further the entrenchment of the EU bureaucracy, which includes the EC itself. This case is thus an example of how norms can be invoked for means of political gain, creating situations that lessen the importance of IPR protection in the view of states – a process that applies in all three
cases discussed in this paper, and which is useful more broadly to explain examples of
states resisting IPRs in general. In the case of Europe, the independent variable is the
EC's pro-integration policy goals.

It must be noted that these cases are by no means the only recent examples of
states resisting IPRs. Rather, these cases were selected by virtue of their differences. Each
deals with a different market sector, a different kind of IP, a different source of pressure,
a different kind of economy at a different level of development. These wide variations are
vital to the case study methodology undertaken in this work; by working backward from
the end result through the process that took place, the Method of Difference allows the
cases to be compared in such a way that the similarities in circumstance become evident.
Were the cases similar on the surface, this methodology would have failed by showing
too many similarities for a direct correlation between the independent variable and the
dependent variable to be established. Thus, the cases were chosen largely because of their
vast differences, which are vital to the methodology.

The bulk of this paper deals with these three case studies, examining the
processes in each instance and exploring the IP implications. First, I examine the South
African case, with focus on the role of political culture and transnational activist
networks. Then, I discuss the Chinese case, focusing on the role of China's pro-economic
growth political culture. Finally, I study the European case, where political culture and
antitrust priorities intersect to deprioritize IPR protections. Going forward, the notion of
political culture affecting the global market, particularly in a sector of rising importance
like IP, is a powerful question that demands further exploration.
SOUTH AFRICA AND PHARMACEUTICAL CORPORATIONS

One prime example of the pathways intellectual property rights can take in a
developing country is that of South Africa. Over the past two decades, AIDS has become
such a severe problem in South Africa that it is now widely agreed that this country has a
higher number of HIV-positive citizens than any other country in the world. This has
caused immense social problems and crippled the economy, as the group worst affected is
people of working age. Amidst the exponential growth of this epidemic, which continues
through the present, the South African government has generally failed to react in a
timely and effective manner, due in large part to political and cultural factors that have
caused a perception that it would be politically costly to discuss and address the problem.
Thus, while the government has resisted IPRs by using TRIPS-compliant exceptions in
order to gain compulsory licensing of AIDS drugs, such actions came about less on the
initiative of the government than because of an especially charismatic brand of domestic
and international activism – including a centrally important domestic activist group, the
Treatment Action Campaign (TAC) – that has brought international attention and
pressure on both the government and on the pharmaceutical companies that supply the
drugs. By this kind of passive reluctance, the Mbeki government hopes to avert the public
eye from the AIDS crisis while simultaneously responding to public pressure from the
TAC and this transnational activist network. In short, while the South African
government has been paralyzed by conflicting policy goals with regard to AIDS, actions
taken by NGOs, both domestically and internationally, have repeatedly prodded the
government into action. By avoiding unilateral action until its hand has been forced by

public pressure, the government is attempting to navigate a set of obstacles in such a way as to allow it to retain a complex political base.

The extent of the spread of HIV/AIDS in South Africa is unquestionably severe. In fact, the situation has been worsening for years, and dramatically affects the South African working population. The 2002 Nelson Mandela Study, a household survey of more than 14,000 people, indicated that 11.4 percent of the population over the age of two was HIV-positive, that women had a higher infection rate than men and that the age group most affected was between 25 and 29 years for women and 30 and 34 years for men. Other estimates of the country’s overall infection rate range from 10 to 25 percent. This proportion has grown dramatically since 1990, when the high estimate was 10 percent; modeling shows that the number is still climbing. The UN AIDS 2004 report shows a similar result.

However, the actual extent of HIV infection in South Africa, as elsewhere, has been difficult to quantify as people are unwilling to be tested for the virus, perhaps because they know that the result is likely to be positive. In the Nelson Mandela Study, only 65 percent of people surveyed were willing to take the test, a fairly good response rate among similar studies. In addition to difficulties caused by resistance to HIV testing, quantification of the HIV epidemic is complicated by the fact that very few deaths are attributed to AIDS-related illnesses, although almost all South Africans who die of certain causes, such as tuberculosis, have actually died of AIDS. This lack of

15 Berry, Fredrikkson, and Noble, 2005.
16 “Mid-year population estimates, South Africa: Key findings,” 2004.
17 “South Africa HIV/AIDS rates are warning for Russia, China, India,” 2004.
18 Berry, Fredriksson, and Noble, op. cit.
19 Ibid.
accurate reporting stems from unwillingness on the part of families and doctors to label the dead with a diagnosis as stigmatizing as AIDS.

This kind of resistance points to what is often called a "culture of shame" surrounding HIV/AIDS in South Africa. People are unwilling to be tested for it, unwilling to admit infection and unwilling to discuss means for prevention and treatment of the disease's spread. This makes public-health measures such as education aimed at prevention difficult. Additionally, the particular economic situation in South Africa, featuring an extremely wide wealth gap, worsens the situation as AIDS has been shown to be a "disease of poverty" - characterized by higher infection rates with lower income level.20 While the exact causes of the severity of the AIDS epidemic in South Africa and countries like it are complicated and closely linked to domestic social factors, the result is striking: South Africa's economy has been harmed by the large percentage of its work force that is HIV-positive, and the epidemic still seems to be on the upswing.

Unfortunately, as in many developing countries ravaged by AIDS, the South African government has been less than amenable to the most successful method of solving the problem, education about safer sex practices that would prevent the disease's spread. While the South African government, led by President Thabo Mbeki, declared in 2003 that it would provide antiretroviral drugs (ARVs)21 to all HIV-infected South Africans, this pledge has yet to be put fully into action and has for two years running

20 Gillies and Wolstenhome, 1996.
21 Antiretroviral drugs are a class of drugs aimed specifically at the category of virus in which HIV finds itself, retroviruses. Since such viruses mutate constantly when they replicate, it has proved difficult to attack the virus itself; rather, ARVs work by suppressing replication and increasing the likelihood that viruses will be unable to survive such mutations. ARVs are usually used in a "cocktail" featuring a number of different kinds of drugs in order to increase the likelihood of positive results. Currently, with careful ARV use HIV virus counts can be dramatically lowered. Unfortunately, the drugs are very expensive, it is often difficult for patients to take the large number of pills required by such cocktails and ARV drugs often have serious side effects.
failed to meet government-set progress goals. Although the government has blamed these setbacks on a lack of adequate medical staffing or on the expense of developing effective education programs, critics have accused Mbeki of failing to adequately prioritize stemming the country’s AIDS epidemic.

There are a number of reasons the Mbeki government has been reticent and roundabout in discussing and dealing with the epidemic. Its preference for dubious homegrown treatments over scientifically proven Western medicine is most likely a result of years of Apartheid resentment; in emphasizing the link between poverty and AIDS, the Mbeki government has emphasized the legacy of poverty and disease the white minority created for the black majority. For example, in a 2004 parliamentary debate, Mbeki criticized the perceived legacy of white people and apartheid in the AIDS problem:

“I will not keep quiet while others whose minds have been corrupted by the disease of racism accuse us, the black people of South Africa, Africa and the world, as being, by virtue of our Africanness and skin colour, lazy, liars, foul-smelling, diseased, corrupt, violent, amoral, sexually depraved, animalistic, savages and rapists.”

Furthermore, Mbeki has mentioned that he does not want Africans to be stigmatized as “sub-human disease carriers,” insisting that honest discussion of AIDS creates a kind of vicious cycle of stigmatization which prevents South Africa from moving past its post-Apartheid poverty and social unrest. The Mbeki government’s stance results from the “culture of shame” surrounding AIDS; by circumventing the issue, it hopes to avoid alienating the electorate, a consequence it believes would result from being open about the problem. By making an issue of public health into an issue of race and class, however, the government takes the focus off of the disease itself and the need to solve a

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22 South Africa AIDS Health.
large-scale public health crisis and makes it seem like in order to decrease the severity of the AIDS epidemic the wealth gap would need to be eliminated, a problem that is much harder to solve. It is important to note that this is not only a result of embracing South African culture in a post-Apartheid era: equally, it represents rejection of a white, Western culture that disenfranchised the South African majority for decades. Forty years ago, white doctors in Cape Town were pioneering the first kidney and heart transplants; that the South African government took so long to embrace proven Western treatments for a deadly disease is telling.

