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Reevaluating U.S. intellectual property right policy in the face of globalization: moving beyond TRIPS and special 301

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REEVALUATING U.S. INTELLECTUAL PROPERTY RIGHT POLICY IN THE FACE OF GLOBALIZATION: MOVING BEYOND TRIPS AND SPECIAL 301

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TABLE OF CONTENTS

CHAPTER 1: Introduction .................................................. Page 1

CHAPTER 2: Background .................................................. Page 5


CHAPTER 4: Case Study: Brazilian Pharmaceutical Industry ......................... Page 49
Case Study: Chinese Computer Software Industry .......................... Page 67

CHAPTER 5: Conclusion/Future Policy Recommendations ......................... Page 87


APPENDIX C: International Relations Theory Primer: Realism, Neoliberalism,
Embedded Liberalism, Post-Hegemonic Stability and the Predictions Of each Regarding TRIPS
I. INTRODUCTION

The Cold War has ended and the North-South conflict that marred international relations at the end of the 1970s and into the 1980s has retreated from the international diplomatic spotlight. World economic activity is shifting toward trade in intellectual property-based goods and services. Although nearly all of the world’s states are participating in this information transformation both directly and indirectly, deviations from a universal norm are nevertheless present as a result of variations in wealth, economic structure, governmental organization, and cultural practices.

All facets of modern society have come to depend heavily on technology. This phenomenon of rapid technological expansion can be attributed to the versatility and widespread applicability of certain technologies. A technological discovery in the electronics industry may reverberate across several different sectors of the economy, resulting in related advancements in several industries. A new computer chip may decrease the time necessary to disseminate massive amounts of information, thereby increasing scientific, economic, and possibly even military efficiency in a short period of time. As a result, the nation that possesses the greatest capacity for technological development necessarily wields a tremendous degree of power. A single technological advancement can significantly bolster a particular nation’s power relative to other nations.

Increasingly, technology represents a crucial variable in the formulation of national security since it can directly influence state power. Traditionally, factors that affect military power have been a central concern of foreign policy practitioners.
Technological creations, even if not developed specifically with the military in mind, can affect military power both directly and indirectly. Technological innovation can result in more sophisticated weaponry, but it can also lead to a strengthened economy which indirectly improves a particular nation's ability to mobilize for war. Moreover, a strong economy results in greater leverage in trade negotiations. Technological gains are fungible. In other words, technological advances tend to increase levels of power in several different sectors of a particular society, thereby increasing the degree of power enjoyed by a particular nation. It necessarily follows that policy practitioners of one state will tend to view relative technological gains in another state as a potential threat to both economic and military vitality.

Several scholars have studied the effects of relative technological gains in a military context; however, few have focused on relative gains in technology and the repercussions for international economic security. Given the importance of economic strength to a wide variety of national security concerns, it seems unusual that more scholars have not undertaken a comprehensive study of relative economic gains as they relate to foreign policy. In the article, "Do Relative Gains Matter? America's Response to Japanese Industrial Policy," Michael Mastanduno analyzes the ways in which United States foreign policy is influenced by relative economic gains in relation to Japan. In his analysis, Mastanduno interprets three cases of trade disputes between the United States and Japan—aircraft, satellites, and high definition TV (HDTV) in the context of international relations theory. At the end of his article, Mastanduno comes to the conclusion that relative economic gains do indeed matter, but that resultant policies are not always determined solely by relative considerations. The focus of Mastanduno's
article is narrow and the results are mixed. Nevertheless, Mastanduno is one of the few scholars that have attempted to interpret U.S. foreign economic policy in the context of relative-gains theory.

In this paper, I intend to expand upon Mastanduno's ground-breaking inquiry by analyzing the motivating factors behind the behavior of the United States in its attempt to establish and maintain an international intellectual property rights regime. The international intellectual property rights system, established at the 1994 Uruguay Round of GATT, represents an international agreement with unprecedented reach into domestic state affairs. This ambitious attempt at establishing a high international norm of intellectual property protection was created as a result of inflexible American resolve. I will attempt to identify the initial impetus that helped define U.S. action—was it relative gains considerations more in line with a realist conception of international relations, or can U.S. behavior be explained more readily by a neoliberal construction? In other words, did the United States work to create TRIPS solely to promote U.S. interests, or did the United States create TRIPS in order to create a universal norm of copyright protection that would benefit all those involved? In addition, what sort of challenges to both U.S. foreign policy and the international economic order result from the rapid proliferation of technology?

In my attempt to answer the aforementioned questions, I will draw from the writings of such realists as Joseph M. Grieco, Michael Mastanduno, and Stephen Krasner and such liberals as Kenneth Oye, John Gerard Ruggie, Arthur Stein, Robert O. Keohane, and Lisa L. Martin. According to realists, nation-states are sensitive to changes in relative power. Nations exist in an anarchical environment that breeds fear and mutual distrust.
States are susceptible to exploitation by other states when changes in relative power occur. A particular state may lose some power relative to another, or another state may gain more power, thereby producing a condition of power imbalance. Cooperation in such an environment is not impossible; however, states constantly worry that their present allies may grow so strong that they become disproportionately powerful adversaries in the future. According to proponents of neoliberalism, which recognizes the same "cooperation dilemma" as realists, collective action is possible as long as the potential for defection is minimized. Neoliberalism also contends that collaboration can be achieved through the creation of a binding international agreement associated with an institution that can monitor and enforce the agreement. A corollary of liberal theory is found in the writings of John Gerard Ruggie. Ruggie's model, known as "embedded liberalism," attempts to address the fears associated with perceived threats to sovereignty confronting states when deciding whether or not to participate in an international institution. The central assumption of embedded liberalism is that nations enjoy wide latitude to intervene in domestic economies in order to alleviate dislocations resulting from trade liberalization. Another corollary of liberal theory that embraces many fundamental components of realism is post-hegemonic stability theory. Robert Keohane developed post-hegemonic stability theory during the early 1980s, and it attempts to explain state behavior in an anarchic environment dominated by a declining hegemonic state. Post-hegemonic stability theory predicts that cooperation is more likely in an anarchic international environment than realists are willing to concede.

In this paper I argue that the United States' efforts to establish an international IPR regime based on the American system is best explained by a synthesis of realism and
post-hegemonic stability theory. Post-hegemonic stability theory accords with realism’s recognition of relative-gains concerns, and it helps to describe the formation of American perceptions in a post-Cold War context. The case of Brazil set an important precedent in the development of U.S. IPR policy in that U.S. action vis a vis Brazil succeeded in both reforming Brazil’s domestic system as well as simultaneously inducing other developing nations to become signatories to TRIPS. Brazil is generally viewed as a U.S. foreign policy success, so the policy approach used to reform the Brazilian IPR system necessarily invites comparison with other cases. China represents one of the most difficult contemporary cases facing U.S. IPR policy-makers. The case of China highlights many of the challenges facing effective intellectual property enforcement that result from unchecked globalization. The noticeable decrease in state sovereignty and control associated with globalization poses significant problems for traditional international relations theory. I argue that a new approach is required to achieve constructive reform to a higher standard of intellectual property protection.

II. BACKGROUND

A Shift In U.S. Policy

During the 1980s, United States IPR (intellectual property right) policy transformed from an unorganized to a coordinated policy of forcing change in trading partners whose levels of intellectual property protection were deemed inadequate. The 1980s witnessed a redefinition by Americans of what constituted acceptable intellectual property protection. One of the reasons for this policy shift can be attributed to changes in the world political economy. Although intellectual property abuses had been occurring
for decades, by the mid-1980s, lax global IPR's were conceived of as a threat to
American economic fortitude. Changes in several economic indicators combined to draw
attention to America's declining economic strength relative to the rest of the world. Slow
growth rates, an overvalued dollar, balance of payment problems, and new international
trade patterns were cause for concern among American trade policy practitioners. The
ability of the United States to compete in an increasingly global economy led many to
question the liberal economic principles on which U.S. trade policy was based.
Asymmetrical trade policies and protected foreign markets were viewed as threats to the
open American market. In effect, the 1980s gave rise to a protectionist backlash in the
United States. The belief that trade liberalization should only be offered in a reciprocal
manner came to provide the foundation for much of United States trade policy—
including that regarding intellectual property.5

This change in United States IPR policy also coincided with the cessation of the
Cold War. One of the consequences of fighting a long, drawn-out cold war of attrition
was the gradual depletion of American economic vitality. During the Cold War, the
United States consistently subjugated economic interests in favor of strategic politico-
military concerns. From the Marshall Plan to help rebuild Europe to a policy of reverse
discrimination in order to help promote Japanese economic growth, for almost half a
century American economic hegemony gradually declined relative to other nations.
American economic strength in absolute terms increased gradually over the second half
of the 20th Century; however, because the U.S. provided a security umbrella for many
nations during the Cold War, these nations were able to focus most of their resources and
energy on economic growth. By the mid-1980s, the relative decline of U.S. economic
strength had become apparent. By the end of the Cold War a few years later, the United States found itself without any major strategic military threats. As a result, the end of the Cold War marked the ascendance of American economic interests to a position of importance among United States foreign policy concerns. One of the more obvious indicators of this trend is the maturation of United States intellectual property rights policy following the Cold War.

By the mid-1980s, trade in high technology goods had become an important sector of the American economy. Amidst growing fears of diminishing American competitiveness, the U.S. found itself slipping in some key high-technology sectors. Lax intellectual property rights protection abroad was identified as a key factor in America’s economic decline. American high-tech firms played an instrumental role in elevating the importance of U.S. IPR policy. In fact, representatives from key industry sectors—pharmaceuticals, fine chemicals, computer software, film and music recordings, were directly responsible for shaping USTR (United States Trade Representative) IPR policy. These industry groups banded together to form two very powerful lobby groups: the Intellectual Property Committee and the International Intellectual Property Alliance. These two interest groups boast large full-time staffs with extensive resources at their disposal. The lack of resources available to the USTR for conducting research on the effects of lax intellectual property protection has greatly enhanced the persuasion exercised by high-tech industry groups in influencing trade policy. The world economic climate of the late 1980s proved fortuitous for well-organized high-tech sectors of American industry that were able to speak with a collective voice. U.S. policymakers came under increasing pressure from American industry to do something about
America’s competitive decline; high tech industry represented a rapidly expanding sector where American firms enjoyed a strong comparative advantage in international markets. A general lack of effective IPR protection encouraged copyright infringement and piracy by foreign companies, thereby undermining America’s high-tech comparative advantage.

The call for action by high tech sectors of the U.S. economy did not go unheeded for long. The Reagan administration developed a multi-track approach to U.S. IPR policy. The U.S engaged countries in bilateral agreements, and it did not shy away from threatening unilateral sanctions. This policy marked a shift away from the World Intellectual Property Organization (WIPO) which was viewed as an inadequate vehicle for securing U.S. interests. WIPO maintained a single-issue focus and tended to grant greater weight to developing country concerns. At the behest of American industry groups, the USTR introduced the Trade-Related Intellectual Property Rights (TRIPS) Agreement at the Uruguay Round negotiations of GATT. Under this agreement, the U.S. sought to harmonize WTO member nations’ intellectual property systems according to a relatively high universal standard beneficial to U.S. firms.

Along with a multilateral approach to achieving a more uniform international system of IPR protection, several other measures were created to help strengthen the mandate of the USTR. In 1988, Section 301 of the Trade and Competitiveness Act was amended to require the USTR to investigate countries that have a history of violating existing laws and agreements dealing with intellectual property rights. Nations who are discovered to be in violation of a minimum standard of intellectual property protection are placed on a “watch list” which results in the opening of bilateral talks. The countries with the most egregious abuses are designated priority countries. Priority
nations can be subjected to unilateral sanctions should bilateral discussions fail to induce positive change. Many countries have changed their practices simply to avoid being placed on the watch list. In addition to the Special 301 Provision, the USTR will often choose to link intellectual property issues with the Generalized System of Preferences (GSP) and other benefits granted to developing nations including the funding of joint scientific projects and International Development Bank loans. Despite all of the tools at the disposal of US foreign policy practitioners, some nations continue to violate intellectual property norms and agreements. Brazil was one of the first nations to initially refuse to acquiesce to U.S. IPR standards. Stubborn behavior from nations such as Brazil prompted the United States to step up its drive to establish a stringent multilateral IPR regime that would further legitimize the United States’ position. The resultant agreement, TRIPS, was signed in 1994.

The Paris Convention

TRIPS expanded upon several pre-existing international intellectual property agreements. Both the Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works pre-dated TRIPS by nearly 110 years. Both conventions represent two of the most comprehensive predecessors to the TRIPS Agreement.

Industrialized nations made up the vast majority of original signatories to the Paris Convention (signed in 1883). The only developing nations to sign the convention were Brazil (1884), the Dominican Republic (1890), Mexico (1903), and Cuba (1904).
After 1962, 62 more developing countries joined the Paris Union. During the 1990s, membership grew once again so that by 1997, 132 countries had signed the convention.¹¹

The Paris Convention has been amended periodically during the course of the twentieth century, most recently in 1979. Unlike TRIPS, the Paris Convention does not impose minimum standards of copyright protection among member states; however, the convention does require signatories to adhere to the principle of “national treatment.” In other words, parity must exist between the rights enjoyed by both citizens and foreigners. Despite the presence of the national treatment provision within the convention, the inconsistent application of diverse standards between states creates a difficult environment in which to conduct business. A patent application that is filed in one member country does not automatically receive protection in all member countries; consistency must be maintained in relation to national levels of protection but standards may vary from one state to the next.¹² As a result, applications for protection must be made to the governments of all nations in which an individual wishes to sell his or her product—a process requiring a great deal of time and effort.¹³ For example, a patent-holder in the United States does not receive any protection for a patented good in any market but the United States. If the patent-holder wishes to sell the patented product abroad, the patent-holder must apply for protection in each and every market that he or she wishes to sell the product. Furthermore, even if the patent-holder is granted protection in every market, there is no guarantee that the same level of protection will be granted in every market because there is not minimum standard of protection. The most controversial provision of the Paris Convention is Article V. This article grants states the right to issue compulsory licenses. A compulsory license law allows a government to
prohibit the foreign owner of a protected good from making and distributing the product and from selecting a local maker and distributor licensee. Under this provision, a government can grant exclusive distribution rights to a domestic company, thereby hindering the foreign owner's ability to exercise discretion in deciding how his or her good or service is sold and marketed. For example, a pharmaceutical company that wishes to distribute its products through a subsidiary in a foreign market, may be prohibited from doing so under Article V. The foreign government may exercise the right to choose a domestic distributor, regardless of whether that distributor can provide the highest level of service. Despite periodic revisions and amendments over the course of a century, by the 1980s, the Paris Convention failed to meet the expectations of U.S. foreign policy practitioners. Several loopholes within the convention invited exploitation by intellectual property pirates and corrupt governments the world over.