Indeed, the government’s pro-ARV stance on HIV/AIDS is a new one. As recently as 2001, Mbeki’s party, the African National Congress (ANC), published a lengthy document questioning the link between HIV and AIDS, calling antiretroviral drugs (ARVs) toxic and ineffective and recommending “holistic healing” such as massage, yoga and herbal remedies. Also in 2001, Mbeki’s President AIDS Advisory Panel brought together Western doctors and researchers and so-called “AIDS dissidents” – the small percentage of researchers who disagree with the description of AIDS as a syndrome caused by the HIV virus – in an attempt to reach a compromise between the two positions. As recently as 2003, the Mbeki government was threatening to “deregister” nevirapine, an ARV used to prevent transmission of HIV from mother to child. Mbeki’s health minister has been called “Dr. Garlic” for preaching the anti-AIDS effectiveness of this herb. In short, by aligning itself with AIDS dissidents, Mbeki and the ANC have de-emphasized – almost ignored – the role of the virus itself. While it is an admirable goal to speak of the important role of poverty in the AIDS problem, the Mbeki

government’s reticence on the subject has proved harmful. Even now, Mbeki shies away from public mention of the disease, barely mentioning it in his 2004 State of the Union address.\textsuperscript{27} Additionally, the Mbeki government – like the Mandela government before it, in which Mbeki played a large role in setting AIDS policy – has been suspicious of “Western,” mainstream approaches to AIDS, preferring to encourage homegrown, South African research and treatments. For example, in 1998, while chairing the Inter-Ministerial Committee on HIV/AIDS, Mbeki publicly criticized the Medicines Control Council (MCC), accusing it of promoting MNCs’ interests at the expense of local competition when it refused to rush to clinical trial a drug called Virodene, developed at the University of Pretoria. However, the MCC’s reluctance was sensible, as Virodene was essentially a scam: it was derived from dry-cleaning fluid, and illegal preliminary trials had shown no effectiveness and raised concerns about liver damage.\textsuperscript{28}

Finally, discussion of AIDS is politically difficult in South Africa; it is a sensitive topic, and misinformation runs rampant. While former president Nelson Mandela recently has been lauded for coming forward to refute AIDS dissidents and admit that his own son had died of AIDS,\textsuperscript{29} he only did so after having been retired for several years. Public discussion of AIDS involves discussion of topics that remain stubbornly stigmatic and taboo: sexual promiscuity, prostitution, birth control. Worse, such discussions and educational measures as have been attempted have proven to be largely unsuccessful; AIDS Law Project expert Jonathan Berger notes that there continue to be more new infections than AIDS-related deaths in South Africa, indicating that the epidemic is still on the rise. “This approach is not working because it is not open or honest about sex and

\textsuperscript{27} Baleta, “South African president criticized for lack of focus on AIDS,” 2004.
\textsuperscript{28} Lodge, 2003, p. 256.
\textsuperscript{29} “Mandela’s grief challenges South Africa AIDS stigma,” 2005.
In short, the AIDS epidemic has left the South African government with two unattractive options: attempt to stem the tide with public health measures such as comprehensive, community-based safer sex education, or accepting mainstream science so far as to promote the use of antiretroviral medications (ARVs). While ideally these two methods would work in tandem, this has not been the tactic taken by the South African government.

Instead, the result has been that in its AIDS programs, the South African government has placed emphasis on antiretroviral medications while such education-based public health measures have been pushed into the background. Berger noted that “other measures, such as ARVs to prevent mother-to-child transmission, are far easier to implement than behavioral changes,” such as those that could be brought about by educational measures. Nonetheless, ARVs have presented a conundrum for the South African government for a number of reasons. One main cause is the instrumental view of IPRs taken by the Mbeki government, which, in accordance with the popular scholarly opinion on increasing IPRs, would prefer to protect IPRs in order to attract MNCs and foreign direct investment, thereby hopefully fostering economic development. In addition, there are important political factors as discussed above, in which the ANC has resisted mainstream, Western explanations for the AIDS epidemic in favor of embracing traditional explanations and remedies. The eventual acceptance of ARV drugs has not been an easy decision for the Mbeki government, which is worried about South Africa’s international image, both in terms of foreign investment and in terms of racialized public health.

30 Berger, 2005.
31 Ibid.
An additional source of difficulty came from the manufacturers of AIDS drugs, a number of different pharmaceutical companies. Prior to about 1997, when the Medicines and Related Substances Act was amended to allow for TRIPS-compliant compulsory licensing and parallel importation,\textsuperscript{32} AIDS drugs in South Africa were mostly patented and therefore very expensive; to make matters worse, prices were often set higher in South Africa than in developed countries such as the United States. Drug companies were resistant to donating drugs, selling them at a lower price in countries affected by AIDS or selling licenses allowing generics to be manufactured because, they argued, this would allow for illegal worldwide distribution of cheap AIDS drugs, decreasing the profit to be made from such drugs and thereby, at least according to the drug companies, lessening the incentive to innovate in the field. Prior to the advent of TRIPS in 1994 and the resultant domestic legislation, then, AIDS drugs were expensive, hard to come by, and only available to a small, well-off segment of the South African population.

In 1997, in an attempt to remedy high drug prices with legislation, the Mandela government passed the Medicines and Related Substances Act, which allowed for TRIPS-compliant compulsory licensing and parallel importation for AIDS drugs. Berger notes that the implementation of the Medicines Act was itself a result of a change in South African politics brought on by international factors: “[the Medicines Act] was passed at a particular time in history,” under the Mandela government at a time of

\textsuperscript{32} While TRIPS was conceived in order to protect IPRs internationally, it contains a number of provisions intended to protect public health, particularly in cases such as the AIDS situation in South Africa. These provisions include compulsory licensing of patented drugs in a public health emergency, permission for such countries to begin work on generics before patents expire, and parallel importing of drugs, which allows a country to buy drugs from countries where the drug is available cheaper, without the permission of the drug’s maker. In order for these provisions to take effect, they must be included within domestic patent laws, such as the Medicines and Related Substances Act.
confusion and optimism following the implementation of TRIPS. Additionally, there was a sense of optimism about the possibilities for a post-Apartheid South Africa after the first free elections were held in 1994; the Medicines Act was a response to these new possibilities, viewed as a way to have Western drug companies help pay for a problem that was perceived to be the fault of the West.

In 1998, 39 pharmaceutical companies, members of a trade group called the Pharmaceutical Manufacturers Association (PMA), filed suit against the South African government over the Medicines Act. The pharmaceutical companies alleged that application of a law like the Medicines Act would “deprive owners of intellectual property” and that it was “discriminatory in respect of the enjoyment of patent rights in the pharmaceutical field,” and as such in conflict with TRIPS. While the case was eventually dropped by the PMA, subsequently many of the Medicines Act provisions were declared unconstitutional. “[The government] got into a lot of trouble [with pharmaceutical companies] on account of the Medicines Act; it has been very hesitant to properly take on the industry since then,” Berger noted. “This is representative of a broader South African approach to trade; there is an unwillingness to push boundaries; [the government] doesn’t want to suggest that South Africa is not investment-friendly.”

This trend was continued in 2003, when the South African Competition Commission ruled that drug companies GlaxoSmithKline and Boehringer Ingelheim had abused their market position by charging too much for their AIDS drugs and that South African generic drug manufacturers should be able to make the drugs without seeking

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33 Berger, op. cit.
35 Berger, op. cit.
permission from the patent holder. The case, being a precedent, went to appeal; it was settled later in 2003, paving the way for generic AIDS drug manufacture in South Africa, and therefore for implementation of the Mbeki government’s 2003 ARV pledge. Nonetheless, the settlement of this case and of the 2001 PMA case raised questions about why the drug companies would so willingly relent to unfavorable terms. “It’s hard to know how this came about, but there are suspicions,” Berger said. “The abandonment of the case in 2001 was a settlement on problematic terms [for the South African government]. It raises the possibility of backroom deals being made that limit South African action...there may have been more subtle threats made behind closed doors. That South Africa is not seen on the Special 301 list does not mean there is no pressure from the U.S. Trade Representative.”

In short, while the South African government has the tools to take on the pharmaceuticals industry and push for cheap generic drugs – tools including TRIPS and the Doha Declaration, which validated the Medicines Act – it has not done so. This is especially evident when one considers the examples of India and Brazil, from which cheap generic drugs are exported to South Africa and other developing countries, primarily by NGOs like the TAC. In Brazil, for example, the government has aggressively used TRIPS public-health exceptions to order compulsory licensing for AIDS drugs, resulting in generic AIDS drugs that are dramatically cheaper than those available in many other developing countries. Brazil apparently does not share South

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37 The Special 301 Watch List, compiled each year by the office of the U.S. Trade Representative (USTR), is a list of countries that, in the view of the USTR, have “the most onerous or egregious policies” on U.S. IPR holders. See: http://www.ustr.gov/Document_Library/Reports_Publications/2004/2004_Special_301/Section_Index.html
38 Berger, op. cit.
African fears of harming foreign investment. For example, Brazil has threatened to flout patent laws in order to compel pharmaceutical companies to offer licenses; in 2001, the Brazilian government declared that if world market prices for two AIDS drugs did not decrease, it would allow Brazilian companies to produce them regardless of patents. 39

South African AIDS interest groups, including the TAC, have imported cheap Brazilian drugs to make a point about South African drug prices and to demonstrate what could be accomplished in South Africa if TRIPS compulsory licensing provisions were put into use more aggressively. 40 Although India recently implemented stricter patent laws, its booming generic drug industry has, like that of Brazil, also been used as a tool to encourage domestic competition in the hopes of pushing ARV drug prices down. 41 The fact that there are other countries using WTO and other mechanisms to produce cheaper generic drugs has resulted in additional external pressure on companies selling AIDS drugs in South Africa to license them more cheaply, and on generic drug companies in South Africa to produce more effectively. This pressure has not come from the government, but from a combination of AIDS activist groups and other outside actors—much like the pressure that resulted in the eventual dropping of the Medicines Act case.

An important actor in both cases was the TAC, a pro-ARV interest group founded in 1998 and headed by Zackie Achmat, an intensely charismatic activist. Achmat, who was an underground anti-Apartheid activist prior to the free elections in 1994, was diagnosed with AIDS in 1990, and has since then refused to take ARVs until they are available to everyone at an affordable price. 42 Achmat’s story is one that commands

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40 “Brazilian generic ARV drugs in South Africa – the background,” 2002.
attention. Following the filing of the 1998 suit, the TAC engaged in civil disobedience and was granted *amicus curiae* status in the case, which was then adjourned to allow the drug companies more time to prepare their case. The case attracted intensive international notice even affecting the U.S. presidential race: in 1999 Al Gore faced a storm of criticism during his campaign when he opposed compulsory licensing of AIDS drugs in poor countries. In 2001, the case was dropped entirely following intense pressure on the drug companies from international and South African interest groups such as the TAC. Former president Nelson Mandela has also become increasingly vocal, and has attracted a significant amount of international attention to the subject. Much as activist groups did during Apartheid, the TAC has attracted international attention to its case by appealing to an international norm, the sense that life-saving health care is a fundamental right that should not be infringed upon, particularly not by seemingly arbitrarily high drug prices or an unacceptably skeptical government. The transnational activist network that formed around this norm violation has exerted pressure on the drug companies, who have of late agreed to license some drugs to South African manufacturers, and on the South African government, which was forced to resume the case after a year of stalling.

Therefore, it can be surmised that as cheap access to ARVs is a necessary precondition for their wider use in a developing country like South Africa, and as the Mbeki government has not been especially enthusiastic about addressing the AIDS epidemic either by education or by ARV administration, the pressure that led to decreased protection for the pharmaceutical companies’ patents came not from the Mbeki government, but from extra-governmental sources, both domestic and international: in short, a transnational activist network arose in the midst of this policy vacuum to apply

pressure in what was widely agreed to be an unacceptable situation. Additionally, this pressure was exerted on both the government and on the drug companies, leading the government to make rulings that decreased IPR protection and increased the availability of generic drugs and leading the pharmaceutical companies to less aggressively seek protection for their AIDS drug patents. Continued pressure and action in generic drug pricing and on AIDS education and other prevention measures has come from the TAC, not from the government. The government appears to have lost steam with time, a predictable result as the impetus for its measures has come from outside sources.

The process of events is complex, but it can be summarized as follows: with initial conditions including a government that was unwilling to deal actively with the AIDS problem, the advent of TRIPS and the PMA case, the intervention of the TAC and transnational activist networks led eventually to loosened IPR for AIDS drugs in South Africa and a still-reluctant government that has no choice but to act. Thanks to charismatic leaders, including Achmat and, later, Mandela, a transnational activist network grew up surrounding the AIDS situation in South Africa, and this led essentially to the government having to choose but to resist IPRs. Thus, this network has forced a change in the government’s AIDS policy; the ball has essentially begun rolling and although the Mbeki government may have preferred otherwise, it now has no choice but to support AIDS drug initiatives. In South Africa, a transnational activist network essentially hijacked this particular policy area when the government proved to be paralyzed. As predicted by Marxist theorists like Susan Sell, the Mbeki government has been cowed by the economic power of MNCs; its seemingly dramatic anti-IPR stance is a response to its domestic constituents and to international pressure. Further, it has used its

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44 Keck and Sikkink, op. cit.
AIDS policy as an instrument: its eventual embrace of ARVs is a result of a desire to
avoid distasteful education and public health measures. In denying the extent of the
problem, it is attempting to minimize the seriousness of post-Apartheid poverty; by
blaming the problem on racism, it suggests that this poverty is the result of Western- and
Apartheid-perpetuated social problems; by claiming that homegrown South African
remedies will stem the epidemic, it asserts that South Africa does not need the help of the
West to solve its problems. However, the policy-changing role of NGOs in this story
suggests that there are important actors outside of the state/MNC model commonly
suggested in the IPR field.
COUNTERFEIT AND PIRACY IN CHINA: PASSIVE GOVERNMENTAL RESISTANCE

The Chinese IPR situation is something of a conundrum, in that the words and the actions of the government are surprisingly out of sync. While there are perfectly adequate IP laws on the books in China, there is a systematic lack of enforcement that essentially amounts to passive resistance to intellectual property rights on the part of the Chinese government. This is surprising, as it runs counter not only to China’s international obligations as a WTO member but to expectations of the behavior of a developing country with regard to IPRs. For example, Keith Maskus argues that intellectual property protection is needed by developing countries in order to attract foreign capital. Susan Sell holds that in the IPR field, states will generally acquiesce to the demands of corporations in order to attract and keep the corporations’ money. Why has the Chinese case run counter to these expectations? Why does Supreme Court Judge Jiang Zhipei suggest, rather, that, “perhaps some foreign companies need much more patience”? This study will examine the automotive industry in China within the wider IPR situation in hopes of illustrating the reasoning behind the behavior of the Chinese government, suggesting that its roots lie in a form of economic nationalism stemming from China’s century-long humiliation at the hands of colonial powers ranging from Great Britain to Japan.

One common explanation for the contrast between the law and the reality of IPR protection in China, offered by William P. Alford, is that in a centralized state like China, where the government seeks to control the flow of ideas (for example, by controlling the news media and which internet sites Chinese nationals can view), there is no room for

45 Zhipei, 2005.
free flow of ideas, and thus there is no room for protection of these ideas.\textsuperscript{46} However, such an ideological explanation is weak as an explanation for such a widespread and systematic phenomenon as the Chinese government's passive resistance to IPRs. As protective IP regimes are by definition restrictive of the flow of ideas, the alternative (the lack of an effective IP regime, as in the current state of affairs in China) would lead to more, not less, exchange of ideas. Rather, there is a concrete economic, rather than ideological, reason behind this phenomenon. There are a number of different political and economic forces at work in this instance. First, and most important, is the Chinese government's developmentalist approach to its economy, which prioritizes the growth of domestic industries ahead of protecting foreign corporations' IP. Secondarily, there is the level of interplay between domestic Chinese politics and international politics; the Chinese government, in navigating between international demands for IPR protections and the goal of domestic economic growth, has chosen a "middle path" consisting of poorly enforced legal protections.

It is difficult to determine the extent of the piracy problem in China; estimates vary widely, and official data is somewhat sparse. Estimates of the total value of counterfeited goods produced annually in China range from $16 billion up to $50 billion. Furthermore, it is likely that only a small percentage of individuals involved are caught or punished: In 2001, the Development Research Committee for the Quality Brands Protection Committee (QBPC), a pro-IPR group comprised of more than 100 multinational corporations operating in China, estimated that the proportion of the value of investigated goods to the total counterfeits of enterprises was about 8.3 percent, a

\textsuperscript{46} Alford, 1995.
figure that had only slightly increased from the previous year. In November, 2004, the Chinese government commenced “Operation Eagle,” a large-scale crackdown on the counterfeiting of goods; at the time of writing, 419 people had been arrested. However, it is likely that this represents only a fraction of the problem; trade groups and websites dealing with IPRs in China list hundreds of stories of offenses. The sheer number of cases described indicates that the problem is widespread and diversely pervasive. Although the losses to foreign companies are difficult to quantify because a large portion of the goods in question are sold in China and it is questionable whether Chinese consumers would pay a higher price for authentic goods, the U.S. Department of Commerce has estimated that U.S. companies lose more than a billion dollars in revenue annually.

Foreign companies sue frequently in an attempt to gain protection for their IP; most of these have to do with trademark infringement. Typical examples including BMW suing Beijing BAOMA, a Chinese company it had formerly had ties with that continued using the BMW trademark after the business relationship had ended, and Yamaha suing when a company using Yamaha parts in its engines lettered its trademark so as to make it appear that the engine was made by Yamaha. Interestingly, in 2004 the State Trademark Review and Adjudication Board was sued for “administrative inaction” for the first time. The case involves a dispute in which the trademark of a German company, Henkel, was deemed by a Chinese company, Chengdu Yashen Chemical Co. Ltd., to be unacceptably similar to its own, and thus attempted to cancel Henkel’s trademarks six times; the TRAB accepted the cancellation applications and the associated fees on all six occasions, but has

51 “Yamaha wins trademark infringement case; awarded RMB 400,000 damages,” 2004.
failed to issue a decision. This case has not yet been decided. Although this case deals with a Chinese complainant and a foreign defendant, it is illustrative that corporations are frustrated with the inefficacy of the administrative bodies that are meant to protect IPRs.

Raids in all sectors are widely publicized, but they evidently continue to fail at deterring counterfeiters. In June, 2004, an auto-parts manufacturer was fined for producing counterfeit Mitsubishi and Toyota shock absorbers, but the fine of RMB 200,000 (about $24,000) was less than the value of the counterfeit goods that had been sold, which was RMB 272,621 (about $32,750); such “slap-on-the-wrist” penalties are common. In its press release for its “Best Cases Awards,” an award intended to reward Chinese authorities for their “exemplary efforts” in handling IPR violations, the QBPC describes this paradox:

In recent years, QBPC members have observed notable progress made by the Chinese government in criminal enforcement against trademark counterfeiting. However, the overall level of deterrence created by both criminal and administrative enforcement has been insufficient to create positive results for the vast majority of our members, as well as local brand owners. QBPC members report that over the last two years, the number of infringement cases transferred to public security authorities has not significantly increased, and there has been an overall reduction in the size of fines issued by administrative enforcers against counterfeiters. It is striking that in a press release intended to applaud Chinese authorities for their efforts, this group representing the firms that should be the beneficiaries of IPR enforcement cannot help but point out the woeful inadequacies.