The Berne Convention

While the Paris Convention bears a direct relationship to a discussion of pharmaceutical patents, the main provisions of the Berne Convention (signed in 1886) have helped define the level of protection granted computer software. Like the Paris Convention, the Berne Convention stipulates that when the author of a particular work is not a citizen of the country in which he or she is seeking protection, that the author "shall enjoy in that country the same rights as national authors." This right is limited by the caveat stating that the level of protection offered to the author must be commensurate with the laws of the country where protection is claimed. Another important article of the convention is Article 9, stating that the author has an "inalienable right to an interest"
in reproduction and resale of the work. The rights of authors are further limited by Article 13, stipulating that national governments may determine the conditions under which the rights are exercised. Article 17 also recognizes sweeping governmental authority: "The provisions of this Convention cannot in any way affect the right of the Government of each country of the Union to permit, to control, or to prohibit, by legislation or regulation, the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right." Finally, unlike the Paris Convention, the Berne Convention establishes certain minimum standards relating to literary and artistic works. A total of 114 governments, including Brazil, China, Egypt, and India, are all signatories to the Berne Convention. The United Nations-affiliated World Intellectual Property Organization (WIPO), which boasts a controlling majority of developing country members, is responsible for the administration of the Berne Union.

Since 1994, the main issue facing the USTR regarding IPR protection, is enforcement of existing standards. According to Susan Sell, a leading scholar on international intellectual property rights, abuses continue in spite of new laws and regulations.

In nearly every instance the targeted countries have engaged in foot dragging and chosen not to implement and enforce new policies. The continued monitoring and repeated threats of renewed Section 301 action in the absence of satisfactory enforcement of the new policies suggest that the trend toward greater protection of intellectual property is not being as ardently embraced as the United States would wish. The targeted states acquiesce on paper and do just enough to free themselves of U.S. pressure—but no more. While these countries have changed their policies, they have not changed their minds about the merits of intellectual property protection...Free riding on others' intellectual property and the profits of piracy still outweigh the liberal norm of respect for property rights.
China stands out as the quintessential contemporary example of how signatories to the TRIPS agreement and other bilateral agreements can agree to institute new standards yet fail to enforce them.

Despite a robust American economy, the United States continues to push for stronger IPR protection abroad. Although poor economic performance may have initially contributed to the attention given IPR protection by U.S. policy makers, continued action by the United States is by no means predicated on poor economic conditions. Further economic success will depend on institutions that serve to promote U.S. concerns abroad. Therefore, the United States maintains a significant interest in securing the comparative advantage that American firms currently enjoy in knowledge-intensive goods and services.

RESEARCH DESIGN

I will employ the comparative case method in addressing the following three questions. Firstly, what are the motivating factors behind the behavior of the United States in its attempt to establish and maintain an international intellectual property rights regime. Secondly, what theory(ies) best explain(s) U.S. action; more specifically, did the U.S. create TRIPS as a result of relative-gains considerations, consistent with a realist explanation of international relations, or does neoliberalism provide a better explanation? Finally, what challenges to both U.S. foreign policy and the international economic order result from the rapid proliferation of technology? To the two cases I will apply a theoretical framework consisting of both realist and neoliberal/liberal thought. After reviewing the relevant historical facts of each case, the respective theoretical lenses will enable me to interpret each case in a disciplined manner. At issue is the behavior of a
particular nation—a nation that currently occupies a central, controlling position on the world stage. In order to explain why a particular nation acts in a certain manner, it is necessary to recognize the limitations that necessarily constrain that nation's actions. For this reason, the environment in which a particular nation acts will both limit and enable state behavior. The environment is likely to influence the action, and the action will in turn produce an effect on the environment.

In evaluating the behavior of the United States and its efforts to establish an international intellectual property rights regime in its image, I will look at the motivating factors behind United States action. Once the “why” is established, the next step is an evaluation of the “how”—were the selected means successful? If not, what are the alternatives? What restrictions limit the policy options? The limitations on state behavior are directly related to the international environment, therefore, the “how” leads to a broader question of how the international environment both enables and constrains American foreign intellectual property rights policy.

The first case that I have chosen is that of the Brazilian pharmaceutical industry. Brazil is generally viewed as a U.S. foreign policy success. Initially, Brazil refused to adopt new standards of intellectual property rights protection; however, under U.S. pressure Brazil finally passed new legislation that effectively reformed its domestic IPR legal system to meet high American standards. Since the introduction of new regulations, foreign investment in Brazil has increased markedly.

The second case is that of China and computer software piracy. Like Brazil, China is a nationalistic country with a robust developing market that holds enormous potential for future expansion. Similar to Brazil, China has refused to ensure that
intellectual property right norms are upheld within its sovereign borders. Unlike Brazil, China continues to hold the dubious distinction of being a "rogue" state that has repeatedly failed to enforce existing intellectual property rights despite consistent U.S. pressure. Given the facial similarities between Brazil and China, can the success of Brazil be duplicated with China? How is the China dilemma different? Does China require a different policy approach altogether? The future role of the TRIPS regime most likely hinges on the final outcome of U.S. efforts to bring China more in line with international IPR norms.

Both Brazil and China represent two very important markets for American high tech goods and services. The United States currently holds the upper hand in trade relations toward both nations, but how long will American preeminence last? U.S. policy-makers can threaten to restrict access to a large U.S. market, but developing markets are growing at a much faster annual rate. In order to cement an advantageous position for American high-tech industry in foreign markets, the United States must secure protection for U.S. products abroad. High tech industry represents the future of the world economy. In an international realm where strategic military threats are no longer dominant, the nation with the largest capacity for technological development can exercise considerable control over international economic affairs. Increasingly, economic security has come to stand for national security.

This paper is divided into three major sections consisting of five chapters. The first section after the introduction is the theoretical introduction and analysis. This section introduces the relevant theoretical models that will be used to analyze the two cases. The second section consists of the two case studies. Each case will be evaluated
using two competing international relations theories: realism and neoliberalism/liberalism. The third section consists of the conclusion and future policy recommendations based on those conclusions.

III. A THEORETICAL FRAMEWORK FOR U.S. IPR POLICY

In searching for an explanation as to why the United States viewed the creation of an international intellectual property rights regime as serving its interests, it is necessary to provide a theoretical framework to interpret the related course of events. An evaluation of the TRIPS regime is informed by two competing schools of thought in international relations theory: neoliberalism and realism. One of the major points of contention between the two theories is the potential for international cooperation between nations. Given the cooperative nature of the TRIPS regime, this argument has special relevance. Neoliberalism is most often associated with the notion that states act in order to increase individual gains without paying attention to the gains of other states—in other words, the pursuit of absolute gains governs international relations. Realism, on the other hand, contends that states act according to perceived disparities in relative gains. Both theories attempt to define state behavior in an anarchical international environment, however, both theories differ as to the appropriate definition of anarchy. Realism and neoliberalism also have different explanations regarding interaction between different categories of states. For example, neoliberals argue that states possessing similar governmental, economic, and social structures behave in a predictable fashion; however, realists argue that all states, regardless of political, economic, and social structure, behave the same way. Conflict within the TRIPS regime oftentimes occurs along categorical
groupings of nation-states. A final aspect of the neoliberal-realist debate that lends itself well to a discussion of the TRIPS regime, is the argument over the effect of linkage issues on international cooperation. The fungibility of intellectual property makes it a natural candidate for linkage with other issue areas. Before delving into an analysis of the United States’ behavior in formulating international intellectual property policy, a fundamental discussion of the two theoretical models is in order.

In this chapter, I begin by surveying the central tenets of both neoliberalism and realism. Fundamentally, both theories start from a similar core assumption of interstate anarchy, however, both theories arrive at entirely different predictions for international cooperation. Once the two theories have been introduced, I compare the effectiveness of realism and its recognition of relative-gains with neoliberalism, which posits that states are only concerned with absolute gains. The relative vs. absolute gains debate helps to enlighten the subsequent analysis of the formation of TRIPS. After exposing the inadequacies of neoliberalism in relation to TRIPS, I introduce two other strains of thought that are closely associated with neoliberalism: embedded liberalism/social constructivism and hegemonic stability theory/post-hegemonic stability theory. Embedded liberalism attempts to build upon the failure of neoliberalism in accounting for the problems that state sovereignty poses for cooperation; however, embedded liberalism is unsuccessful in providing a sound predictive model for state behavior. Post-hegemonic stability theory is unique in that it manages to seamlessly integrate a recognition of relative-gains with a decidedly liberal prediction for cooperative ventures. Post-hegemonic stability theory helps to inform an analysis of U.S. perceptions contributing to
the formation of TRIPS at the end of the Cold War through a recognition of relative economic decline.

REALISM

According to the realist approach to international relations, nations are sensitive to changes in relative power. Nation-states exist in an anarchical environment, thereby creating a pervasive condition of fear and distrust. Anarchy is defined by realists as an ordering principle recognizing independent, sovereign states as the primary actors in the international arena; there is no higher authority above the nation-state. With the ever-present possibility of war looming in the background, relations between nations are defined by constant security competition. The intensity of this competition varies from case to case. At the extreme, nations worry that they will be either conquered or destroyed by more powerful states. In a more moderate sense, nations are fearful that a decrease in their power, or an increase in another state’s power relative to their own, will enable other countries to take advantage of their weakened political position. A particular nation will take action to remedy changes in the distribution of power that serve to disadvantage the capabilities of that nation.

Several other assumptions flow from the realist conception of anarchic international relations. Since states possess offensive military capability, every state inherently possesses the ability to harm and potentially destroy one another. A third assumption that follows from the aforementioned condition is that states can never be certain of the intentions of other states. In a world of imperfect information, state behavior is impossible to predict beyond a shadow of a doubt. Moreover, once benign
intentions may become malignant in a very short period of time. Ultimately, states are concerned with survival in an uncertain, constantly changing environment. Calculated survival strategies enable states to generally act in a rational manner; however, misperceived intentions can result in irrational actions, thereby exacerbating the pervasive condition of fear and distrust in international relations.²⁶

Since states cannot rely upon one another for security, alliances may form, but they only represent temporary arrangements. The international arena is ordered in such a way that states acting in their own self-interest stand to benefit the most. States that can successfully improve their military and economic strength relative to other states will enjoy a higher degree of security. In essence, states possess the potential to act both offensively as well defensively.²⁷

According to realists, cooperation can and does occur despite numerous disincentives for collective arrangements. In order to succeed, cooperative endeavors must adequately address both relative-gains considerations and concerns about cheating. Realists contend that states are concerned with both absolute gains and relative gains.²⁸ Due to balance of power considerations, states are primarily motivated by relative gains. In an anarchic international environment, states are concerned with at least maintaining the status quo relative to another state when entering into an agreement. A related concern of states is that one or more states will defect from a cooperative arrangement, thereby gaining a relative advantage. This phenomenon is known as “cheating” in international relations parlance. To realists, institutions represent manifestations of national self-interest based on the international distribution of power. The most powerful states create institutions to promote national concerns. Cooperation and institution
building are possible in a realist world, but only if they coincide with individual state interests.29

NEOLIBERALISM

Neoliberal theory poses a significant challenge to realism in that it seeks to build upon a fundamental premise of realism to achieve an entirely different explanation for state interaction in the international realm. Like realism, neoliberalism takes power into consideration, but not to the exclusion of domestic and ideological variables. Similarly, neoliberal theory, like realism, can be characterized as utilitarian and rationalistic.30 Like realists, neoliberals argue that states are the main actors in world politics and that international anarchy impedes cooperation. Since cheating is both feasible and profitable, collaboration in an anarchic realm is difficult. Unlike realists, neoliberals posit that international institutions can promote cooperation through eliminating incentives to cheat.31 Realism and neoliberalism are very similar in several respects; however, the two schools of thought differ subtly on three counts: the decision-making apparatus of states in an anarchic environment, relative vs. absolute gains, and the potential for international cooperation.

The Prisoner's Dilemma is a useful tool in analyzing the potential for state cooperation in an anarchic international environment. According to realists, the outcome of the Prisoner's Dilemma provides a perfect example of why the potential for cooperation is minimal at best.32 Neoliberals point to different variations of the Prisoner's Dilemma as examples of how cooperation can spring from the "institutionally arid setting" of international relations.33 Neoliberals find fault with the traditional, realist
conception of the Prisoner's Dilemma because it assumes that states are unitary actors. According to neoliberalism this assumption is inaccurate because it fails to consider the following: government decisions that are the product of politically mediated coalition bargaining; the cognitive and perceptual elements of state interaction; the give and take of bargaining; and the search for joint gains.\textsuperscript{34} Neoliberalism contends that through an iterated Prisoner's Dilemma defections can be punished and coordinated conventions can develop.\textsuperscript{35} More specifically, an effort to respond to present cooperation with cooperation in the future and a threat to meet present defection with future defection can effectively improve the potential for cooperation.\textsuperscript{36} In order to achieve this objective of increased cooperation, actors' moves must be relatively transparent, thereby resulting in an increased level of information sharing.\textsuperscript{37}

According to neoliberal theory, international institutions facilitate the emergence of cooperation. A related tenet of neoliberalism is that institutions, by providing information, can work to assuage fears of unequal distribution of gains. Institutions can ensure that gains are evenly distributed over time. In essence, distributional issues, or relative-gains concerns are essentially the same thing as concerns dealing with iterated reciprocity—a central focus of neoliberal theory. Neoliberals contend that the solution to both dilemmas is the formation of institutions that promote the sharing of more perfect information.\textsuperscript{38} Regimes do not enforce rules in a hierarchical manner. Instead, they reduce the level of uncertainty between nations by altering the transaction costs and by providing better information to the participants.\textsuperscript{39}

Aside from the transparent sharing of information between states, another contingency determining the success of institutions is the size and the structure of
participatory states. Cooperation is most successful when the initial stage of institution building involves a small number of states.\textsuperscript{40} Once a regime is established on a smaller scale, it can be maintained and even expanded through patterned behavior and legitimacy.\textsuperscript{41} Legitimacy leads to the condition that future payoffs are valued more than current payoffs, making the incentive to defect today less important since the other members will retaliate tomorrow.\textsuperscript{42} In addition, the neoliberals contend that regimes can create issue-linkage that further induces states to act according to established rules instead of defecting in pursuit of short-term gains. States become reluctant to breach an agreement for fear that retaliation can occur in several different issue areas.\textsuperscript{43} Once regimes are established, neoliberals contend that international norms and procedures can serve to alter the decision-making process of states, thereby inducing a greater willingness to cooperate due to greater transparency. In essence, decision making becomes a joint process.\textsuperscript{44}

According to neoliberals, the creation of conditions that promote cooperation is easiest in issue areas of political economy as opposed to those dealing with military security. According to Charles Lipson:

"It is precisely these problems of mistrust, which spring from cognitive uncertainty and the danger of surprise, that make cooperation so difficult and unstable. The dangers of swift, decisive defection simply do not apply in most international economic issues. Timely monitoring is important but rarely vital since most economic actions are reasonably transparent...States know that they can readily verify compliance with economic agreements and will have time to discuss possible violations and, if need be, adjust to them.\textsuperscript{45}"

Security regimes are few and far between whereas economic issues are usually embedded in extensive networks of rules, norms, and pre-existing institutions with set expectations.\textsuperscript{46} As a result, the likelihood of successful regime creation in areas of
political economy is much higher than in areas of military security where the short-term threats to survival are much greater. Despite the somewhat limited facial applications of neoliberal theory, most neoliberal theorists argue that by establishing a connection between current behavior in a single-play game and future rewards in an iterated game, cross-issue linkage can lengthen "the shadow of the future." The "shadow of the future," reciprocity, and clear incentives help to determine the ultimate success of a particular cooperative venture. If these conditions arise in a military security situation or a related issue area typically associated with "high politics" and a more protracted condition of anarchy, neoliberals argue that cooperation is still indeed possible. The rarity of such opportunities, however, generally limits neoliberal explanations to issue areas associated with "low-politics" and epistemic communities such as the environment and the international political economy.