In January of 2005, the PRC adopted a new official interpretation of how to handle criminal cases of intellectual property infringement. It outlines “serious circumstances” of violation for counterfeiting of patents and trademarks, for example

52 “State Trademark Review and Adjudication Board sued for administrative inaction for the first time,” 2004.
calling for a fine and/or a maximum of three years of detention for cases in which illegal gains are more than RMB 200,000 (about $24,000) or "direct economic losses" to the patent holder of more than RMB 500,000 (about $60,400). "Especially serious circumstances," those in which the amount of sales of goods with copied trademarks is more than RMB 150,000 (about $18,100) merit a fine and a prison term of between three and seven years. Further, "whoever causes losses of more than RMB 2.5 million [about $302,000] to the obligee of business secrets and thus falls under the definition of ‘the consequences are especially serious’...shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years and shall also be fined for committing the crime of infringing on business secrets." In short, there are criminal laws on the books for the punishment of IPR-related infringements, although they may have been put into place to give the appearance of effort or of a stricter regime. However, the penalties that are implemented have up to now been so low as to fail to discourage infringement. In contrast, in the U.S. there are no criminal penalties for patent infringement (although the Digital Millennium Copyright Act allows for criminal penalties for copyright infringement), but there are no monetary limits in place for enforcement of the civil laws, thus making it much easier for parties to file patent infringement complaints.6

Furthermore, in very few cases are criminal charges ever brought; the thresholds for the monetary value of the counterfeit goods in question that must be met before prosecutors will investigate a case remain relatively high, and it can also be difficult for a complainant to prove that they have been met. Between 2000 and 2004, Chinese public

56 "FAQs: Patent law, the patent application process and more," 2002.
security officials arrested 7,100 people on suspicion of IPR infringement, but prosecutions were only initiated in 2,566 cases. The cause for such a discrepancy is often unclear. For example, although computer software is widely and unapologetically pirated, software companies might have a hard time convincing government officials of the amount of economic loss that has resulted. In the 2004 Special 301 Report on global IPR protections, the Office of the United States Trade Representative complained that in such cases, “valuation calculations are not usually done using the price of the legitimate good,” meaning that often the loss is calculated as the total at the lower, illegal price, not what the goods would cost if they were legitimate. Additionally, because the price of authentic software is prohibitively high, it is likely that few would be willing or able to buy it even if the pirated versions did not exist, so it can be argued that monetary losses are much lower than they may appear and lower than the injured party may believe. Just because people will buy an extremely cheap pirated version of a piece of software does not mean that they would be willing to purchase the full-price legal version which could cost a hundred times as much. It is also unclear how the authorities choose which offenses to investigate or punish and which to leave alone entirely, and some observers have noted that there often seems to be some kind of political motivation. For example, as many of the Chinese enterprises accused of counterfeit manufacture are at least partially state-owned, particularly in the automotive industry, the Chinese government has little interest in seeing such enterprises caught and punished. In one ongoing case, General Motors has filed suit in Shanghai accusing an automotive manufacturer, Chery, of copying designs for the Daewoo Matiz minicar (Daewoo is GM’s South Korean unit).

59 Fishman, China, Inc., op. cit., p. 246.
Because the majority share of Chery is owned by the city government in Wuhu, Anhui province, the local authorities are likely to fight both the case and implementation of any penalties. This is thus a government-perpetuated cycle of IPR infringement.

In addition, there are few actual lawsuits over industrial design theft because so many foreign manufacturing companies form direct partnerships with domestic companies and in these cases the Chinese government requires that all intellectual property, including that brought to the partnership by the foreign partner, is to be shared equally. This is a very clear example of the Chinese government using its intellectual property laws as industrial policy: by giving these domestic partners an equal share in foreign investors' IP, it is giving them access to the technology and designs of bigger companies that have had enough success to operate multinational, and allowing them to compete with these companies right off the ground. Therefore, companies bringing proprietary technology to the deal must first come to terms with the fact that their Chinese partners are allowed to distribute these technologies however they see fit.

Tomoo Marukawa, an expert on Chinese industrial development at the University of Tokyo, describes the situation as a strategic quandary for Japanese firms operating in China:

Weak IPR protection and enforcement makes it difficult for Japanese companies to compete in low-end products, because domestic companies can easily copy Japanese technology and design in such products. Hence Japanese companies have to focus on high-end products, for which domestic companies do not have the capacity to copy the technology. While an expected result according to the Maskus way of thinking might be that foreign corporations would be repelled by the IPR conditions in China, the fact is that they

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continue to be attracted by low production costs, and thus find ways to minimize the
losses. Manufacturing corporations that might prefer to protect their intellectual property
- for example, industrial designs - by manufacturing outside of China find themselves at
a disadvantage because their competitors may not share their concerns, or may have
strategized more effectively against them. The sheer size of the markets and
manufacturing capabilities make investment in China an irresistible prospect for many
multinational firms, regardless of the potential IPR problems that may result.

In fact, charges of any kind, criminal or otherwise, are rarely brought, and
penalties are rarely imposed, despite the fact that Chinese IPR law is WTO-compliant and
largely comparable to laws in other countries. The problem is not in the laws
themselves. Rather, the problem is that the laws are only selectively enforced. This
selectivity seems to be systemic. China is somewhat unique in that its IP laws are
enforced by a patchwork of administrative bodies, rather than primarily in the courts.
This entails a large number of different government bodies on the local level, making for
an opaque system that can be difficult and time-consuming for a complainant to navigate.
Furthermore, each of the enforcing administrative bodies may have different political
motivations and, thus, different views on how the codes should be implemented. For
example, Marukawa notes that:

Some government organs, for example the Bureau of Vehicle
Certification, do not apply the law so strictly. It is said that the Bureau
may authorize a new model of motorcycle 'if it is more than 5 percent
different from existing models.' Hence, hundreds of motorcycles, which
are virtually copies of Honda's motor cycles, have been authorized.

63 For a detailed discussion of Chinese IPR laws, see Appendix A.
64 Zhonglin, 2002.
65 Marukawa, op. cit.
As the automotive industry, including motorcycles, is a sector that the Chinese government hopes to grow into an exporting industry (and, in fact, it has already begun exporting to down-market locations where it does not face competition from well-known global firms\textsuperscript{66}), enforcement here is lax, and the government seems to be using the laws to help domestic firms along. As one Chinese report put it,

Exporting automobiles and auto parts, especially the large-scale export of independent brands possessing their own intellectual property, reflects a country's level of industrial technological development, as well as its overall competitiveness. China's Ministry of Commerce has thus decided to encourage and support the global market expansion of automobile production companies possessing intellectual property.\textsuperscript{67} For example, in 2001 SIPO revoked Honda's 1994 patent for a “mini-motorcycle,” saying that a patent had already been issued to a domestic firm for a similar design;\textsuperscript{68} that the ruling was eventually overturned when the Shanghai High Court found that the designs were not excessively similar is telling. SIPO, by making such rulings, shows itself to be leaning favorably toward domestic firms, despite its statements to the contrary.

While these administrative bodies play the largest role in administering and enforcing IP law, the People's Courts also have a certain amount of involvement, although their clout is limited by the tendency toward centralized administration, by local prosecutors that may or may not choose to investigate cases and by budget concerns.\textsuperscript{69} However, the trends and tendencies in the People's Courts are indicative of the broader IPR climate. In addition to the thousands of Primary courts (which generally do not hear IP cases), hundreds of Intermediate courts and 30 High courts, there are three specific

\textsuperscript{66} Fishman, \textit{China Inc.}, op. cit., pp. 211-212.
\textsuperscript{67} "China to support the international market expansion of automobiles with independent brands," 2005.
\textsuperscript{68} "China bogged down in IPR dilemma," 2002.
\textsuperscript{69} Oksenberg and Potter, 1998.
courts set up to deal with questions of intellectual property rights, the Intellectual Property Trial Chamber of Fujian Higher People’s Court, the Intellectual Property Trial Chamber of Tianjin Higher People’s Court and the Intellectual Property Right Tribunal of Szechwan Higher People’s Court. These three special courts are part of a largely-unsuccessful push on the part of the Chinese courts to have more jurisdiction in the field of IPRs. Supreme Court Judge Jiang Zhipei, who specializes in IPR cases, complained that, “The administrative enforcement [of rulings and laws] is weak sometimes and most of the IP owners also do not like to sue [for] piracy [in] the Court. They think [the procedure is] so complicated.” This lack of judicial power in IPR cases is significant; the government does not encourage the channeling of power to a body interested in full enforcement because it sees a big economic benefit in doing otherwise. However, it is unclear if increasing the role of the courts in IPR enforcement would ameliorate the situation. The sheer number of courts hearing IP cases means that it is unlikely that all the courts are ruling in accord; local variables and externalities are likely to be factors in the decisions. Marukawa sums up the problem as follows:

...the court is improper and weak. The local courts tend to stand in favor of local interests, so if a foreign company files a lawsuit in a local court, it may be difficult to win the case. Even if you win a case, the judgment may not be enforced; as the system of enforcing a judgment by the court is still weak, the domestic company, which [lost the case] by the court as piracy, will keep on producing the copied product with no interference.