DO INSTITUTIONS MATTER? –YES, BUT

RELATIVE GAINS MATTER MORE

Having briefly outlined the major points of neoliberal and realist theory, the next question that arises is which theory boasts a greater wealth of empirical evidence supporting its respective propositions? Given the apparent strength of neoliberalism in explaining state action within the world political economy, it seems as though neoliberalism would enjoy an explanatory advantage if tested against cases relating to international trade.

Robert O. Keohane, one of the founders of neoliberalism, recognizes the difficulty associated with distinguishing the effects of environmental conditions from the
international institutions themselves. According to Keohane, it is impossible to find an ideal experiment to test the impact of institutions. Nevertheless, Keohane responded to a realist attack on neoliberalism by pointing to empirical evidence presented in Lisa Martin's *Coercive Cooperation* that seems to support the prowess of neoliberalism in explaining state action in international trade. Martin attempts to show that the involvement of international institutions in economic sanctions results in high levels of cooperation. For evidence, Martin draws attention to European Community sanctions against Argentina during the Falklands War. In her analysis, Martin discovered that states used the EC framework to reduce fears of cheating in the form of violating sanctions in order to profit from continued trade. According to Keohane, the major contribution of institutions in this case came in the form of issue linkages between EC budget contributions and the sanctions issue. Keohane contends that the work done by Martin highlights the superiority of neoliberalism in promoting cooperation through issue-linkages as well as through prevention of cheating by more conventional means.

According to realists, the "most recent variant of neoliberalism is simply realism by another name." In other words, the distribution of gains by institutions simply points to the fact that balance of power, a fundamental component of realism, is really at the heart of interstate relations. Institutions, on the other hand, exist to facilitate the balancing process. Moreover, since great powers use institutions to further their interests, the fact that states devote modest resources to institution formation and maintenance does not undermine realism. Realists also contend that issue linkages were an important part of international relations long before institutions achieved relevance. Institutions matter, but only minimally.
In order to further prove their point, realists point to several case studies that serve as empirical evidence supporting the explanatory power of realism in the realm of international political economy. The cases elucidate the importance of relative gains as a factor in economic relations. Furthermore, given the fact that neoliberals often emphasize the efficacy of neoliberal theory in explaining economic relations between advanced industrialized states, most of the available empirical evidence seems to contradict neoliberal predictions precisely within those analytical constraints. Joseph Grieco evaluated American and European Community efforts to implement several different agreements relating to non-tariff barriers to trade within the GATT framework. He concluded that relative gains represented the main determinant of success. Neoliberal concerns about cheating played a minor role at best in determining the final outcome of the bargaining process. Another case study that recognized the saliency of relative gains over cheating concerns is that conducted by Michael Mastanduno. Mastanduno evaluated three specific trade disputes between America and Japan: the FSX fighter aircraft, satellites, and high-definition television. Similar to Grieco, Mastanduno concluded that relative-gains considerations have a significant impact on influencing inter-state relations. The aforementioned case studies serve to undermine the strength of neoliberalism as an explanatory tool regarding the behavior of powerful states in forming international institutions.

REALISM, NEOLIBERALISM AND THE TRIPS REGIME

Given the central point of contention in the neoliberalism vs. realism debate as the importance of relative and absolute gains in determining state behavior, what is the
strength of each explanation in relation to TRIPS? Central to the focus of this paper is an analysis of the decision-making process of states as they evaluate whether to participate in cooperative arrangements. When viewed in the context of the TRIPs regime, what light does the realism vs. neoliberalism debate shed on the subject of state behavior?

Although neoliberals agree with realists that anarchy is defined by the lack of a central governing authority, neoliberalism does not directly account for relative gains. Neoliberals argue that states are rational, "atomistic" actors that seek to maximize individual absolute gains while remaining indifferent to gains achieved by others. According to neoliberals, "cheating" is the main impediment to joint action. The solution to the neoliberal conception of the cooperation dilemma is manifest in international institutions that can help states "learn" to cooperate through iterated, transparent interaction. Relative considerations do not preclude any and all cooperation rather they suggest that a nation evaluating relative capabilities is more interested in distribution than the accumulation of joint benefits. In order to narrow or eliminate gaps between nations, a state in pursuit of relative gains will seek to reshape cooperative relationships or eschew them altogether. Through collaboration, states worry that their increasingly formidable allies in the present could develop into overwhelmingly powerful adversaries in the future. Neoliberalism fails to recognize the perceived threats that anarchy poses to states. Without a central authority to govern international relations, nations fear for survival and independence. Realists contend that states do not seek to attain the highest possible gain; instead, they try to prevent others from acquiring greater relative capabilities. Unlike neoliberalism, realism recognizes two major barriers to cooperation as opposed to one: state concerns about cheating and state concerns about relative gains.
According to realists, hegemonic states are least likely to pursue relative gains in economic relations with friendly nations due to numerous economic advantages including size, natural resources, and productive capacity. Faced with a tangible military threat to the physical security of the United States during the Cold War, American policy-makers pursued a policy supporting rapid economic growth among its allies. For nearly forty years, the United States tolerated the existence of high trade barriers in both Japan and Europe. Determining that neither Japan nor Europe would be able to compete economically with America, the United States embraced a trade policy of reverse discrimination in which American goods were essentially denied entry into European and Japanese markets while the U.S. government gave massive amounts of aid to help bolster production. Instead of pursuing relative gains, the United States determined that American security was best served through the economic vitality of its allies. As a result, the U.S. allowed its allies to strengthen their economies at the expense of American economic interests. Since the United States enjoyed such a large economic advantage over its allies at the time, and since the Soviet military posed the greatest threat to U.S. security, economic interests were subjugated in favor of military security.

The end of the Cold War marked the elimination of a serious threat to vital American interests. The dissolution of the Soviet threat, combined with the relative economic decline of the United States, worked to elevate the degree of importance afforded economic security concerns by American policy practitioners. According to realism, U.S. economic policy toward its allies reflects a greater recognition of relative gains. The free-riding once tolerated by the United States under the pressures of the Cold War was no longer feasible during the late 1980s once it was recognized that America
had slid from its relative economic perch. Realist theory posits that as military threats recede from the international spotlight, a hegemonic state will be less likely to forego national economic interests in order to promote the collective welfare.\(^6^1\) An understanding of hegemonic decline is crucial to a relative gains interpretation of United States foreign policy in the immediate post-Cold War world.

On the surface, it would appear as though the United States' decision to create the TRIPs regime was governed by neoliberal theory. According to neoliberals, U.S. policy practitioners introduced the TRIPs Agreement at the Uruguay Round in order to establish an international set of rules that would eventually work to universalize much of the world's diverse intellectual property systems. Since the TRIPs regime mirrors the stringent protective standards of the American intellectual property system, the United States undoubtedly saw the creation of TRIPs as serving American interests. The problem with a neoliberal construction of TRIPs results from the fact that a large percentage of nations at the Uruguay Round negotiations did not initially support the codification of the Agreement. Only in the face of intense U.S. pressure in the form of trade sanctions—threatened and implemented—did reluctant nations finally acquiesce to U.S. demands. According to many trade scholars, protective IPR systems encourage foreign investment, thereby injecting large amounts of capital into developing economies.\(^6^2\) With this knowledge in mind, developing nations should support the idea of domestic IPR reform. Neoliberal theory posits that the long-term absolute gains that would accrue to developing nations should provide incentive for nations to cooperate within the TRIPs regime. The fact remains that many developing nations continue to circumvent TRIPs standards in order to bolster their comparative advantage relative to
developed nations who are TRIPs signatories. Cheating occurs because of harsh, short-term economic dislocations that accompany domestic IPR reform. Cheating is in a developing nation’s interest because it provides a means for domestic high tech producers to pirate the goods researched and developed abroad at high costs. The costs of research and development are too high for many companies in developing nations. Developed nations on the other hand, enjoy a comparative advantage in high tech R&D. Piracy enables developing nation companies to compete with foreign producers. According to neoliberal theory, nations should want to cooperate within TRIPs because of the incentive of long-term absolute gains; however, short-term dislocations enable foreign producers to capture enormous percentages of developing country markets because of a considerable comparative advantage in high-tech research and development. It would take domestic producers years to become competitive with foreign producers even in their home markets, let alone abroad. This short-term gain in the relative capabilities of developed nations seems to provide a disincentive for developing nations to accede to TRIPs norms. Given the apparent explanatory failure of neoliberal theory in this case, it remains to be seen if realist theory can provide a better explanation.

According to relative gains theory, the United States perceives a future threat to American high tech industries in the form of increased foreign competition. U.S. companies, devoting massive amounts of capital to research and development projects, were failing to recoup the costs of their initial investments due to pirating in foreign markets. Given the potential military applications of high tech products, coupled with the large percentage of revenue that the high tech sector contributes to the U.S. economy, it is in America’s interest to arrest this gradual dismantling of relative power. Michael
Mastanduno, a leading scholar of relative-gains theory, explains the reasoning behind relative economic gains rather succinctly: "If the concern is that economic interaction will endanger a country's competitive position economically, we should expect officials to contemplate and adopt measures associated with strategic trade policy, such as the targeting or promotion of 'strategic' industries, or the disruption of efforts by other governments to lend their industries a competitive advantage." Through piracy, developing nations erode America's comparative economic advantage in high tech industries. In order to address this perceived threat to the U.S. economy, the United States sought to establish international norms that would make diverse foreign IPR systems offering varying degrees of protection commensurate with high American standards. As a result of U.S. efforts, the TRIPS Agreement was signed at the Uruguay Round negotiations in 1994.

**Potential For Collaboration**

In addition to differing conceptions of international anarchy, neoliberalism and realism also offer opposing views on the potential for collaboration among advanced democracies and the place of linkage issues in fostering international cooperation. Both of these debates help to further inform an analysis of the TRIPs regime. Neoliberals argue that cooperation is more likely between nations that share similar political, economic, and social systems because cooperative ventures are usually nested in pre-existing joint arrangements within common issue areas. Assuming for the moment that the aforementioned postulate is true under certain conditions, it would seem as though neoliberalism provides a simple explanation as to why discord exists between developed
and developing nations. Realists, however, refute this assumption. Although many countries from both distinctions possess fundamentally similar political and economic systems, they are by no means identical in their respective levels of development. The advanced condition of this neoliberal assumption lends itself well to an analysis of why economic reform instituted from an exogenous source on exogenous terms is generally not welcomed by developing nations. Enforcement of a complex system that mirrors that of a world superpower will not be flawlessly implemented, let alone upheld, in a developing nation with an under-developed political system.

The problem with this reasoning from a theoretical standpoint is that it sounds much like an argument supporting a relative-gains interpretation. A developing nation is unlikely to allow another country to impose economic regulations that serve to hamper economic growth in the short-run. Put another way, one country stands to increase its gains while the other stands to lose. The developing nation is worse off even before the developed nation begins to exploit a relatively more favorable investment environment. In sum, neoliberalism is limited to explaining cooperative relations between advanced developed nations-- and only under certain conditions.

Issue Linkages

The third debate between neoliberal and realist thought that has special relevance to the TRIPs Agreement involves linkage issues. According to neoliberals, linkages within and across issue areas facilitate iterative relationships among states, thereby increasing the depth of cooperation. Realists, on the other hand, view linkage issues as detrimental to fostering cooperative relationships. According to realists, if a particular
state views two issues as linked, then that state will be less-likely to collaborate with another state if the relationship might produce unequal gains. If two issue areas are linked, then the state that stands to gain more will gain in two sectors as opposed to one, thereby doubling the disparity.66 The fungibility of high tech intellectual property--especially in relation to military applications--poses a significant challenge to any regime seeking to control its dissemination and use.

Realist theory and its relative gains component provides an adequate explanation as to why the United States worked to create the TRIPs regime. Neoliberal theory also provides a reasonable explanation as to why the U.S. chose to act in the manner that it did. However, neoliberal theory fails to explain why TRIPs continues to be plagued by non-compliance and it does not offer a realistic solution to the cooperation dilemma. According to realism, neoliberalism fails in this regard because of its incomplete assessment of the international environment: neoliberalism does not account for problems of distribution.67 Relative gains theory goes one step further than neoliberal theory in providing an explanation as to why the United States initially created the TRIPs regime and, more importantly, why many developing nations continue to circumvent the norms established by international agreement.

ALTERNATIVE THEORETICAL MODELS: EMBEDDED LIBERALISM, HEGEMONIC STABILITY THEORY (HST), AND POST-HEGEMONIC STABILITY THEORY (PHST)

The economic dislocations that inevitably result from IPR reform represent a serious impediment in convincing developing nations to accept "international" IPR norms
According to the theory of comparative advantage, domestic firms in developing nations will have difficulty competing in high tech sectors of the economy because firms from developed nations have the advantage due to their preeminence in research and development. To develop high tech industry domestically, developing nations usually entertain one of two options: 1) the developing nation can impose trade barriers to shield infant industries from foreign competition; or 2) the developing nation can allow its domestic companies to pirate foreign technological know-how (i.e. intellectual property). The first option has not been viable for quite some time, as a liberal, free-market international economic order has been in place since the end of WWII. As was witnessed during the late 1980s in the case of Japan, protectionist trade policies usually result in a trade war with both parties losing in the end.

During the past fifty years, the tenets of free trade promotion have been more or less formally accepted as internationally binding principles. Even after the Cold War, international economic relations based on open market trade theory have expanded greatly. In fact, the United States currently pursues a policy promoting free trade as though it were oftentimes a crusade. U.S. persistence in removing barriers to trade is a symptom of an international system in which economics has assumed a greater strategic importance than ever before.

Through U.S. efforts, the first tool commonly used by developing nations to beat the liberal economic order established after WWII -- trade barriers -- is now increasingly met with overwhelming international disdain. The second policy tool, allowing piracy of foreign intellectual property, is also seen as a threat to vital U.S. interests by United States policy makers. U.S. efforts in this issue area, however, have met with much less
success. A rift between developed and developing nations has arisen over the proper conception of intellectual property rights.