At the root, the Chinese approach to developing its economy since 1979 is very similar to that taken by other East Asian countries such as Japan. Chalmers Johnson describes the Japanese “plan rational economy,” in which the widely agreed-upon

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70 "The organization, functions and powers of the People’s Courts."
71 Zhipei, op. cit.
72 Marukawa, op. cit.
overarching goal of high-speed economic growth led to collaboration between the
government and business, with a powerful and developmentally-oriented political center,
or what Johnson calls a capitalist developmental state, directing business into
advantageous sectors and attempting to create conditions that would lead to fast
economic growth. In Japan, the government was attempting to create economic growth
by working closely with its businesses, for example by directing the zaibatsu into areas of
business it felt should be further developed. Other nations in Northeast Asia, including
South Korea and Taiwan, later followed similar models of economic developmentalism.
The Chinese case, while different on the surface, is similar in that there is a clear
overarching goal of fast economic growth; in the Chinese case, the model has been called
a "socialist market economy," but the basic message of government intervention for fast
economic growth remains much the same; in the case of China, the term "market
socialism" has been interpreted to encompass a "whatever works" mentality toward
economic growth. Following several decades of colonialism, economic hardship and
diminished international political power, China hopes to take a place as one of the
world's largest and most powerful economies. As Oded Shenkar of Ohio State University
puts it, "If the Chinese Empire was a regional player, today's China sees itself as a global
player with interests reaching far beyond its ancient sphere of influence of East Asia."

Throughout East Asia, capitalist developmental states have used methods such as
government subsidies and protective tariffs in order to protect nascent industry; in China,
lax IPR law enforcement is being used similarly, as an instrument for economic
development. According to a State Intellectual Property Office official,

74 Shenkar, 2005, p. 35.
In order to grab as much market share as possible, mighty foreign rivals, with advanced technologies and optimized-management models, may plot against domestic manufacturers by all means, especially IPRs. This speaks to the crux of the matter: the market. While the Chinese government accuses foreign corporations of seeking to unscrupulously gain market share by accusing domestic companies of IPR infringement, the reality is that these domestic companies are committing this infringement in relative freedom – and in some cases, even directly subsidized by the government – and making a lot of money by doing it, while also taking market share away from their foreign partners and competitors. The developmentalist state seeks to protect and nourish growing industries; in the case of China, one of the tools the government is using to help develop its economy is its IPR laws, or lax enforcement thereof, or, in other words, IPR non-protection as one spoke of Chinese industrial policy. A telling example is that fact that foreign investors must share their IP on an equal basis with their Chinese partners; by requiring that such foreign technology be shared with domestic firms, the government is in effect subsidizing research and development. With the Chinese government constantly working toward economic growth, with the goal of making China into a global economic powerhouse – an economy that will make those of its former colonizers seem small by comparison – lax IPR enforcement is seen as an instrument, a means of helping domestic companies become competitive on the global market and dominant domestically.

In addition to attempting to develop the Chinese economy, the Chinese government’s lax approach to IPR enforcement is affected by the interplay between domestic and international politics. This situation can be viewed, in the words of Robert Putnam, as a “two-level game.” On the international front – the “external” level of

“China bogged down in IPR dilemma,” op. cit.
negotiation — actors such as the WTO and the United States are exerting pressure on the Chinese government to more effectively protect their corporations' IPRs. Meanwhile, at the domestic level of negotiation, China is a capitalist developmental state and economic development is at the top of the agenda. In effect, the result is that while the Chinese government must have strong, WTO-compliant IP laws on its books and make at least a passable effort to enforce them, the government's passive non-enforcement amounts to a huge subsidy for domestic industry.

Foreign corporations enter into partnerships with domestic firms, who then have the technical know-how to become fierce competitors. Domestic manufacturing firms, freed from the research and development costs that saddle the foreign firms because they can simply use the foreign firms' designs with little fear of repercussion, can focus on low-cost manufacturing. Further, overhead costs such as for software are virtually eliminated, because pirated software is available for free. China's lax attitude toward intellectual property persists because it is so beneficial to the domestic economy, and thus exists as a result of the Chinese's government's developmentalist economic political culture. In the end, because the United States has failed to follow through on threatened economic sanctions and foreign corporations have proved to be willing to continue to invest in China regardless of the IPR-protection circumstances, the domestic level of negotiation takes priority and economic developmentalism — and diminished IP law enforcement — takes the day. This suggests that contrary to the views of Marxist scholars such as Sell, the government in this developing country has not been cowed by the demands of MNCs; as in South Africa, the Chinese government has resisted IPRs, this time because of direct domestic economic gains to be made. Contrary to the popular

76 Zeng. 2002.
view, then, IPR protection is not necessarily an important tool for economic
development.
MICROSOFT V. EUROPE: EXPANSION AND ANTITRUST

A third important case that illustrates the role of governments in intellectual property protection is the ongoing case of Microsoft vs. the European Commission, in which the European Commission (EC) has taken a proactive stance in dismantling a perceived monopoly on the part of American software giant Microsoft, at the expense of protecting Microsoft’s intellectual property. This case is in many ways the outlier of the three discussed in this paper, as the European economy does not stand to benefit in any directly tangible way from this decision. Rather, it appears that this stance stems from a political culture that prioritizes antitrust policy and the rule of law ahead of IP protection, rather than from any directly demanded benefits to European companies or consumers.

The European Union is characterized by a legalistic political culture, in which strict adherence to the rule of law – the idea that authority should only be exercised in accordance with laws, and not arbitrarily in individual cases – is viewed not only as a way to combat cronyism and related particularistic market intervention, but as an effective way to hold a diverse Europe together. Within a long history of a strong, autonomous bureaucracy that is linked inextricably to the EU itself in the minds of constituents, it is inevitable that this bureaucracy would want to increase and perpetuate its role by increasing its size and importance. In order to accomplish this, the EC has invoked the European rule of law norm in order to expand the European legal mandate into a new arena – international antitrust and intellectual property rights – and set a precedent for the future.

77 For the purposes of this case, Europe can be treated as a cohesive state because the case deals only with the European Commission, not with national governments.
The story begins ostensibly in March of 2004, when the Competition Directorate of the European Commission, then headed by Mario Monti, ruled that Microsoft was abusing its dominant market position by automatically including installation of its media player software, Windows Media Player, with every installation of its newest operating system, Windows XP, in a practice called "bundling." Additionally, Microsoft was purportedly "refusing to supply" interfaces that would allow servers using operating systems other than Windows to communicate with Windows computers. This decision was the result of an investigation that began in 1998 when Sun Microsystems, a competing software company, brought an antitrust complaint against Microsoft in the EC Competition Directorate, accusing Microsoft of illegally programming its network interfaces such that separate, proprietary codes known only to Microsoft were needed in order to achieve interoperability.

The decision stated that Microsoft must pay sizeable fines, "unbundle" the software in question and divulge some of the Windows source code - a kind of code called middleware interfaces - so that competitors will be able to produce software that can seamlessly integrate into Windows XP. While Microsoft appealed the decision and the case has been in process in the European Court of Justice, in December of 2004 the Court of First Instance, where the case is being heard, made a preliminary ruling that Microsoft would have to implement the stipulations of the ruling immediately, without

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78 "Bundling," or "tying," refers in this case to the marketing practice of packaging several items together within a single product. In this case, the product in question is Windows XP and the different items are Outlook, Windows Media Player, and the Windows XP operating system software, among others.

79 One example of such an operating system is Linux, an open-source operating system which is increasingly popular among corporate users.

80 A workgroup server is a computer that serves a central function, such as file storage, in a network of "client" machines, used by employees around the world, which make use of such functions during day-to-day activities.

81 There is an international standard code for these interfaces, onto which Microsoft had unscrupulously built, claiming that it was only "adding on" to the standard code.
waiting for the results of the appeal process. Although the proceedings of this case are confidential upon the request of Microsoft, it seems likely that this decision was made in anticipation of an eventual rejection of Microsoft's appeal. The EC has expressed considerable confidence in the strength of its legal case, and outside observers have stated that Microsoft was indeed most likely behaving in a way that abused its dominant market position. Most recently, as of the time of writing Microsoft had proposed a plan for implementation and was waiting for approval from the EC.

The EC is also carrying out an ongoing competition investigation, begun under Monti,\textsuperscript{82} of Microsoft's proposed acquisition of ContentGuard, a digital rights management (DRM) software company. Although Microsoft altered its original proposal\textsuperscript{83} and will now share ownership equally with Time Warner and Thomson, a French technology interest, the EC has expressed continuing concern about the possibility for Microsoft to abuse its market position in the same way that occurred with Outlook and Windows Media Player. DRM software is used to prevent privacy of digital audio and video files while allowing legitimate users who have paid for the files to use them freely. This kind of software is gaining in importance as digital music and movies have become dramatically more popular over the past five years. ContentGuard holds a number of patents in this area and its standard is the basis of the International Standards Organization's MPEG Rights Expression Language, which sets an international standard for rights and usage of digital audio and video files.\textsuperscript{84} The EC has expressed concern that Microsoft's acquisition of ContentGuard would allow the software giant to dominate in

\textsuperscript{82} Monti left office in November, 2004.
\textsuperscript{83} The original proposal stated that Microsoft and Time Warner would each control 50 percent of ContentGuard.
\textsuperscript{84} Gray, 2005.
yet another area of the software industry and thus to stifle competition in the same way it purportedly did in the operating-systems arena.