Although it would appear as though intellectual property right disputes revolve around competing notions of development theory, the blatant invasion of state sovereignty that accompanies IPR reform represents the central point of contention. The effects of globalization have seriously eroded state power. Nation-states are increasingly constrained in their attempts to influence the flows of capital, the migration of people, and the dissemination of ideas and culture that have permeated increasingly porous state borders. Nations struggle to control the mechanisms of globalization in order to bolster national interests. The United States is no exception. American business interests are promoted through the opening of developing markets to American products produced at a comparative advantage. American values of democracy and its associated institutions are increasingly spread via the Internet. The American way of life is depicted in American films and television programs exported around the world. Globalization can be seen as a threat to American institutions as well as a vehicle for the promotion of U.S. interests at the same time.

One particular aspect of globalization that originated at Bretton Woods is the concept of subjugating state sovereignty in favor of greater international cooperation through international institutions. At Bretton Woods, the United States saw an opportunity to create a New World Order in its image. By embedding a certain degree of American power in international institutions, the United States appeared to give up some sovereign control. In reality, by establishing international institutions where the United States enjoys a considerable degree of influence and power, the U.S. could ensure its
position as a hegemon relative to other nations. According to realists, the United States created certain international institutions in order to promote self-interest.

Considerations of relative power and state sovereignty grew in importance during the 1980s as the United States found itself in a position of declining economic hegemony. Through the WTO and the TRIPS regime, the United States hopes to cement its power relative to potential peer competitors by forcing all nations to adopt an IPR system that favors United States business concerns. American policy-practitioners are faced with the challenge of convincing sovereign states that domestic IPR reform is in their best interests.

Defection from international regimes most often occurs when individual national interests conflict with the interests of the cooperative venture. Neoliberalism posits that less-than optimal outcomes in international relations can be surmounted through the establishment of a binding international agreement associated with an institution that can monitor and enforce the agreement. Linkage issues, however, suggest that problems of distribution are much more prevalent in international trade than problems associated with cooperation-- especially considering America's role as a declining economic hegemon. In other words, sensitivity to relative gains is a much greater factor in evaluating the outcome of a collaborative effort in establishing a universal standard of IPR protection. Therefore, relative disparity in the distribution of gains received from participation in TRIPS, is a more appropriate explanation as to why nations might choose to defect. The central international trade dilemma is not one of cooperation and collaboration with states sharing a common interest in a single goal; such a conception overlooks the important distributional problems associated with linkage issues in international trade.
The elevation of global intellectual property rights law to developed country levels will most likely fail to produce a uniform increase in international economic welfare. Occupying various levels of development, different nations differ in their relative abilities to produce innovative products. The creation of lax IPR regimes by developing nations is seen as an economically reasonable solution to ameliorate the relative gap in high-tech research and development. From the perspective of developing nations, an increase in IP protection is seen as disadvantageous to the promotion of national welfare. According to realists, the problem with a neoliberal, collective action approach to solve the dilemma of international cooperation is that neoliberal theory fails to recognize the relevant challenge to multilateral collaboration: relative-gains. Neoliberals assume that the benefits from cooperation accrue symmetrically to all states involved. National interests are rarely symmetrical, and conceptions of how best to achieve those objectives often vary. 

EMBEDDED LIBERALISM

According to the writings of John Gerard Ruggie, U.S. policy-makers may have worked to create TRIPS with the intent of overcoming the relative-gains dilemma of international cooperation. Ruggie attempts to explain the system of international trade by applying his "embedded liberalism" model. Unlike neoliberals, Ruggie recognizes the obstacles to cooperation inherent in an international system where nations are concerned with relative gains. Unlike realists, Ruggie recognizes that relative-gains considerations represent only one of numerous factors that may work to influence state behavior. In determining the motivating factors behind the establishment of international institutions,
embedded liberalism posits that political variables matter more than the traditional constraints on collective action. In other words, states are not simply unitary actors seeking to maximize their individual welfare. Embedded liberalism sees anarchy as a structure of socially ordered states that define the system as easily as the system works to define the nation-state. The definition of anarchy is never static. As a result, relative-gains considerations only matter sometimes, if at all. Myriad factors ranging from domestic politics to state identity also affect the decision-making process of states. In essence, Ruggie’s variation on liberal theory attempts to explain what factors help to mitigate perceived threats to sovereignty that states evaluate when deciding whether or not to participate in a particular international institution. Embedded liberalism seems to address the cooperation dilemma that arises between developing and developed nations when sovereignty is at stake. According to realists, the threat to the sovereignty of developing nations posed by TRIPS would result in insurmountable obstacles to cooperation in the form of disproportionate relative-gains. Embedded liberals, on the other hand, contend that other factors may work to make collaboration feasible.

Embedded liberalism draws from an alternative body of literature that takes direct aim at the fundamental predictions of realism. This school of thought is known as constructivism. Constructivism is similar to neoliberalism in that it believes that the potential for international cooperation is much greater than realists admit. According to constructivists:

“...
conventional constructivism presumes we should be looking for communities of intersubjectivity in world politics, domains within which actors share understandings of themselves and each other, yielding predictable and replicable patterns of action within a specific context.  

Constructivism differs from realism most fundamentally in its conception of international anarchy. According to constructivists, states are not welfare maximizing entities sharing similar interests and similar fears. In other words, several different types of anarchic orders exist. 

In addition to a markedly more complex definition of anarchy in international relations, constructivism differs from realism in the way that constructivists posit that states have different identities which are subject to change. Different identities and their associated perceptions help to define international relations. Constructivism also differs from realism in the way that constructivism assumes that states have heterogeneous interests that are the product of identity. Conversely, realism states that all nations share the same general interests, thereby making the international realm relatively predictable. 

Constructivists state that relational change is possible under certain conditions. Since constructivism conceives of “identity politics” as a perpetual quest for control over the power necessary to exert social influence, the potential for change exists so long as there is diversity. Realists contend that material capabilities are the ultimate determinant of international influence, however, constructivists argue that discursive power represents an equally important factor. According to constructivists, the state that controls the dissemination of ideology, culture, and language will occupy a dominant position in international affairs. Despite the potential for hegemonic order, change can occur from the bottom up or the top down. The condition of hegemony does not create change by itself. To be sure, hegemonic order, with its associated disparity in values,
ideologies and power between states, does nothing more than create a foundational order for change.  

Embedded liberalism calls for states to pursue a policy of controlled liberalization in order to help mitigate the effects of globalization. According to embedded liberalism, equilibrium can be reached between domestic and international stability. Federal governmental institutions can coexist harmoniously with international institutions resulting in improved cooperation and general welfare maximization. Central to this hypothesis is respect for state sovereignty. In order to control the effects of economic and political integration, individual states must retain a certain degree of sovereign power. The mechanisms for control must be normalized to the extent that they become "embedded" in international relations. Like conventional constructivism, embedded liberalism recognizes the importance of the "power of practice" or iterated action combined with a recognizable identity.

CRITIQUE OF EMBEDDED LIBERALISM

Given the basic predictions of embedded liberalism, the challenge presented to U.S. policy-makers was how to secure a legitimate role for the nation-state in establishing an international intellectual property rights regime. Under the TRIPS Agreement, domestic stability is ensured through certain exceptions. Article 27 of TRIPS permits states to exclude certain goods from patentability where human health and the environment are threatened. In addition, Provision F of Article 31 states that the use of a patent "shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use." However, Provision F is limited by Provision H that
states the following: "the right holder shall be paid adequate remuneration of each case, taking into account the economic value of the authorization." If U.S. policy practitioners applied the embedded liberalism model to the formulation of American IPR policy, then TRIPS represents an attempt on the part of the U.S. to respect the autonomy of individual states. Despite limited recognition of individual state concerns in the TRIPS agreement, state sovereignty must be sacrificed to a considerable extent in the sense that a new system of law must be implemented as a condition of acceptance. Moreover, some states stand to lose disproportionately more than others. Obviously developing nations stand to gain the most in terms of relative advantage.

According to the embedded liberalism model, nations were to have wide latitude to intervene in domestic economies to address dislocations resulting from trade liberalization. The expansion of the WTO into new areas of traditionally domestic policy threatens to constrain states in their ability to manage the domestic economy effectively. The results of globalization are in effect institutionalized in the form of the WTO. Not only is state sovereignty in the realm of domestic economic affairs being eroded by the increasingly free flow of capital, but international institutions have also usurped a considerable share of state power. In India, this sort of social compact includes the governmental provision of inexpensive pharmaceuticals. Before TRIPS, pharmaceuticals in India were not patentable. Under pressure from the United States and other developed nations, India became a signatory to the TRIPS Agreement. As a result, the cost of pharmaceutical products in India will undoubtedly rise, thereby inhibiting the government’s ability to address the widespread health deficit that plagues India. A state is unlikely to accede voluntarily to international norms that undermine its
ability to provide for the general welfare of its citizens. Problems presented by the case of India and the gradual expansion of the WTO point to the epistemological inadequacies of embedded liberalism in explaining U.S. efforts to create the TRIPS regime.

In part, neoliberal theory is inadequate because it misconstrues the fundamental cooperative dilemma facing nation-states. When applied to linkage issues such as intellectual property rights, the shortcomings of neoliberalism are readily apparent. Embedded liberalism encounters similar problems when applied to the TRIPS Agreement. Although embedded liberalism recognizes one of the fundamental challenges facing cooperative ventures based on linkage issues—sovereignty—it fails to provide a compromise between domestic and international spheres of influence. Globalization has led to an increase in economic freedoms and a related decrease in state sovereignty. As a result, the distinction between the domestic economy and the international economy has started to erode. International economic institutions increasingly handle policy with ramifications for domestic economies. In light of these global changes, a traditional theory, realism, with its account of relative-gains considerations within the international political economy, seems to offer the best guide for explaining U.S. behavior in establishing an international intellectual property rights regime.

In response to this immutable trend of globalization, nations seek to secure economic self-interest through as many mechanisms as possible. A nation may decide to enact unilateral measures to obtain economic gains. Similarly, if a nation believes that an international agreement is biased in its favor, that nation will attempt to universalize the reach of that agreement to increase its influence relative to other nations. According to
realists, cooperation is indeed possible in international relations. When cooperation does occur, it occurs as a result of one or more of the Great Powers acting to satisfy national interest. Extended, universal cooperation is unlikely in international relations due mainly to relative-gains calculations made by states when evaluating the international environment. An important distinction exists between an international agreement that serves the interests of a few Great Powers at the expense of other states, and a truly universal international regime where all states decide to compromise to achieve improved collective welfare. The former scenario is known as harmony of interests whereas the latter example embodies all the trappings of a genuine cooperative arrangement. The former is consistent with realist thought, whereas the latter is not.

Given embedded liberalism's focus on issues relating to state sovereignty, combined with its alternative conception of inter-state behavior, it appears to address some of the important environmental conditions that frame the actions of the United States in the world political economy. More specifically, in making certain behavioral predictions, embedded liberalism recognizes the barriers that state sovereignty poses to effective international cooperation. Although embedded liberalism ultimately proves inadequate when applied to this paper’s central occupation—the TRIPS regime and U.S. I.P.R. policy—it nevertheless draws attention to an important obstacle facing any cooperative effort in international relations.

Several other conditions affecting state behavior when observed in a cooperative behavior also deserve attention. One of the central assumptions of this paper is that the United States was in a period of hegemonic decline during the formative stages of U.S. IPR policy. This assumption has special relevance to a discussion of relative gains. As
America's power declined relative to other nations, the United States chose to act in a particular way. According to realists, the United States was more sensitive to the relative distribution of power—both military and economic—among the nations of the world. Relative-gains serve to constrain U.S. policy choices and have a direct effect on resultant U.S. action. Two related, alternative schools of thought, hegemonic stability theory and post-hegemonic stability theory, offer different prescriptions for regime formation and maintenance in an international environment marked by the unequal distribution of power and influence.

HEGEMONIC STABILITY THEORY AND POST-HEGEMONIC STABILITY THEORY

According to proponents of hegemonic stability theory, a condition of hegemony in the world political economy is defined as a preponderance of material resources. Four areas of material dominance are especially crucial. A hegemonic state must have control over raw materials, over the sources of capital, over markets, and a hegemon must enjoy a competitive advantage in the production of highly valued products. The final criterion is very appropriate for a discussion of the TRIPS regime and the related role of the United States in the regime's formation. According to hegemonic stability theory, the United States enjoys a competitive advantage in the production of high technology goods and services, therefore, the U.S. established TRIPS in order to promote its status as a world leader in high tech industries. Hegemonic stability theory also avers that regimes are formed and maintained by a single, dominant state. Once again, the application of HST to the TRIPS regime seems facile.
It would appear as though hegemonic stability theory and its predictions about state behavior go a long way in explaining why the United States worked to establish the TRIPS regime. Upon further inspection, however, hegemonic stability theory seems a bit outdated in explaining modern-day international relations. Since the 1970s, most scholars of international relations would agree that the United States did not occupy a consistent position of hegemony. In fact, the 1970s marked the beginning of a gradual descent of the United States from a position of dominance that continued into the late 1980s. This assumption is further strengthened when viewed in the context of the international political economy. The 1980s witnessed a period of protectionism in the U.S. mainly as a result of the recognition and widespread acceptance of the fact that the United States was facing increasing competition in international trade from countries like Japan. Proponents of hegemonic stability theory predict that as long as hegemony is maintained regime formation and maintenance is a likely occurrence. With several indicators pointing to a general decline in American hegemony, how does hegemonic stability theory account for U.S. efforts to establish TRIPS shortly after American policymakers realized that new competition constrained U.S. action? Hegemonic stability theory observes that under conditions of weak hegemony, cooperation is much more difficult. Robert Keohane, a leading scholar of post-hegemonic stability theory, readily admits that the contention “that hegemony is both a necessary and efficient condition for cooperation is not strongly supported by the experience of this century.” In other words, the contemporary empirical evidence supporting the claims of hegemonic stability theory is very limited.
In contrast to hegemonic stability theory, post-hegemonic stability theory, a modified version of the theory elucidated above, makes certain predictions for state behavior in an environment of declining dominance. Post-hegemonic stability theory predicts that as hegemonic conditions deteriorate, the prospects for regime formation diminish as well, although cooperation is still feasible. In addition, as hegemonic stability declines, pre-existing international regimes may well continue to flourish.  

Certain conditions must be in place in order for cooperation to occur in spite of a deteriorating hegemonic order. The presence of shared interests is an obvious criterion for the promotion of cooperative agreements. A second, less obvious condition that may foster participation in an international regime is the existence of conflict.

According to post-hegemonic stability theory, cooperation can arise as a result of many different factors and combinations of factors, some of which appear contradictory. A combination of related events and actions can build to establish certain predictable relationships that facilitate cooperation—much in the same way that embedded liberalism describes the formation of common interests. In this conception of the process through which cooperation is achieved, post-hegemonic stability theory contends that coercive means and the exploitation of discord among nations, can also be an equally important factor in explaining why cooperation occurs. As control by a dominant state decreases, the potential for disagreement and conflict increases. Conflict, according to post-hegemonic stability theorists, is often an essential impetus for cooperation.