While the 2004 EC ruling was first and foremost an antitrust ruling, its implications in the field of intellectual property rights are an important side effect. By ruling that Microsoft would have to divulge some of the Windows XP source code to competitors, the EC essentially stated, in a very roundabout way, that it should have a strong degree of control over Microsoft’s intellectual property. As a source within the EC Competition Directorate staff stated,

“We have operated under the assumption that the code this decision deals with does fall in the category of intellectual property, and thus our decision stands the highest legal test that can be applied, that competition will be eliminated without such a decision. However, the decision did not take the position that there is intellectual property here...”85

Essentially, the EC has stated that the IP in this case is inconsequential, if it even exists. This viewpoint is at odds with the facts of the case. Although in a statement explaining the 2004 decision, the EC called the middleware interfaces “the hooks at the edge of the source code which allow one product to talk to another” and stated that “the interfaces do not concern the Windows source code,”86 the communications protocols in question were in fact proprietary and part of the source code. However, this is the case illegally, as Microsoft had previously agreed to adhere to the international standard code.

Additionally, two of the main participants on this so-called “interoperability” side of the case, Sun Microsystems and Novell Inc., both of which manufacture competing server software, have little substantive interest in the outcome of the case, as Sun had a pre-existing license for the interfaces and Novell settled its antitrust claims against Microsoft in the United States for a large sum of money and without securing such a

85 European Commission Competition Directorate staff contact, 2005.
license. In short, Microsoft bought Sun and Novell off; this behavior suggests that Microsoft is attempting to act outside the rule of law, contrary to the standard in Europe. This is confirmed by the fact that the EC has pursued the interoperability side of the case even without materially interested complainants; clearly, it is the lack of respect for the rule of law that has offended. It seems almost as if the complaints were an excuse for the EC to investigate Microsoft’s behavior. This represents a unique attitude toward intellectual property rights and antitrust practices on the part of the EC, that IPRs should fall secondary to antitrust practices; such an attitude can be explained by a number of different factors. It reflects the core reasoning behind the case: that the EC has its own motives.

Evidently, European economic and political priorities have shifted away from a preference for intellectual property rights protection. This shift could have occurred in favor of increased protection of European software consumers, or in favor of encouraging competition, or in order to give a boost to European companies. However, none of these explanations appears to completely explain the phenomenon. For example, it does not appear that European consumers have as yet been significantly harmed by Microsoft’s practices or that they will benefit from the unbundling of the Windows XP package, and, more importantly, European consumers were not among the complainants or the interested parties in the case. In fact, the most common prediction is that the unbundling, which will in all likelihood result in one version of Windows XP being sold without Windows Media Player (under the name “Windows XP Edition N”), while the original, bundled software package remains available, will result in only a very minimal market

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87 Transcript of Microsoft news teleconference with US journalists and analysts regarding European Court of First Instance order on interim measures, 22 December, 2004.
While part of Microsoft’s appeal relies on the complaints of other software makers who manufacture software that may rely on Windows Media Player, and who would theoretically be harmed by the ruling, in reality Windows Media Player is a free download and the market is unlikely to be changed by the existence of Edition N. Obviously, consumers would rather receive more software for the same price. Additionally, other email and media player programs are easily usable with the existing version of Windows XP, as any user who uses Qualcomm’s Eudora email program or Apple Computer’s iTunes music player can attest. Although EC officials have stated that the goal of the ruling was to benefit European consumers by encouraging competition, it seems that consumers have actually not been a driving force.

It is also unlikely that European software companies will be significantly aided by this ruling. The complainant that brought about the original investigation of Microsoft’s market practices was Sun Microsystems, a software maker based in Santa Clara, California. In addition to Sun Microsystems, nine other “interested third parties” were admitted to the proceedings in the 2004 decision. These parties include corporations including Lotus Corporation, Time Warner, Novell Inc., and RealNetworks, all American-based companies. The main corporate proponent of the bundling/tying side of the decision has been RealNetworks, a software company based in Seattle, Washington whose main product is a media player that competes directly with Windows Media Player. In short, the companies that are most in favor of the EC ruling – those that stand to benefit the most from it – are not European companies but American companies.

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89 Smith, 2004.
Taken together, both the bundling/tying side of the decision and the interoperability side seem to have been made not for protection of a politically powerful consumer base or for protection of European companies, but for the sake of antitrust practices on their own merits. This strongly suggests that the EC is not using its antitrust policies for any instrumental purpose in the usual sense of the word. Furthermore, EC concerns about Microsoft’s proposed ContentGuard acquisition persisted even after the proposal was revised to give French software interest Thomson a one-third share in ownership, equal to that of proposed American partners Microsoft and Time Warner. Although a European company now stands to gain in this case, EC authorities remain skeptical of the opportunities it could create for Microsoft to further consolidate and abuse its market position. It seems clear that the EC wants its case against Microsoft to be both airtight and extremely thorough.

Another, stronger possibility is that the EC is hoping to foster European competition against the American software giant by punching holes in Microsoft’s dominant market position. While this was likely part of the decision-making process, as potential aid to European software companies would have been seen as a net gain, this does not seem to have been a guiding principle. Had this been the case, European companies would have been more eagerly encouraging the investigation, and would be more actively seeking its conclusion in their favor, which seems to be imminent. The fact that this support is very minimal suggests that the EC is doing more than simply fostering pre-existent competition; it is attempting to create competition for the sake of competition. As stated by the contact in the EC Competition Directorate, although the decision was made "based on the effects of [Microsoft’s] conduct on [the European] 91

market," it was "never directly about nationality," and in making the decision the EC aimed to "preserve competition to the benefit of consumers, irrespective of nationality"—although, as shown above, it is unclear how consumers will benefit from such a decision.

It is likely that some of the impetus for the EC investigation and subsequent ruling came from observation of the antitrust proceedings against Microsoft in the United States. These proceedings culminated in a settlement between Microsoft and the U.S. Department of Justice in 2001, which was similar in many ways to the 2004 EC ruling. There is "an overlap in the kind of information to be disclosed by Microsoft," and the EC case "takes a similar approach, although the starting positions were different," according to the EC source, who noted that EC officials meet regularly with officials from the U.S. Department of Justice to discuss the issue. While there were no fines imposed in the U.S. case, the settlement stipulated that Microsoft had to license its operating system to computer makers on uniform terms for a period of five years, banned retaliation against computer makers choosing to use non-Microsoft software components with the Windows operating system, and included compulsory licensing of any intellectual property necessary for competitors to produce software that would work as smoothly on a Windows PC or server as Microsoft products did. While this settlement diverges from the EC ruling in that Microsoft was still permitted to bundle its own software with its operating system — software such as the widely used Internet Explorer and Windows Media Player — the requirement for sharing of Microsoft's middleware interfaces is very similar to that included in the EC ruling. Both bodies viewed Microsoft's tactics as abuse.

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93 Ibid.
of a dominant market position, and both stated that the only way to level the playing field for competitors was to force Microsoft to divulge some of its intellectual property. The main difference between these two instances seems to be that while American competition in the software industry stood to gain directly from the settlement, this does not appear to be the case in Microsoft v. Europe, and thus that the U.S. was using antitrust proceedings in an instrumental way.

Therefore, there seem to be two possibilities for what impetus may have caused the EC to make its 2004 ruling against Microsoft: the need to protect and encourage Microsoft's European competition in much the same way the U.S. Department of Justice did in its 2001 settlement and a norm that prioritizes antitrust action ahead of intellectual property protection. Europe has also set itself up in several ways to be compared to the U.S. or to counterbalance to American political and economic power, and this decision is no exception; as Monti put it, "in this case, the EU was more united than the United States."95 However, although the ruling was against an American company, it is American companies that will eventually benefit, so it is unlikely that the hope in this ruling was meant as a jab at American corporations. Rather, it is more important to note that Microsoft is not a European firm. By focusing its attentions in this precedent-setting case on a non-European firm with a history of antitrust investigation in the U.S., the EC avoids angering its constituency.

Notably, there is a strong representation of associations that promote open-source software. Aside from American companies, the admitted interested third parties are all industry associations, mostly U.S.-based, that have historically lobbied for open computing systems and markets, including the Computer Technology Industry

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95 Meller, June 8, 2004.
Association, the Computer and Communications Industry Association, Free Software Foundation Europe and the Software and Information Industry Association. The open-source movement is the one obvious beneficiary of the ruling. It stands to gain market share from both the unbundling side of the decision, as open-source media players may gain in popularity if users are no longer automatically presented with Windows Media Player, and from the interoperability side, as operating systems and other programs face an obvious disadvantage if they cannot communicate with Windows machines. The open-source movement is contrary to the market practices to which the EC is objecting, and it represents by its nature a possible counterbalance to Microsoft’s dominant standing. It is also by definition amenable to antitrust ideals: since the software is free and the source code is openly available, open-source companies are not prone to the kinds of behaviors that Microsoft is accused of. It is also a movement that is inherently good for the consumer, because it represents competition to “closed-source” companies like Microsoft and because it encourages collaboration for a better product. The fact that the main beneficiary of the EC ruling is a movement that is so strongly antitrust is striking and reflective of the fact that the EC’s primary priority here is ostensibly antitrust action.