Post-hegemonic stability theory recognizes a distinction between harmony of interests and genuine cooperation. Harmony results from one nation's policies, enacted in pursuit of self-interest, helping to inadvertently fulfill another country's goals. In this
sort of situation, no adjustments need to be made by either country as a result of the actions of the other. Harmony can occur without communication or the exertion of influence. Cooperation, on the other hand, is accomplished through the alteration of patterns of behavior. In the case of TRIPS, post-hegemonic stability theory would contend that U.S. policy, pursued in the course of American interests, served to both alter behavior and redefine preferences of certain states. Post-hegemonic stability theory posits that international change may spring from both positive and negative inducements. In short, cooperation can result from threats, punishments, and coercion, as well as from rewards, persuasion, and good example. Cooperation should be viewed as a reaction to perceptions of actual or potential conflict. According to post-hegemonic stability theory, TRIPS resulted from a U.S. policy designed to force nations into reforming their domestic IPR systems in the face of threatened punishment such as trade sanctions.

In defining regimes, post-hegemonic stability theory views regime formation as a process resulting from the pursuit of individual self-interest. Much like realists, proponents of post-hegemonic stability theory see cooperation in an anarchic, decentralized international arena as a difficult, albeit achievable, endeavor. Post-hegemonic stability theory can be distinguished from most liberal theories in that it allows for the formation of regimes as a result of negative pressures. Similar to realism, post-hegemonic stability theory recognizes that regimes are established and subsequently shaped by their most powerful members, often through coercion and threat. Unlike realism, post-hegemonic stability theory postulates that regimes can also have an effect on the behavior of state interests since self-interest is a fairly subjective pursuit. Post-hegemonic stability theory simply maintains a slightly more sophisticated conception of
self-interest in that it allows for the possibility that regimes may be able to affect the values and expectations of states. Although post-hegemonic stability theory and realism differ in their respective predictions for regime maintenance, as far as regime formation is concerned, post-hegemonic stability theory essentially embraces the fundamental assumptions of realism. According to realism, the United States worked to establish the TRIPS regime in order to reverse or at least arrest the general trend of declining American dominance relative to its economic competitors in high tech industrial sectors. According to post-hegemonic stability theory, the United States, in pursuing its own national interest, created an international regime to further promote those interests. The prospect of future trade conflict over intellectual property rights, coupled with declining relative economic power, compelled the United States to take a hard-line approach vis a vis other nations to coerce, threaten, and punish recalcitrant nations into acceding to TRIPS standards. Both realism and post-hegemonic stability theory agree that TRIPS represents an act of self-interest on the part of the U.S. that was designed to afford the United States a short-term comparative advantage in high tech goods and services.

Little opposition was presented by America’s primary trading partners (Europe and Japan) as they, too, stood to gain as a result of market liberalization in developing nations; Europe, Japan, and the U.S. all enjoy a comparative advantage over developing nations in high tech R&D. According to post-hegemonic stability theory, U.S. policy resulted in a harmony of interests among the Great Powers which translated into minor adjustments made on behalf of the EU and Japan in order to make their respective I.P.R. systems accord with TRIPS. The future gains that the EU and Japan stood to receive in
the form of increased market share far outweighed the costs of modest adjustments (if any) to their domestic intellectual property right systems. Since the most-developed nations of the world possess relatively uniform domestic I.P.R. systems, the TRIPS agreement proved an attractive proposition with minimal costs and substantial future gain to actors such as the U.S., Japan, and the EU.

During the 1980s, a well-organized, powerful collection of high-tech industry groups exerted a tremendous amount of pressure on U.S. government officials in an effort to convince American trade-policy practitioners of the need for increased IPR protection abroad. A similar phenomenon occurred in other industrialized nations with republican systems of government, namely Japan, Australia, Canada, West Germany, France and the United Kingdom. For example, in 1985, the House of Commons in the U.K. enacted a more stringent copyright law in the face of unrelenting pressure from the Federation Against Software Theft (FAST).98 In Japan, the Ministry of Trade and Industry (MITI) was prevented from instituting a proposal calling for compulsory licensing as a result of heavy criticism from the Japanese computer industry. The Japanese computer industry was worried about reciprocal actions abroad that might hurt foreign sales.99 Similar forms of pressure applied by influential high-tech lobby groups helped shape the policy preferences of government trade officials in many of the most highly developed countries.

Shared interests formed the core foundation for the creation of an ambitious international cooperative effort with far-reaching consequences for most developing nations. In an era of declining American dominance, TRIPS represents the product of a general coalescence of individual interests of the most powerful actors in international
relations. U.S. resolve helped shape the policy preferences of several key states, thereby initiating a trend toward gradual international change that is presently far from complete.

Brazil played a crucial role in the formation of the TRIPS regime. Brazilian recalcitrance in the face of U.S. pressure enabled American foreign policy practitioners to prove to the world the seriousness of U.S. resolve in combating intellectual property violations abroad. In the case of Brazil, U.S. trade officials applied overwhelming pressure in the form of trade sanctions that served as a wake-up call for developing nations. As a result of U.S. pressure, Brazil effectively reformed its domestic intellectual property rights system. More significantly, U.S. action taken against Brazil during the Uruguay Round talks of GATT successfully coerced other developing nations to agree to the new standards established by TRIPS.

IV. CASE STUDIES

PHARMACEUTICAL PIRACY IN BRAZIL

The United States, as the world leader in developing information-intensive technologies, stands to lose the most from weak or nonexistent IPR protection. During the 1980s, high technology trade accounted for over half of total trade flows in advanced industrialized nations. Moreover, the growth of high technology trade eclipses the total rate of growth for all trade combined.¹⁰⁰ Not surprisingly, inconsistencies in intellectual property right systems within and between Latin American nations gained the attention of American trade officials a little over a decade ago. During the late 1980s and early 1990s, losses in information-intensive sectors such as pharmaceuticals, entertainment software, and motion pictures in Latin America cost U.S. businesses an estimated $3.4
billion each year. Losses to U.S. pharmaceutical firms doing business in Latin America totaled just under $1.7 billion alone. Latin American consumers purchased pirated pharmaceuticals from Latin American companies at an average price that was 56% lower than the price charged for the patented drug in the United States. Latin American producers managed to transfer these savings onto domestic consumers because they did not have to incur the costs of researching and developing new drugs. To bring a new drug to market, the estimated cost is anywhere between $100 million and $500 million. The total cost of production for Latin American pharmaceutical companies who pirate drugs developed abroad is 134% lower than that paid by U.S. producers.

Pharmaceutical industries do business in a highly politicized environment. National welfare, one of the central concerns of any government, is directly related to the health of a particular country's citizens. Governments are generally confronted with two obligations—sometimes contradictory in nature—when dealing with the production and distribution of pharmaceuticals. Developing countries especially must strike a careful balance between establishing and enforcing high standards for drug safety, efficacy, and purity, and promoting the development of domestic pharmaceutical production in order to achieve self-sufficiency and economic development. These two goals are not always mutually attainable for developing nations with balance of payment problems and very little regulation of domestic industries. The case of Brazil is a perfect example.

In 1991, 450 Brazilian national laboratories earned $928 million (roughly 28 percent of the Brazilian pharmaceutical market) from selling medicines produced only from copied formulas. These drugs were produced at a savings to Brazilian manufacturers of about $50 million. The figure of $50 million represents the amount that
Brazilian pharmaceutical pirates would have had to pay for the right to use the patented chemical formulas if they manufactured pharmaceuticals according to international IPR standards.\textsuperscript{105} Of the 6,000 medicines produced by Brazilian laboratories in 1992, none were developed in Brazil. All were manufactured in countries that possess a system that meets at least a minimum international standard of patent protection.\textsuperscript{106}

\textbf{THE BRAZILIAN PERSPECTIVE}

By turning a blind eye to rampant pharmaceutical piracy, the Brazilian government, through inaction, helped domestic pharmaceutical producers compete against large, established multinational pharmaceutical manufacturers for a share of the Brazilian market. During the early 1980s, Brazil represented one of the largest consumers of pharmaceuticals in all of Latin America. In fact, in 1980 the Brazilian market accounted for 36\% of total pharmaceutical sales for Latin America.\textsuperscript{107} Increased market share and higher profits inevitably came at a price. The pirated drugs are often of suspect quality as the copying process is never completely accurate. Although the copied drugs might end up overly potent, another risk was that the pirated drugs did absolutely nothing. According to Morton Sheinberg, director of the Sao Paulo-based Arnaldo Vieira de Carvalho Cancer Institute, “Some imitation products are so innocuous that when patients take them it is like taking water and sugar.”\textsuperscript{108} Despite health risks, the Brazilian government continued to promote the production of pirated pharmaceuticals—the main justification being that the health risks were not as immediate a threat to the population as the inability of most citizens to afford the high-priced pharmaceuticals produced by foreign companies.
In an effort to force multinational pharmaceutical manufacturers to lower their prices, in 1993 the Brazilian government threatened to start producing medicines exclusively in state laboratories. Believing that the multinational producers would have to lower prices to match the low prices of the drugs produced domestically by the state, the Economic Rights Secretariat of the Justice Ministry also threatened heavy fines against any pharmaceutical companies that refused to lower their prices. This short-lived policy was obviously flawed in its lack of economic comprehension of fundamental cost analysis. It points to the fact that the Brazilian government of the early 1990s did not take into consideration the costs incurred by multinational pharmaceutical companies who invested millions of dollars in the research and development of pharmaceutical products. The Brazilian government could afford to manufacture the copied drugs and sell them at a lower price because they did not have to recoup the costs of hundreds of millions of dollars in development costs. As long as foreign manufacturers continued to bring new and innovative drugs to market, the Brazilian government stood to bolster the economic performance of its domestic producers. From the Brazilian government’s perspective, the general health of its citizens was being met through inexpensive, copied drugs, and the domestic Brazilian pharmaceutical industry was competing effectively against large, capital-rich multinational pharmaceutical manufacturers. In other words, why would Brazil want to strengthen its intellectual property rights laws?

THE AMERICAN PERSPECTIVE

One major concern of United States policy makers in their evaluation of different Latin American IPR systems, is the apparent lack of a uniform system of laws to provide an adequate degree of protection. Another obstacle in the way of effective IPR protection
is the failure of Latin American governments to provide effective enforcement of pre-existing laws. Latin American governments not only fail to enforce existing laws, but they oftentimes encourage pirating as well. Common tactics used in weakening IPR protection include issuing compulsory licenses (foreign firms must license products to domestic firms if they wish to sell that particular product within the domestic market), allowing parallel imports (allowing competitors who have acquired the right to use a patent in a foreign market to sell a copy of the product domestically, thereby providing competition for the patent holder), and applying a working requirement test (the holder of a patent must produce or use the innovation within the country, or other domestic producers may use the license without the patent holder’s consent). This developing country view of IPR protection stands in stark contrast to that espoused by the United States. Developed nations, including the United States, perceive intellectual property protection as an incentive for individuals to invest the requisite time and resources to researching and developing new products and processes. In essence, IPR protection is a reward for creativity. In exchange for releasing information about the invention, the inventor has the right to prohibit others from using the innovation for a prescribed number of years.

A MULTI-FACETED U.S. STRATEGY

After recognizing the challenges posed to the American pharmaceutical industry by lax IPR standards in Latin America, United States policy practitioners implemented a multi-faceted strategy aimed at addressing these concerns. The approach taken with Latin America in general and Brazil more specifically represented an attempt by the United States to pressure individual Third World nations to adopt U.S.-style patent laws.
Pressure was applied to developing countries through the Office of the USTR. Additionally, intellectual property protection became a central component of NAFTA and will most likely be included in any new regional trade agreement involving the United States. Most importantly, the United States succeeded in coercing other nations to include intellectual property protection measures in the Uruguay Round GATT negotiations which began in 1986 and ended in 1994.\textsuperscript{112}

To create an internationally binding minimum standard of protection for intellectual property rights, the United States proposed the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) under the General Agreement on Tariffs and Trade (GATT). These minimum standards are enforced through the dispute resolution system of the World Trade Organization (WTO).\textsuperscript{113} The choice of GATT as the location for such an international IPR agreement seemed a little unusual at the time. The two preexisting international agreements dealing with intellectual property, the Paris Convention on patents and the Berne Convention on copyrights, are both administered by the World Intellectual Property Organization (WIPO) of the United Nations.\textsuperscript{114} One of the major shortcomings of the Paris Convention is that it allows member nations to ignore foreign patents as long as they provide the same treatment to domestic patent holders. The Paris Convention also failed to address the problem of enforcement because it required disputes to be settled by the International Court of Justice (ICJ)—an institution whose decisions are non-binding.\textsuperscript{115} Two other shortcomings of the Paris Convention enforcement procedures are the reliance on the voluntary cooperation of any party receiving an unfavorable judgement and the lack of a means by which infringing goods may be seized.\textsuperscript{116} As an alternative to revision of international IPR requirements, Third
World nations preferred the use of WIPO negotiation mechanisms. This preference of developing nations is understandable as they could exercise greater influence in WIPO matters than they could in a GATT forum. The underlying explanation for American recalcitrance in this debate is obvious: the United States wanted to reform the international IPR regime to its own advantage. To retain control over the reform process, the United States wanted the regime to be administered by an international institution over which American trade officials could exert considerable influence.

The purpose of the TRIPS Agreement was to address two primary concerns of the United States: lack of a uniform system of minimum regulations concerning intellectual property rights and the nonexistence of strong enforcement procedures that would ensure compliance by parties to the agreement. Under the Paris Convention, domestic law determined which subjects were patentable. As a result of TRIPS, patentable material is now determined by international agreement. The TRIPS Agreement borrows two principles from American patent law: "non-obviousness" and "utility." As a result, the international standards determining the patentability of subject matter now mirror U.S. patent law. Article 33 adopts yet another US patent law standard in declaring that patent protection is valid for twenty years from the date of filing. Article 28 of the TRIPS Agreement effectively prohibits the practice of parallel importation, the patent workability requirement, and compulsory licensing schemes in its definition of patent holder rights:

(a) "where the subject matter of a patent is a product, to prevent third parties not having his consent from the acts of: making, using, offering for sale, selling, or importing for these purposes that product;
(b) where the subject matter of a patent is a process, to prevent third parties not having his consent from the act of using the process, and from the acts of: using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process.""

Brazil's exclusion of patent protection for pharmaceuticals is illegal because Article 27 requires that all parties to the TRIPS Agreement grant patents for innovations in all fields of technology.  

While the Articles of the TRIPS Agreement mentioned above transformed Brazil's IPR system by imposing internationally agreed upon standards, TRIPS also established certain requirements in the enforcement of these norms. Just as TRIPS insulated IPR regulations from national tampering, it also removed the enforcement mechanism from state control. Part Three of TRIPS obligates member states to meet certain standards of national enforcement. This provision states the following: "Members shall ensure that enforcement procedures as specified in this Part are available under their laws so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.""

In other words, Members must allow for fair judicial procedures for civil infringement suits. These include the right to legal counsel, the ability for claimants to present all relevant evidence, and the right as a defendant to receive timely written notice. TRIPS requires that judicial authorities have the power to grant injunctions, remove infringing goods from channels of commerce, and award damages and expenses. In addition, administrative mechanisms must enable authorities to stop the importation of counterfeit
goods at the border. These enforcement provisions were established in order to guarantee that they do not act as barriers to trade, and to make sure that they are readily available to patent holders.

A second important component of the TRIPS enforcement mechanism is the transparency requirements set forth in Article 63. According to this article, all administrative rulings, regulations, laws, and judicial decisions must be published in order to ensure that all parties to the Agreement have access to them. Whenever new laws are enacted that have any bearing on Agreement, the TRIPS Council must be notified and any relevant information must be sent to all of the Members. The transparency requirements of Article 63 are a crucial component of TRIPS in so far as they facilitate compliance with the established standards of the Agreement.

The third prong of the enforcement mechanism established by TRIPS utilizes the dispute resolution system of GATT to fill in the gaps left by the Paris Convention and the Berne Convention. Under the 1994 WTO Agreements, the Dispute Settlement Understanding (DSU) was expanded to cover the TRIPS Agreement. The DSU altered the old system of dispute resolution by establishing rights to the following: a panel; in the absence of a consensus to reject, the adoption of panel reports; appellate review of panel decisions, and time limits upon which a member must comply with a final ruling. According to the DSU, a Member must either alter the repugnant measure or negotiate a compensatory settlement if a final ruling is made. Trade sanctions may be allowed if the offending Member refuses to change the measure or fails to compensate the applicant. Retaliatory measures may only be applied in the "same sector" in which the original violation occurred.
Prior to the TRIPS Agreement, the United States could not rely upon multilateral mechanisms to force countries to accede to U.S. IPR norms. As a result, during the 1980s and early 1990s the United States acted unilaterally in order to achieve its foreign policy objectives regarding intellectual property rights. When the US opts to take unilateral action, it often occurs under the authority of section 182 (amended in 1988) of the Omnibus Trade Act of 1974, commonly known as “special 301.” It was through the use of Special 301 that the United States succeeded in convincing Brazil to reform its domestic IPR system so as to bring the nation more in line with acceptable international norms.

Under the Reagan Administration, the USTR formulated a policy under which the United States would work to expand multilateral discussions, while continuing to engage countries in bilateral agreements and intensifying unilateral pressures. In relation to intellectual property rights, this change in policy called for a moving away from the World Intellectual Property Organization (WIPO). Progress toward IPR reform had stalled under the oversight of WIPO. In order to address the inadequacies of WIPO, with the support of American industries, the USTR introduced a new initiative at the GATT Uruguay Round. In conjunction with this new multilateral effort, the United States stepped up its unilateral IPR protection vigilance.

Under the authority of Section 301, the USTR began placing countries that failed to provide adequate IP protection on “watch lists” and “priority watch lists.” Once placed on a list, a country received notification that if they failed to institute IP reforms, then the United States would impose trade sanctions in the form of tariffs on the target country’s exports to the United States. The United States also utilized state and private
delegations in the diplomatic sphere as tools to apply additional pressure. Furthermore, a series of linkages were made between intellectual property and International Development Bank loans and the funding of joint scientific projects. Many countries changed their behavior just to avoid being placed on one of the lists in the first place. Brazil, however, decided to test the Americans' resolve by refusing to alter its IPR practices after receiving notification of its designation as a "priority country." 135

In October 1988, the United States acted on its trade sanction threats in relation to Brazil's stubborn refusal to institute adjustments in its domestic IPR system. Following a period of negotiation, the Reagan Administration imposed 100% tariffs on thirty-nine million dollars worth of Brazilian imports to the United States. The US government justified this figure by equating it to the market loss suffered by US pharmaceutical makers arising from Brazil's lack of protection for pharmaceutical patents. In retaliation to US sanctions, Brazil denounced America's actions as contrary to the basic premise of GATT. The version of GATT at the time of the dispute required member states to settle disputes through the GATT dispute settlement mechanism. 136

The sanctions, coupled with a change in Brazilian government, succeeded in instigating the reform of Brazil's patent laws by 1990. Despite some progress, Brazil's efforts did not satisfy the United States. Brazil convinced the United States to remove the sanctions by promising to offer pharmaceutical patent protection "when it was politically possible." Despite this assurance, Brazil did not undergo substantial legal reform until its new Industrial Property Law was passed in 1994. 137 This legislation was only introduced after the US had placed Brazil on its priority watch list in 1991 and 1992 and designated Brazil as one of the worst offending countries in 1993. 138 This legislation effectively
restructured Brazil's domestic IPR legal system. Under the old system (unlike CD pirating in China) pharmaceutical companies in Brazil were not violating domestic law by producing counterfeit drugs and other pharmaceutical products. Before terminating its investigation, the USTR also made sure that the Brazilian government obtained congressional approval of the results of the Uruguay Round of multilateral trade negotiations, including the provisions of the TRIPS Agreement. As a result of lackluster progress between February of 1994 and April of 1995, Brazil was placed on the Priority Watch List again in April 1995. By April 17, 1996, the Brazilian Congress passed a new patent law that provided patent protection for pharmaceutical products in addition to prohibiting parallel imports. Satisfied by the Brazilian government's efforts to reform its domestic IPR system the USTR removed Brazil from its previous designation as a "priority country." Through external pressure, the United States succeeded in coercing Brazil to reform its IPR system by adopting a regulatory regime mirroring the more stringent U.S. system. This objective was achieved largely as a result of the "special 301" provision of the 1974 Omnibus Trade Act.

In formulating IPR policy toward Brazil, the United States hoped to achieve two objectives: continue to develop a more uniform standard of IPR protection among Third World nations, and improve the level of enforcement presently applied to domestic IPR laws. Through the American Uruguay Round proposal, U.S. policy-makers hoped to achieve both of the aforementioned goals on an unprecedented international scale. By forcing Brazil to take a more responsible approach in protecting intellectual property rights just before the vote on whether to adopt the TRIPS proposal, the United States used Brazil as an example of the lengths to which the American government was willing to go
in order to improve IPR protection. In effect, the United States demonstrated to the
world that it was willing to use aggressive unilateral measures in order to convince
developing nations to implement strict IPR systems. At the Uruguay Round negotiations,
the United States essentially presented Third World nations with an ultimatum: either
adopt the TRIPS agreement or face the threat of severe economic sanctions.

INTELLECTUAL PROPERTY RIGHT REFORM IN BRAZIL:
THE AFTERMATH

Overall, U.S. efforts to elevate the degree of protection afforded intellectual
property in Brazil are viewed as a success. The Brazilian pharmaceutical market is now
the fourth largest in the world with sales of over $8 billion. By demonstrating to the
world that the Brazilian government is committed to complying with the TRIPS
Agreement, Brazil’s markets have been flooded by U.S. goods.\(^{141}\) The implementation of
more stringent Brazilian IPR laws corresponded with a marked decline in sales growth of
the Brazilian pharmaceutical industry. Domestic IPR reform coincided with a sweeping
change in economic policy that called for increased market liberalization. From 1996 to
1997, sales growth fell from a figure of 17.2 percent to 6.8 percent. Sales of domestically
manufactured pharmaceuticals continued to increase at a decreasing rate in 1998. In
1999, sales rebounded exponentially to a year-end figure of 26.2 percent.\(^{142}\) With a
landmass larger than the continental United States and over 160 million people residing
within its borders, the opportunities for continued expansion of the Brazilian
pharmaceutical market are substantial.\(^{143}\) From the perspective of the United States, the
increased market share garnered by American pharmaceutical companies can be viewed
as a foreign policy success. In effect, forcing Brazil to adopt a higher standard of intellectual property right protection helped to satisfy the long-term objective of the USTR, which is to secure a dominant position in global trade for American high tech industry. Although Brazil’s pharmaceutical manufacturers suffered an initial loss in sales momentum as a result of the more stringent IPR standards, signs of recovery have appeared in the relatively short period of just two years.  

The sales growth of the Brazilian pharmaceutical market is largely attributable to an influx of products from multinational pharmaceutical companies. With the passage of the Brazilian Industrial Property Law and TRIPS, multinational pharmaceutical companies can attain a monopoly on their new drugs in the Brazilian market for the term of the patent, thereby eliminating the potential for massive profit losses resulting from pirating. Under the new laws, large multinational firms enjoy a considerable advantage over Brazil’s domestic pharmaceutical manufacturers who have until recently subsisted largely through pirating drugs manufactured abroad. Massive amounts of capital must be invested in researching and developing new drugs before Brazil’s pharmaceutical companies will be capable of competing in their home market, let alone in foreign markets. Reform of Brazil’s IPR system came form an exogenous source, and it was implemented from the top down. According to one construction of development theory, a country reaches a middle stage of development when its infrastructure has matured to the point where improved technology can be used to pirate patents. Given the similarities between the aforementioned description and Brazil’s economy, Brazil can be characterized as a middle-tier developing nation. The final stage of development occurs when a particular nation’s domestic industry achieves the capacity to produce world-class
products, thereby rendering it profitable for the country to institute adequate patent protection.\textsuperscript{146} Brazil's economic potential has not yet been realized as a result of market volatility,\textsuperscript{147} yet patent reform associated with the final stage of development has nevertheless been implemented. As a result, Brazil's domestic pharmaceutical market is dominated by multinationals from the United States and Europe. Although increased IPR protection within Brazil increased the overall profitability of the pharmaceutical market, it did so at the expense (at least in the short-term) of Brazil's domestic pharmaceutical manufacturers.

**Shortcomings of American IPR Policy**

The case of Brazil points out several shortcomings of U.S. IPR policy. If the consideration of relative gains is the motivating factor for United States IPR policy, then several problems arise from this particular theoretical construction. A multilateral regime created in order to secure a condition of unequal power between nations creates inherent participatory disincentives. The only effective way for the United States to coerce recalcitrant nations into joining the TRIPS Agreement is for the U.S. to employ unilateral sanctions. Unilateral trade sanctions, however, will only work to undermine the international institutions that the United States uses to its advantage, namely the WTO and its predecessor (GATT). By delegitimizing the power of the WTO, the U.S. will essentially undermine one of the fundamental components of the TRIPS Agreement.

Brazil was seen as an anomaly in the grand IPR strategy of the United States. Unilateral sanctions were utilized to prove to other nations the resolve of the United States regarding intellectual property right protection. The adoption of TRIPS was
supposed to be the end-all solution to address lax international IPR standards. TRIPS was to eliminate any future need for unilateral sanctions to coerce nations to adopt a greater degree of IPR protection. Despite the fact that relative gains considerations seem to have provided the initial impetus for U.S. action, American policy-makers appear to have embraced liberal or neoliberal assumptions in formulating the TRIPS regime. The nature of intellectual property rights protection, since it can be conceived of as a linkage issue in which changes involving IPR’s are fungible across other areas of national interest (such as economic vitality and military security), poses a unique set of problems to U.S. policy.

American manufacturers face little or no competition from Brazilian producers because these companies have been operating under the assumption that capital need not be allocated to research and development. After Brazil adopted a new industrial patent law, Brazilian pharmaceutical companies found themselves at a tremendous disadvantage relative to foreign manufacturers.

According to Game theory, nations seek to maximize their welfare through international trade, but are faced with a Prisoner’s Dilemma. In a zero-sum game, a nation will try to profit at the expense of others by manipulating trade policy with the objective of increasing exports while simultaneously restricting imports. Collective welfare suffers as a result of individual nations pursuing isolated, rational strategies. According to this theory, TRIPS is understood as an agreement that seeks to overcome the problems associated with concerted action on an international scale. Once TRIPS was adopted by the member-nations of the WTO, the United States hoped that unilateral action would no longer be necessary as all IPR disputes would be multilateral in scope.
TRIPS represents a neoliberal solution to the Prisoner's Dilemma. U.S. policy-makers were convinced that to eliminate the possibility of defection and gain the higher payoffs associated with cooperation, states will try to establish international norms, procedures, and institutions. The United States hoped to be able to influence state behavior through the creation of an international framework based on American standards. U.S. policy practitioners sought to overcome the problem of cooperative action presented by an international playing field governed by realism. Since states are the primary actors in an anarchic arena, state behavior is seen as the focal point of policy formation. Assuming that individual states represent rational, welfare-maximizing actors with both common and conflicting interests, interstate cooperation is therefore a difficult achievement. Nevertheless, proponents of neoliberalism contend that collective action is indeed possible as long as the potential for "cheating" is minimized.\footnote{149}

Given the failure of the neoliberal collective action model and the embedded liberalism model in providing a sound rationale for U.S. efforts to establish an internationally binding IPR regime, it seems as though a multilateral approach is ineffective in achieving U.S. interests. As is illustrated by the case of Brazil, recalcitrant nations can only be persuaded to reform their domestic IPR systems under relentless unilateral pressure from the United States.

Voluntary acceptance of the TRIPS Agreement is unlikely in many developing nations because of the economic dislocations that result from domestic IPR reform. Even if a particular nation does not view the TRIPS Agreement as an insuperable invasion of sovereignty, few incentives exist to entice that nation into reforming its domestic IPR laws. Furthermore, the TRIPS grace period that distinguishes between different levels of
development, enables nations to self-identify themselves as less-developed in order to enjoy a longer period of time in which they can continue to take advantage of lax IPR laws. This mechanism creates an additional disincentive for prompt compliance.

Another reason why a multilateral approach is not applicable in dealing with linkage issues, is the fact that United States behavior was predicated on relative gains considerations. Linkage issues inherently involve distributional considerations—in other words, sensitivity to relative gains. Given America's position as a declining economic hegemon, coupled with an international environment marked by a diminished military threat to American security, it stands to reason that the U.S. was more aware of the relative economic standing of its allies. The idea of a multilateral regime created as a result of relative gains considerations seems somewhat contradictory. An international institution established to perpetuate an unequal distribution of power between nations inevitably creates serious disincentives for participation. So far, the only way that the U.S. has successfully coerced non-compliant nations to join the TRIPS Agreement is through involuntary persuasion, accomplished via unilateral trade sanctions. The use of unilateral mechanisms will only serve to undermine the liberal international economic order that the United States created in order to further its interests.

If it is assumed that American hegemonic power will only decline further, the U.S. will rely more and more on multilateral institutions as a source of international influence. The ability of the United States to shape nations' behavior using unilateral measures will decline in tandem with America's status as a hegemon. If the United States has truly regained its status as world economic hegemon, then the United States
should have no problem persuading nations to join and then adhere to the TRIPS regime. The case of China, however, continues to confound U.S. trade officials.

**CASE STUDY: COMPUTER SOFTWARE PIRACY IN CHINA**

The case of Brazil highlights some of the central problems facing U.S. efforts to achieve universal compliance with TRIPS standards. Many of the nations that have not acceded to a higher degree of intellectual property protection can be characterized as developing nations with limited resources and particularized problems resulting from underdeveloped infrastructures, judicial systems, and market controls. The People’s Republic of China is no exception.