This reasoning results from long-term importance of the rule of law in the development of the EU. It is commonly agreed that in Europe, an increased rule of law—specifically driven by several provocative rulings made by the European Court of Justice—has been central to the increase in integration that has taken place over the last several
decades. The European legal system is now one in which international, European Community law (over which the ECJ presides) is supreme to national law of member states. This is a fairly recent and unique development, and one the EU administration as a whole holds dear, as it forms the basis for its legal authority. In order for international law to be effective, it must be viewed as potent and legitimate, rather than as an anemic third party that can be ignored. As Karen Alter, a specialist in European law at Northwestern University, puts it,

When violations of law are not pursued, and when violators can talk their way out of being condemned, the cost of violating law depreciates...one needs compliance with European rules to be a priority lest inattention, inertia, or the weight of competing interests lead to numerous violations of the law. Protecting and enhancing European rule of law has thus been crucial in prolonged European integration; this becomes clear when one considers the drawn-out battles that have occurred over things like yogurt cultures. Were the international rule of law weaker, it seems likely that member states would have taken the path of least resistance and the EU would simply have disintegrated rather than coming to agreements. Creating and maintaining a culture of a strong European rule of law remains vital in making the treaties enforceable and potent and, thus, making the EU seem like a serious undertaking. At this point, European rule of law is a deeply entrenched norm in the EU, and while the European courts are widely seen as supreme, the value of a strong rule of law, in which laws are enforced in a strong but even-handed and non-particularistic way, is part of this norm. Within this culture, a case like Microsoft is an example of the strength of this norm. It is being invoked by the EC in order to further the importance of the European

100 Alter, 2001, p. 3.
101 Ibid., p. 212-213.
bureaucracy and increase integration – and, to be sure, there is a strong precedent for judicial activism furthering European integration.\textsuperscript{102}

Thus, the decision was to some degree a power play by the EC. The decision occurred at a time when the EU was in the midst of expansion and facing questions about its political nature: will it be an intergovernmental institution, as many national governments would generally prefer, or will it increase in supranational capacity? This ruling is in some ways central to this debate, in that as Monti made a ruling in an area that had not previously received much attention from the EC but in which national governments were not acting, he was attempting to increase the EC’s power by adding a new area of litigation. Although the EC has insisted that the case does not break new ground and rests on “solid legal principles,”\textsuperscript{103} it does have to potential to form a precedent in other ways. There is now a precedent of having such cases handled by the EC rather than by national governments. Additionally, once the final ruling is made, there may be a precedent set that will facilitate the EC’s handling of such cases in the future; in an EU where institutions are seeking ways to make themselves more credible and politically potent, such a precedent is highly attractive. According to James Governor, a London-based analyst for Redmonk, a Bath, Maine market research consulting firm, Monti apparently wants to impose a historical precedent that will apply to bundling and tying across a host of industries in the age of digital products...if such an approach sticks and doesn't collapse under appeal, then the EU will have put itself forward as the global antitrust regulator in the face of the weakness of the [U.S.] DOJ.\textsuperscript{104}

This ties into the importance of the rule of law in the formation of the EU. If precedents such as direct effect and supremacy of European law – both established in ECJ cases –

\textsuperscript{102} Altman, 2001, pp. 17-18.
\textsuperscript{103} EC Competition Directorate staff contact, op. cit.
\textsuperscript{104} Rooney, 2004.
have formed much of the legal basis for the EU and established European law as legitimate in the eyes of the public, this decision indicates a continued desire to legally entrench the EC and the European rule of law.

Regardless of Monti’s place within the larger debate over the future of the European union, it is clear that he did play an important role in the development of the case against Microsoft, and that his influence remains prevalent months after he left office. While in office, he plainly made a goal of making EU competition policy “something to be reckoned with.” In fact, he has been criticized even by other EC officials for being overly harsh; prior to the 2004 ruling, the EC Single Market Commissioner, Frits Bolkestein, intervened because of concerns that the decision could infringe on IPRs and later be overturned in courts, an outcome which Bolkestein, who at the time hoped to proceed Monti as Competition Commissioner, hoped to avoid. However, although Monti was zealous in his pursuit of the rule of law in antitrust enforcement, this case was not a one-man show. Rather, this kind of inter-directorate consultation, along with the EC’s very slow and careful investigation of the complaints against Microsoft, including “formal expressions of Microsoft’s doubts” in 2000, 2002 and 2003, and a formal hearing in March of 2003 indicate that through a methodical process the EC hopes to come up with a ruling that will stick and form precedent. This stance has continued with Monti’s successor, Neelie Kroes, under whom the EC Competition Directorate has energetically continued its investigation of the proposed ContentGuard acquisition and the bundling case against Microsoft, including the January, 2005 ruling calling for immediate implementation of the 2004 EC ruling.

107 EC Competition Directorate staff contact, op. cit.
Further, while European competition policy seemed to have taken a new shape after Monti entered office in 1999, he did not act in a vacuum. Rather, Monti did not single-handedly come up with the idea of promoting stronger competition policy, but instead acted within a political culture where strong competition policy was viewed as a worthy ideal. This grows out of the importance of the rule of law in Europe, which perhaps has arisen alongside the growth of the EU bureaucracy, an arena in which extremely detailed laws have proven thus far to be an important tool in European integration. This seems to have given rise, in turn, to a sense that the European market—which did not exist prior to the implementation of the Maastricht Treaty in 1993—as a whole benefits from increased levels of competition, and that in order for the European market to be successful, strict market principles must trump any appearance of cronyism or selective enforcement. For the EC to have allowed Microsoft to continue its seemingly illegal dominance unopposed would have been uncharacteristic. One analyst, Daniel J. Giford of the University of Minnesota, noted that antitrust rhetoric in Europe uses “the American language of consumer welfare, but I think [they] mean rivalry for the sake of rivalry.” This norm is sufficiently strong that in the case of Microsoft it has decisively trumped the desire to protect corporations’ intellectual property rights, although European corporations were among those advocating most vociferously for the implementation of TRIPS. Again, conveniently, no European firm is involved with this case, so a strong antitrust norm can be effectively harnessed for furthering European integration without harming European firms’ IP. By contrast, what would have happened if Microsoft happened to be a European firm? It seems likely that the EC would have been vociferously accused of overstepping its bounds and of failing to protect IPRs.

This result counters the findings of Susan K. Sell, who found that international intellectual property protection resulted almost exclusively from pressure exerted by corporations on states, which were willing to cooperate in order to protect their domestic businesses and attract foreign capital.109 Where Sell emphasizes the importance of governmental acquiescence to the demands of both domestic and foreign corporations, this model fails on two counts in this case: the pressure has been against intellectual property protection, not for it; and the pressure came from individuals and interest groups, not from corporations. Additionally, the result here counters the findings of Keith Maskus, whose model states that IP protection is needed by both states and corporations in order to attract capital and foster innovation, and that intellectual property protection arises endogenously with economic development.110 In this case, however, the result is the direct opposite: the EC’s position is that reduced IP protection is needed to foster innovation (by encouraging the development of viable European competition), and it seems to have decreased with the increase in economic development that the EU has brought about.

The Microsoft v. Europe case, standing outside the most common models, can therefore be viewed as somewhat of an outlier in terms of international IP protection; it is an example of the special conditions that can lead governments to act counter to these models. In this case, the process leading to this kind of action can be viewed as follows: Microsoft’s monopolistic market tactics, when combined with a legalistic political culture, antitrust priorities and Monti’s antitrust goals, led to an EC ruling that infringed on Microsoft’s intellectual property. In short, the European political culture is unique in

that antitrust practices are elevated, while other goals that are commonly pursued by
developed countries, such as IPR protections, are therefore secondary. In this case,
intellectual property was the casualty of the EU’s particular political culture, harnessed
by the EC for instrumental purposes. In this case, Microsoft is viewed as an interloper,
seeking to use unfair practices to maintain market dominance and avoid being subject to
the rule of law. The EC’s actions in this case stem from a Europe-wide norm emphasizing
the importance of the rule of law, and Microsoft’s IP losses are viewed as a byproduct.
This norm, which developed over a long period of time, is here being invoked
instrumentally, as the EC asserts itself in a new policy arena. In being an outlier, then, the
Microsoft v. Europe case is illustrative of a larger phenomenon of governmental
resistance to IPRs. Although IPRs are not always resisted for instrumental reasons, in
these three cases states have defied expectations for IPR-related behavior to do so.
CONCLUSION: LOOKING FORWARD

Governmental resistance to the increase in the international intellectual property rights can thus best be viewed as a result of states' individual political interests and preferences. However, these interests and preferences are not a unifying concept; as a result, while states clearly are using IPRs in an instrumental way, these state reactions cannot be viewed as monolithic. In fact, this phenomenon fits best into an interactive framework: these policy outcomes are the result of the interactions between states' particular, unique political situations and the demands placed upon states by international and domestic factors. Thus, policy recommendations must be based primarily on the varying ways these interactions can be colored.

One of the most important points suggested by this work is the idea that the popular wisdom, that states are beholden to MNCs in the international IPR area, is incorrect. If states are using resistance to IPR regimes freely as a policy instrument and managing not to totally alienate foreign investment or stifle innovation, then it must be that MNC lobbying groups are not as powerful as much of the literature suggests they are, and that IPRs are not as important a development tool as one might think. This suggests that perhaps states should go further: they should resist the increasingly protective global IPR regime more often, if such resistance would serve an instrumental purpose. For example, the generic drug experience in Brazil should be illustrative for the South African government, in that drug companies are still willing to operate in Brazil despite the fact that Brazil has repeatedly invoked the TRIPS exceptions for public health emergencies. Although the South African government has been highly skittish about
these exceptions, it seems clear that thanks to a transnational activist network's attention to the issue, a global public-health norm would make it unappealing, from a publicity point of view, for drug companies to pull out of South Africa if TRIPS exceptions were invoked for generic ARVs. Overall, this work suggests that states, even developing countries, can effectively attract foreign investment and foster innovation while resisting IPRs with a good deal more confidence than the literature suggests is possible. The cases discussed here, as well as numerous others, suggest that states can and should be more critical in the IPR arena, because the rules are more malleable than is commonly discussed and certainly not monolithic.