Inherent impediments to effective IPR implementation and enforcement in China arise out of its status as a developing nation. China has a decentralized government with authority over a billion citizens. Its market economy is in a relatively nascent stage of development and is still not completely free from manipulation by the communist state apparatus. Unlike Brazil, China must strike a balance between a markedly non-Western cultural and historical tradition and an embryonic Western economic system. In Brazil, the intellectual property right dispute was defined along a divide between developing and developed nations. In China, the concept of intellectual property regulation runs contrary to cultural and historical experience in addition to facing the added obstacle of short-term economic disincentives as they relate to development. China presents a dilemma for U.S. trade practitioners that is at once very similar to that posed by Brazil yet more enigmatic in several respects. China is not yet a member of the WTO; therefore, the dispute resolution system for trade disputes is not a viable option in Sino-American relations.
Although China is not a signatory to the TRIPS Agreement, China has improved its intellectual property right system to accord to many of the standards emphasized in the Agreement. China has also made a commitment to the Berne Convention in addition to several bilateral agreements with the United States. On paper, China boasts quite a sophisticated intellectual property rights system; however, enforcement of IPR standards within the People's Republic of China has proven unsatisfactory to American interests. At stake for the United States is the future legitimacy of the TRIPS Agreement as well as billions of dollars in potential trade revenue.

American high tech industries, representing a crucial sector of the U.S. economy, depend heavily upon the effective enforcement of intellectual property rights. Because of the importance of American high tech industries to overall U.S. economic vitality, American foreign policy practitioners see the promotion of IPR rights in the expanding Chinese market as an important objective. According to a study performed by Economists Inc., in 1995, the U.S. copyright industries accounted for foreign sales and exports of $53.25 billion. This figure places intellectual-property-dependent U.S. industries third in overall export revenue behind the automotive and agricultural sectors. The report also states that core American copyright industries accounted for 3.78% of U.S. gross domestic GDP or 254.6 billion in value added. In addition, between 1987 and 1994, industries reliant on intellectual property protection grew twice as fast as the rest of the economy with a growth rate of 4.6% vs. 2.3%. This trend was also visible in job creation: between 1987 and 1994, core copyright industries created twice as many jobs as the rest of the economy combined (2.85% vs. 1.25%). With total revenue of $385.2 billion, core copyright industries accounted for 5.72% of U.S. GDP. According to
these figures, industries reliant upon intellectual property protection for their products and services represent an increasingly influential sector of American business with important ramifications for future American economic growth.

In 1997, estimated total losses to the U.S. copyright industries in China as a result of piracy amounted to nearly $2.8 billion. This figure represents an increase of $500 million from the previous year’s estimated losses of $2.3 billion. Losses to the computer software industry accounted for nearly $2.4 billion of the total. In 1998, America had the largest percentage of total software losses resulting from piracy out of any country, with lost revenue estimated at $3.2 billion. This figure represents 28% of total losses worldwide. U.S. companies producing computer programs with business applications lost an estimated $987.9 million, and the entertainment software industry lost $1.409 billion. In 1996, the losses to the business software industry amounted to $506 million, and the entertainment software industry lost $1.371 billion. Although the United States is the world leader in the value of software copyright violations, an estimated $2.4 billion a year (1997 estimate), this figure represents a small percentage of the total U.S. software market. China is third behind Japan ($1.2 billion) with a figure estimated at $700 million. The percentage of China’s total software market that is cornered by pirates, however, is extremely high. The estimated piracy level for the business software market in China rose from 95% of the market in 1996 to 96% of the market in 1997. A one-percent decrease in the piracy level of the entertainment software market occurred between 1996 and 1997 (96% vs. 97%). Positive change is generally non-existent, and, where visible, is barely discernible.
Between 1983 and 1994, trade between the U.S. and China became severely unbalanced. In 1983, the U.S. trade deficit with China was $70 million and by 1994, the deficit had soared to $30 billion. During the same period, Chinese exports to the United States increased from $3.1 billion to $38 billion, but American exports to China only increased from $3 billion to $9 billion.\textsuperscript{157} For the most part, China exports more high tech products to the United States than America sells to China. For example, in 1995, China exported $1 billion worth of computers to the U.S. whereas the U.S. only exported $267 million in computers to China.\textsuperscript{158} The Chinese are also exporting pirated software abroad for sale in markets around the world, thereby undercutting U.S. prices. On September 12, 1995, in the notorious “Golden Shopping Arcade” in Shamshuipo, one could purchase a CD-ROM with a collection of software for Windows 95 valued at more than $30,000 for $100.\textsuperscript{159} In 1995, China exported $50 billion in pirated discs.\textsuperscript{160} Lax customs regulations in China only comprise half of the problem facing American policy practitioners: in the past five years, the number of people with Internet access has increased exponentially. The Internet provides a perfect vehicle for the dissemination of software around the globe in a matter of seconds.\textsuperscript{161} With estimated trade losses resulting from Chinese piracy amounting to billions of dollars, the United States has considerable incentive to ensure the effective enforcement of Chinese intellectual property rights.

The United States relied heavily on the export revenue of intellectual property products and services to offset its trade deficits in world markets.\textsuperscript{162} The size of the Chinese market coupled with its potential for future growth represents an important target of U.S. trade policy in promoting increased American high tech investment.
To secure the benefits of high tech investment in China, a reasonably stable intellectual property rights system must be in place so as to guard against substantial revenue losses resulting from piracy. Beginning in the early 1980s, the United States applied increasing amounts of pressure in an effort to coerce China into adopting more stringent intellectual property right norms. As the trade deficit between the U.S. and China climbed upward, the United States assumed a progressively less-accommodating posture toward China. Throughout the early 1990s, U.S.-China trade relations nearly deteriorated into an all-out trade war on several occasions. The decline of United States trade dominance gave rise to concerns of relative economic gains and their effect on the future of American economic growth.¹⁶³

This chapter explains the evolution of intellectual property law in China, concentrating on three distinct periods in Chinese history: the pre-Maoist era (prior to 1949); the Maoist era (1949-1979); and finally the present period of IPR development. The last section will be the focus of much of this case study as the role of the United States is central in contemporary IPR development within China. The implementation of an effective intellectual property system must overcome two hurdles: cultural differences that arise out of different philosophical foundations and governmental differences resulting from unique organizational and structural considerations. In an effort to explain why the idea of intellectual property is so foreign to the Chinese people, the first two sections will focus on the philosophical underpinnings of Chinese culture. Both Confucianism and Maoism embody philosophical orientations that are decidedly incompatible with the Western concept of intellectual property. In the last section, after looking at the evolution of China’s contemporary intellectual property system and the
role of the United States in instigating change, the problems associated with China's system of administrative government will be expounded upon in the context of efforts to protect intellectual property.

THE EVOLUTION OF INTELLECTUAL PROPERTY LAW IN CHINA:

PRE-1949

Intellectual property law in China did not exist as a formal institution until the early part of the 20th Century, which is when some formal protection was granted by the state.164 During the Tang Dynasty (618-906 A.D.), printing first appeared in China and with it came the arrival of copyright requirements. Unlike Western societies, however, copyright law was used in China to ensure the review of works prior to publication for purposes of protecting the monarchy from seditious literature. In other words, the Chinese government used copyright law to prevent the proliferation of "dangerous" printed materials—not as a means to guard against the unauthorized reproduction of works.165 In 1910, the Emperor enacted the first written statute dealing with copyright, known as the Da Qing Copyright Law. Literature, art, photographs, and pamphlets were protected under the statute. In addition, the statute dealt with oral works and translations, commissioned works, ownership, inheritance, and works of joint authorship. Protection was granted until thirty years after the author's death. This rather sophisticated statute lasted nearly forty years until the Communists founded the People's Republic of China in 1949 and subsequently abolished all copyright statutes.166

The early period of intellectual property right development in China was defined by another factor other than lack of government protection: Confucianism. Confucianism
goes back 2500 years in Chinese history. Central to the teachings of Confucianism is the concept of learning by copying. To be sure, for thousands of years the copying of various works has been regarded as necessary and sometimes as a polite form of flattery. Confucianism also emphasizes the good of society rather than the pursuit of individual accolades. The confrontational or litigious nature of rule by law contradicts one of the core philosophical underpinnings of Confucianism: that the moral development of the individual—not a system of law—is crucial to maintaining social order. Two central components of a philosophy that was ingrained in Chinese society for over 2500 years are completely repugnant to the ideological foundation of intellectual property.

THE EVOLUTION OF INTELLECTUAL PROPERTY IN CHINA: 1949-1979

In addition to Confucianism, Maoist thought was another philosophy that had a profound effect on the development of intellectual property rights in China. When the Communists took over in 1949, Chairman Mao promptly expelled all foreign influence and abolished any semblance of a formal copyright system. Under the rule of Mao Tse-Tung, law was viewed as a mechanism for the oppression of enemies of the state. Maoism stipulated that the masses should have access to creative works as long as those works were not critical of the State. In fact, barely a year after gaining power the Communists issued a directive stating that all inventions were to be considered state property. The aforementioned tenet of Maoism is borrowed directly from traditional Marxism, which contends that the renunciation of private property promotes economic growth. According to the Communists in China, the protection of copyright could be
used as a politically manipulative tool of the state to ensure that opposition could not gain an effective voice. As a result, the Communists could gradually construct an advanced socialist culture and society while fostering the growth of state-sponsored scientific research and industrial development. The interests of the state enjoy primacy. Nowhere present in the People's Republic of China's copyright law of the Maoist Era is the concept of individual gain or the protection of individual interest.\textsuperscript{172} The normalization of relations between the U.S. and China in 1979 marked a fundamental shift in the attitude of China's government toward intellectual property.

**U.S. EFFORTS TO IMPROVE CHINA'S INTELLECTUAL PROPERTY RIGHTS SYSTEM: 1979-**

In 1979, the United States and China signed a formal trade agreement establishing certain conditions governing relations between the two nations. Under the agreement, both governments were to offer a degree of protection to patents and trademarks roughly equivalent to the amount of protection afforded by the other party.\textsuperscript{173} In other words, both countries agreed to maintain relative equality in the degree of copyright protection granted within their respective borders. The signing of the 1979 trade agreement between the United States and China helped induce the Chinese government to increase the level of protection afforded to intellectual property by enacting several regulatory statutes. The Technological Contract Law of China, the Law of Scientific and Technological Progress of China, and the Law on Combating Unfair Competition were all passed in the years immediately following the 1979 agreement.\textsuperscript{174} China adopted the Trademark Law in 1982 and the Patent Law in 1984, and the
Copyright Law in 1991. The Implementing Rules and Regulations for the Protection of Software followed shortly after the passage of the Copyright Law. In 1993, China enacted the Unfair Competition Law. Another measure taken by China to institutionalize IPR protection domestically is the creation of a new system of courts designed specifically to handle intellectual property disputes. China has since joined numerous international IPR conventions including the Paris and Berne Conventions, the Madrid Agreement for International Registration of Trademarks, and the World Intellectual Property Organization (WIPO).

By the late 1980s, conflict between the United States and China loomed large, as an escalating trade imbalance between the two nations threatened to disadvantage American industries. Despite China’s attempt to institute new provisions for the protection of intellectual property, high tech commodities remained susceptible to widespread piracy within the Chinese market. In the face of this threat to American economic vitality, U.S. foreign policy practitioners decided to step up the pressure on China’s government to coerce the Chinese into taking a more aggressive approach when combating piracy.

During the 1980s, the rampant intellectual property right violations occurring in nations such as China and Brazil revealed the inadequacies of the pre-existing international intellectual property conventions. Provisions set forth in the Berne and Paris Conventions failed to establish substantive standards of protection and neither treaty was effective in providing a mechanism for dispute settlement. U.S. trade policy-makers endeavored to formulate a two-part strategy that would create a multilateral mechanism to fill in the loopholes of the outdated international IP agreements, while
simultaneously applying unilateral pressure through threats of trade sanctions. While working to establish the TRIPS Agreement during the Uruguay Round Talks of GATT, the United States attempted to address the problem of intellectual property piracy in China by applying pressure unilaterally. With the Section 301 Amendment added to the 1988 Omnibus Trade and Competitiveness Act, the Office of the USTR was poised to turn up the pressure on the Chinese government.

Despite China's effort to integrate international norms while strengthening its intellectual property system, American businesses remained unsatisfied with China's progress. Mounting pressure from American lobby groups and high-tech industry organizations helped in convincing the USTR to designate China a "priority country" even after the passage of China's first comprehensive copyright act in 1990. The PRC's Copyright Law codified basic rights and requirements dealing with the requirement of a written contract for licensing, liability of infringers, the inheritance of copyright, and the creation of enforcement agencies. Through China's acceptance of multilateral intellectual property treaties, foreign authors were also covered under the provisions of the Copyright Act. Despite the moderately ambitious nature of the new Act, it nevertheless failed to cover several key areas of concern to U.S. businesses. A major loophole in the Act allowed for considerable governmental discretion in determining what intellectual property deserved protection based on the state's conception of the "public interest." In effect, the ambiguous wording of this clause allowed for government manipulation of the existing laws if the government deemed the intellectual property to be contrary to the interests of the state (i.e. if it served to undermine state objectives). A second concern of American businesses, especially the
software industry, was the Act’s lack of protection for computer software: computer software was not included as a protected literary work. A third point of contention was the clause that stipulated that in order to receive protection, software must be “published”, or produced, in the PRC first. Finally, many American business interests were quick to point out that the Act failed to impose criminal sanctions for copyright violations. The United States threatened to apply trade sanctions unless China provided a higher degree of protection for U.S. intellectual property, especially computer software.

THE MEMORANDUM OF UNDERSTANDING ON THE PROTECTION OF INTELLECTUAL PROPERTY

The trade dispute between the United States and China led to the signing of a more extensive intellectual property agreement known as the Memorandum of Understanding on the Protection of Intellectual Property (MOU). The pact was unprecedented in that it contained provisions that dealt explicitly with enforcement measures as well as the actual imposition of new regulations. Under the MOU, China agreed to implement several core concepts of Western law as they related to the protection of copyright infringement and computer software. It was hoped that by committing to the points of the MOU, China would eventually develop into a legitimate producer of intellectual property, thereby discarding the embarrassing distinction of being the world’s most egregious offender of intellectual property rights. Just as much as China wished to avoid a potentially harmful trade war with the United States, China was also very concerned with maintaining its image as an important player in the international
The terms of the MOU required that China join the Berne Convention and the Geneva Phonograms Convention. China joined both agreements by April 30, 1993. In order to address the concerns of the American software industry, China passed the Software Regulations in October of 1991, which included software as a literary work and extended the period of protection to fifty years.