This research also suggests that if the IPR regime in a given state is less than ideally protective, corporations should (and will) not avoid investing in the state entirely, but rather will adapt their investments and business practices to work within a given country's political situation, interests and preferences. This practice of adaptation has already manifested itself in some instances. For example, Marukawa noted that Japanese automotive manufacturers operating in China had adapted to the ineffective IPR regime in an unexpected way, by manufacturing expensive, high-end technologies in China because local manufacturers would not have the manufacturing capacity to copy these complicated technologies, even though by Chinese law they have rights to the designs. Likewise, in South Africa drug companies have adapted to threats on the IPR front, such as the lawsuits and the demonstrations of the effectiveness of imported generic ARVs put on by the TAC, by working more closely with the government, which has proved repeatedly to be a weak responder in terms of IPR resistance, if not in word then certainly in action. By this close alignment, these pharmaceutical firms give the appearance of

working with, rather than against, South Africa on IPR issues, while also reminding the government of the potential consequences of resisting IPR protections (although this research suggests that this may be a bluff). Thus, drug companies in South Africa have managed to harness the Mbeki government’s skittishness to their advantage, at least for the time being.

A third point this work raises is the idea that in the arena of IPRs, developing countries can and should listen to the demands of their constituents. Essentially, this is a question of the balance between democracy and a government’s interests and preferences. For example, in South Africa, it seems clear that the Mbeki government’s interests and preferences do not jibe with the demands of South Africans, who have had to face a severe epidemic in which most public-health response has come not from the government, but from NGOs and outside actors. While the government has doubtless behaved in such a way while attempting to balance concerns about the AIDS epidemic with the “culture of shame” and concerns about foreign investment and South African economic development, so as to please a diverse and complicated constituency, it has failed to address the AIDS crisis in a substantive way until compelled by a transnational activist network invoking an international public health norm. This is a strategy that allows the government to avoid the appearance of making unpopular decisions voluntarily, but it also disenfranchises South Africans who have had to wait far longer for decisive actions regarding ARV IPRs than they would have had to if the government was proactive. This research shows that, at least in the arena of IPR resistance and invoking TRIPS public health exceptions, governments should not ignore the demands of their
constituencies in order to avoid alienating foreign investment because this is unlikely to occur.

Finally, this study raises the question of the overall IPR balance. Has the global IPR regime tipped too far toward protection? What would constitute an ideal, fairly balanced IPR regime? It must be noted that IPRs did not exist in the current sense of the word until fairly recently; the term "intellectual property" did not come into common use until the creation of the World Intellectual Property Organization in 1967. With the advent of TRIPS and the fact that WIPO is pushing for an even more protective global IPR regime, have states allowed MNCs to have too much control over this arena of international law? This research suggests that states, in fact, resisting this regime, it seems that barring a change in the tide, they are likely to continue to do so.

112 "Intellectual property."
APPENDIX A: Chinese IPR laws

IPR law in China is a patchwork, appearing in a number of different legal bodies. Crucial for China’s entry into the World Trade Organization was harmonization of its domestic patent laws, trademark laws and copyright laws with the requirements of the WTO. China has also been a signatory to the Patent Cooperation Treaty since 1994; this treaty provides for an “international” patent application deemed acceptable by all signatory nations. Patent law is now administered by the Patent Administration Office, which is largely responsible for filing and enforcement of patents. There are provisions for licensing fees; there is also a provision allowing for compulsory licensing (with a fee) in the case of compelling state interest in a given piece of intellectual property, as well as for the circumstances allowable under TRIPS. If foreigners or foreign corporations apply for patents, the application has to be made via a patent agency and will be treated according to treaties and international organizations to which both China and the other country belong, according to the “principal of reciprocity.” “Invention-creations” created while the inventor “in execution of the tasks” assigned to him by his employer are regarded as the property of the employing entity, who can choose to pursue a patent.

For a patent to be granted, the invention-creation in question must possess “novelty,” meaning that no identical invention has been disclosed, “inventiveness,” meaning that the invention-creation represents “significant progress,” and “practical applicability,” meaning that the invention can be made and “produce effective results.” In China, where things like drugs and movies are often pirated long before they hit the

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113 "PCT contracting states."
114 I.e. circumstances of national emergency and cross-licensing of new with necessary prior patents.
legitimate marketplace, the “novelty” requirement can pose a problem because it is often interpreted such that items which have already been pirated can no longer be patented; an example of this conundrum is Pfizer’s drug Viagra. Patents last for a period of 10 years for inventions. A number of things are excluded from patent protection, including scientific discoveries, mental activities, methods for the diagnosis or treatment of diseases, animal and plant varieties and substances obtained by nuclear transformation; however, the processes that these things may involve are patentable. There are provisions for monetary fines as penalties for patent infringement offenses, limited at confiscation of the illegal income plus three times the amount of illegal income or a maximum RMB 50,000 (about $6,040). Review of patents and adjudication occurs both through the Patent Administration Office and through Intermediate People’s courts.

Chinese trademark law is generally similar to that elsewhere. For a trademark to be protected, in all cases except those of “well-known” trademarks the trademark must be registered with the Trademark Office and will be protected for a renewable period of 10 years. The law provides for punishment for use of designs that are “identical or similar” to registered trademarks and for aiding or abetting such infringements. There are also provisions for trademarks indicating geographic origin, quality classes and like qualifications. There are a number of exceptions that can prevent a trademark from being registered, such as marks that are deemed to be “detrimental to socialist morals” or those that are seen as prejudiced against any nationality.

“Well-known” trademarks are protected under different rules, which took effect in 2003 and provide protection for marks that are widely recognized but that may not be

\footnote{Fishman, \textit{China, Inc.}, op. cit., p. 223.}
\footnote{Young, 2004.}
\footnote{Ibid.}
registered. For a trademark to be considered "well-known," it must be well-known throughout China. This can make it difficult for foreign companies to protect their trademarks, as labels that are famous in Shanghai may well be unheard of in rural provinces. For example, Burger King was denied protection; according to Laura W. Young, a partner at Wang and Wang, a law firm that specializes in international intellectual property disputes, "from the Chinese point of view, such international products are generally luxury products, and thus are naturally unknown to the great majority of Chinese."\(^{119}\) Paradoxically, however, China is party to the Paris Convention of 1883, and is thus required to protect trademarks and brand names "without the requirement of filing or registration applicable under national law, whether or not such names form part of a trademark, thereby recognizing the importance of trade names with respect to intellectual property."\(^{120}\) There are currently about 69 "well-known" trademarks recognized in China, about 11 of which are foreign-owned.\(^{121}\)

The third body of law that the Chinese government adjusted to fit WTO requirements is that of copyright law. Chinese copyright law protects the works of foreigners and non-Chinese nationals, whether or not their home countries are signatories to copyright-protecting treaties with China. Works are protected for a period of the author's life plus 50 years, or for 50 years for corporate works. Authors also retain "moral rights" to their work.\(^{122}\)

In addition to these three bodies of law, which have the largest amount of significance in the field of intellectual property, other parts of Chinese law also include

\(^{119}\) Ibid.
\(^{120}\) Kaufman, 2002.
\(^{121}\) "Another list of well-known marks published."
IP-related provisions. For example, there is a Product Quality law intended to discourage the sale of fake or inferior goods. It calls for corporations to adopt quality control procedures and makes it illegal to "pass of a fake product as a genuine one."\(^{123}\) China also has a law prohibiting "unfair competition," within which is included "deception of consumers by passing off a registered trademark of another person" and "infringing others' business secrets."\(^{124}\) The law was implemented as part of China's transition from a planned economy to a market economy, in order to encourage competition. This highlights the fact that through its IPR protections, the Chinese government is seeking to encourage its domestic industries; the protection of foreign companies' IP is secondary and falls by the wayside.

One perennial complaint about intellectual property protection in China (or the lack thereof) has been that there is no penalty for crossing the Chinese border with pirated goods. In 2004, following pressure from the United States, the Chinese government instituted new customs rules in an attempt to remedy this situation. The new law allows for owners to register their IP with the State Administration of Customs (SAC). Owners are then permitted to request that the SAC detain suspect goods at the border, and the SAC is likewise required to notify owners if suspect goods have been detained. However, the law is fairly opaque and does not seem to favor the IP owner; for example, owners are required to pay the costs of storing detained goods until it can be determined whether or not they are illegal, a process which does not even have to begin until 30 days following the incident. If the goods are deemed "fit for public consumption," they are not automatically transferred to the IP owner as one might expect.

\(^{124}\) Ling.
but rather may be sold to the owner in return for “adequate compensation.” Furthermore, although the law allows for criminal liability “if a crime is constituted in the import or export of goods infringing IPR,” customs violations do not constitute a criminal violation in and of themselves. The only penalty for these violations is confiscation of the goods in question. Thus, it must be noted that a persistent and significant failing of Chinese IPR law is in the customs law arena.

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