THE 1995 ACTION PLAN AND THE 1996 AGREEMENT ON THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

A year after the MOU had been signed piracy in China was more widespread than ever. Although the Chinese government had instituted significant reform of its domestic legal system to include new Western-style regulations, many of the enforcement mechanisms had not yet been fully implemented. Lack of action by China's government attracted the concern of both U.S. government and industry leaders. After the failure of twenty-one separate attempts at negotiations with Chinese government officials, the USTR, Michael Kantor, placed China on the Priority Watch List. According to the Office of the USTR, recalcitrance regarding enforcement by the Chinese government was particularly abysmal in the following areas: "internally inconsistent laws; a lack of transparency in the enforcement structure; a lack of protection for existing works; gaps in responsibility in the enforcement structure; a lack of funding, training, and education; the absence of clear and effective criminal penalties; possible conflicts of interest; burdensome and discriminatory agency requirements; overly-broad compulsory licensing provisions; failure of enforcement authorities to coordinate; and the absence of an effective border mechanism." Only a tiny number of intellectual property infractions
actually made it before Chinese courts and the USTR found a "lack of consistent application of the laws throughout the central, provincial and local governments."\(^{188}\)

After finding that China was unwilling to take action against intellectual property pirates, the U.S. imposed $1.08 billion in sanctions and the Chinese responded with sanctions of their own. Chinese officials perceived continued U.S. pressure as an unwarranted affront toward all recent Chinese efforts at transforming the domestic legal system to coincide with Western standards.\(^{189}\) At the last minute, a trade war was averted when Chinese and American officials reached an agreement that included an Action Plan for the Effective Enforcement of Intellectual Property Rights. Under the Action Plan, China agreed to the following: "to provide U.S. right holders with enhanced access to the Chinese market; establish a system at the central, provincial and local levels to provide strong, transparent and responsive enforcement of intellectual property rights; initiate a special enforcement period during which enhanced resources will be allocated to the enforcement of intellectual property rights; establish an effective border enforcement regime; and ensure transparency of its legal regime, including the publication of all laws and regulations concerning intellectual property protection."\(^{190}\) As a result of China's commitment to the aforementioned terms, the USTR revoked China's designation as a priority foreign country and eliminated the sanctions.\(^{191}\) The 1995 Enforcement Agreement differed from previous pacts in that it focused entirely upon strengthening China's existing laws instead of trying to implement new ones.\(^{192}\)

Continued dissatisfaction with China's enforcement efforts led the United States to place China back on the Priority Watch List in 1996. Task forces that were supposed to take action at addressing IPR abuses in twenty-two provinces were never created.
Pirate compact disc factories that were shut down during a brief enforcement period reopened at the end of the crackdown. American software companies claimed that twenty-eight of the twenty-nine pirate CD factories were still maintaining operations. In addition, customs regulations were woefully ineffective. U.S. officials engaged in a series of talks with the Chinese government. In all, over forty negotiating sessions were held between representatives from the two countries. Under mounting U.S. pressure in the form of $2 billion in threatened trade sanctions, China signed the 1996 Agreement on the Protection of Intellectual Property Rights. During the negotiating session a team of U.S. government officials was sent to China to verify the enforcement efforts undertaken by the Chinese government. The increased transparency resulting from bilateral monitoring helped assuage U.S. fears of Chinese foot-dragging. Despite the initial findings of the USTR which stated that China was unwilling to implement IPR reform, U.S. officials monitoring Chinese efforts discovered that a lack of coordination and widespread corruption provided a better explanation as to why IPR reform was occurring at such a "slow" pace. In fact, evidence suggests that the central Chinese government had recognized the importance of stronger intellectual property laws as a means to enhance China's development efforts, but was having difficulty enforcing the new mandates because of a lack of control over regional and local governments. The difficulty in U.S.-China relations stemmed from misperceptions of relative power and control: the Office of the USTR mistakenly perceived the Chinese state to have much more control over the mechanisms of administrative enforcement than it actually possessed. The decentralized nature of the Chinese state, made enforcement of new IPR
standards difficult as a result of problems that were endemic to the bureaucratic system of government.

To fulfill its commitment to the Agreement, Chinese authorities instigated a series of campaigns against intellectual property pirates that resulted in the closure of thirty-nine factories making illegal CDs, 250 arrests, and the confiscation of 1.9 million illegal compact disks. Forty illegal VCD production lines in Guangdong Province were also closed.\(^{198}\) China’s government has also instituted a reward system that pays up to $36,000 for information leading to the seizure of CD lines.\(^{199}\) Despite all of China’s efforts in bringing its domestic IPR system up to international standards, piracy continues to be a major point of contention in U.S.-China trade relations. China continues to make periodic raids on pirate factories and arrests continue on a regular basis.\(^{200}\) The Criminal Law, which criminalizes copyright infringement, was enacted in 1997, yet intellectual property piracy persists at an annual cost of billions of dollars to U.S. high tech industries.\(^{201}\)

To gain a better understanding of why intellectual property enforcement is so difficult in the People’s Republic of China requires a look at the state apparatus itself. The realm of governmental authority and structure is typically recognized as one of the most sacred institutions of non-interference in interstate relations. The fact that both the 1995 and 1996 IP Agreements between the U.S. and China narrowly avoided an all-out trade war necessarily raises the question of how the U.S. can expect to strike a balance in its trade policy toward China without completely destroying the conditions necessary for constructive engagement.
TRADE SANCTIONS: ELIMINATING THE SHORT-TERM GAINS ASSOCIATED WITH SOFTWARE PIRACY

Similar to the case of Brazil, in dealing with China, U.S. policy-makers were faced with the challenge of convincing China that the long-term gains associated with the formation and enforcement of an effective IPR system far outweighed the short-term costs. Brazilian pharmaceutical manufacturers successfully competed with large, well-established multinational drug manufacturers in the Brazilian market through a strategy of pirating drugs that were developed by foreign companies. By copying drugs, Brazilian pharmaceutical companies did not have to invest hundreds of millions of dollars to research and develop a new product. As a result, small, domestic producers effectively eliminated the comparative advantage enjoyed by large, capital-rich pharmaceutical manufacturers with operations in developed nations. Similar conditions exist in the Chinese computer software market that favor the existence of piracy over a more legitimate approach to competition.

In the years after 1979, China struggled to modernize after decades of isolation from the international market. Intellectual property rights hindered China's ability to obtain and utilize the technological information necessary for economic growth. The pirating of high tech goods enhanced the process of modernization through the elimination of costs resulting from research and development. Lack of capital and technical resources inhibited domestic enterprises from investing in costly development efforts relating to research and marketing. The implementation of intellectual property
rights in such an underdeveloped economy would drive domestic interests out of business, thereby enabling foreign interests to capture a substantial share of the market. The displacement of domestic producers by foreign companies in the Brazilian pharmaceutical industry following the implementation of more stringent intellectual property protection is a perfect example of the short-term costs associated with IPR reform in developing nations. Economic sanctions imposed by the United States eliminate the short-term benefits enjoyed by developing nations (such as Brazil and China) that refuse to provide adequate enforcement of intellectual property rights. The threat of costly sanctions proved a successful strategy in the case of Brazil, and it has met with some success in the case of China in that the threat of trade sanctions has induced the Chinese to make concessions on several occasions. Despite the initial efficacy of a U.S. policy toward China that relies upon the threat of trade sanctions, intellectual property rights violations by Chinese nationals continue to drain revenue from American high tech industries. Unlike Brazil, China does not possess a democratic system of government. The popular accountability of government officials does not exist to the same extent in China as in Brazil. As a result, unchecked corruption and “cronyism” in the Chinese government represent significant impediments standing in the way of effective IPR reform. The structure of the Chinese government itself represents the main obstacle preventing continued intellectual property right reform in the form of stricter enforcement mechanisms.
ENFORCEMENT PROBLEMS UNDER A DECENTRALIZED ADMINISTRATIVE GOVERNMENT

In China, central governmental authority is transferred to regional governments in the way that local administrative bodies enforce state directives. The economic reform of the 1980s enabled local governments in China to gain considerable control over their administrative bodies, so that the separation of interests has in some instances become blurred. This phenomenon is especially evident in the area of intellectual property rights. Recognizing the importance of administrative government in enforcing government policy, the United States worked to strengthen the administration of intellectual property protection when formulating both the 1995 Accord and the 1996 Agreement with China.

A centerpiece of the 1995 Accord was the creation of the IPWC, a separate administrative entity that would assist provincial, regional, and local governments in the enforcement of intellectual property rights. The IPWC oversees the efforts of several different agencies, all of which have some involvement in the protection of intellectual property rights. These agencies include the AIC, the Patent Office, and the Public Security Bureau. The 1996 act improved upon these changes by increasing the responsibility allotted to the centralized Ministry of Public Security (MPS). As a result of these changes, the MPS possessed the authority to include piracy as a target in its national anti-crime campaign. By enlisting the formidable resources and manpower of the MPS, efforts to combat intellectual property right violations were elevated to a new level.
Despite much needed changes in the organizational structure of the enforcement apparatus of its government, poor IPR enforcement continues to plague China's state officials. The special system of courts that the Chinese government established expressly to deal with intellectual property rights disputes are plagued by inexperienced judges who, because of their low salaries, are easily bribed by copyright pirates. Between 1957 and 1965, the once independent judiciary was integrated into the Communist Party. A completely independent judiciary has been slow in the making despite numerous reforms. Although some agencies have been made autonomous, local and regional officials are often reluctant to take action against powerful government officials who might be implicated in the violation of intellectual property rights. The Chinese Trade Minister has stated that one illegal factory in particular is "untouchable" because of the owner's close ties to the military. According to the Business Software Alliance, illegal software is often used by government agencies. Local governments that occupy a position of relative autonomy from Beijing often invest heavily in illegal software production. According to a 1996 article in the Electronic Engineering Times, in Shenzhen, China, "...CDs are openly displayed in nearly every shop, despite the presence of armed soldiers and police...business is brisk." Despite the existence of enforcement mechanisms, piracy continues unabated as a result of crooked governmental interference.

The Chinese government's efforts to promote development have reached a crossroads of sorts: either officials can continue to turn a blind eye to rampant intellectual property rights violations, or China must restructure its administrative apparatus so as to eradicate the conditions that presently perpetuate piracy. The former course of action will only serve to further alienate China from the international market to which it so
desperately desires membership. Legitimacy comes with World Trade Organization (WTO) membership. Change must occur from the top down, as local and regional authorities are often themselves the source of copyright violations. The lure of quick profits coupled with little or no threat of prosecution from Beijing, represent strong incentives favoring persistent localized corruption.

China's economy has developed to a considerable extent since 1979. Technology crucial to development that was once inaccessible is now no longer so. To be sure, China is far from attaining developed country status, but is has also moved a long way from its underdeveloped, isolated position that it occupied only two decades ago. In order to continue to develop, China needs access to new technology. Although China's reliance on new technology has slackened, it nevertheless remains a crucial component in any development equation. The United States represents one of only a handful of nation that possess the technological research and development capabilities that China covets. The United States also represents China's most important market for exports. Through U.S. investment China can continue to develop its economy at an increasing rate. Piracy of intellectual property discourages U.S. investment, especially by small and mid-size firms who cannot afford substantial losses that result from piracy. The United States also holds the key to China's entry into the WTO. In short, China cannot afford to alienate itself from the United States. In addition, the United States needs access to China's vast market in order to promote exports. China's market also boasts considerable potential for expansion. Indeed, the U.S. can ill afford to push China beyond arms length. In formulating a coherent intellectual property right policy vis a vis China, the United States must take into account several factors that could potentially derail constructive relations.
One of the most important considerations is perception. The United State must refrain from becoming overly impatient with the reform process. Many of the remaining impediments to IPR implementation are structural, and cannot be easily modified. Moreover, many of the necessary alterations rest firmly in the protected realm of state sovereignty. The history of Western imperialism in Asia is still fresh in the minds of the Chinese. In addition, American foreign policy practitioners must be mindful of cultural differences and take action accordingly. The re-education of 1 billion people does not occur overnight. Although the U.S. approach adopted in the case of Brazil met with success in that country, a similar approach toward China has produced what can only be described as mediocre results: IPR laws and related enforcement mechanisms are roughly in place, yet piracy continues unabated. The policy considerations briefly highlighted above necessarily raise the question whether the present U.S. IPR policy toward China is the best possible course of action in years to come. In the concluding section, I hope to answer that question with policy recommendations of my own.

V. CONCLUSION

In a world where the dissemination of information and ideas occurs on an unprecedented scale, the protection of the knowledge responsible for the production of high-tech goods and services poses a difficult set of challenges to United States foreign policy practitioners. The erosion of the power of states to exercise control over the flow of capital and information makes the institutionalization of a uniform system of protection for intellectual property a crucial objective for U.S. officials seeking to sustain American preeminence in international markets. A second consideration also threatens
America's present position of global dominance in high tech goods and services: as the high-tech competitiveness of the United States declines relative to other nations, the power of the United States to influence the behavior of other nations will decline as well. The recognition of a condition of deteriorating economic power relative to other nations necessarily induces state officials to become more sensitive to concerns of relative gains. In the case of the United States, implicit in the drive to establish an international system of intellectual property right protection is the recognition of declining American dominance in certain high-tech sectors. During the mid to late 1980s, the effective end of the Cold War combined with rising Japanese economic strength caused U.S. trade officials to re-evaluate American trade policy. During the Cold War, U.S. trade policy called for the subordination of U.S. economic interests in favor of strategic military concerns, in effect a policy of reverse discrimination. The dissolution of the Soviet threat shifted the focus of U.S. foreign policy officials to the deteriorating balance of trade with Japan. The phrase "Buy American" quickly replaced "Better Dead than Red." By the end of the Cold War, economic concerns had attained an elevated degree of importance in the realm of interstate relations.

High tech industries dependent on intellectual property protection experienced the highest level of growth during the 1980s. In the 1990s, high tech industries accounted for an even greater percentage of U.S. economic growth. Perhaps most significantly, these same industries possess the greatest potential for future expansion when compared to other sectors of the American economy.

Although sectors that produce high tech goods and services stand to reap enormous profits in the future, this favorable position is made precarious by high tech
industries' reliance on the protection of intellectual property. In order to bring technologically innovative products to market, companies must invest hundreds of millions of dollars into research and development. As an incentive to encourage continued innovation on the part of private enterprises, most developed nations have instituted systems of intellectual property protection that guarantee the inventor of a particular product all profits that may result from the sale of that product for a fixed number of years. Piracy of intellectual property in foreign markets represents the greatest aggregate threat to continued growth in American high tech industries. Developing nations, where piracy as a percentage of the total market is very high, are perceived of as threats to important U.S. economic interests (i.e. the promotion of U.S. high tech goods and services in foreign markets). Both Brazil and China represent large developing nations with weak intellectual property rights systems that have been targeted in the past by U.S. foreign policy officials for aggressive IPR reform. As was the case in both Brazil and China, most developing nations are faced with numerous economic disincentives to institute stringent intellectual property right systems. Intellectual property right reform in developing nations often results in short-term economic dislocation. Domestic producers, unable to compete with capital-rich multinational corporations, are forced out of business under stricter IPR regulations. Established multinational companies that enjoy a comparative advantage in industries requiring substantial investments in research and development stand to gain the most from intellectual property right reform in developing nations. U.S. foreign policy practitioners were faced with the challenge of creating a policy that would make piracy more costly than the process of intellectual property right reform. Faced with a rapidly changing international economic environment, U.S. foreign
policy practitioners endeavored to secure vital U.S. business interests abroad. As U.S.
hegemony declines, American trade officials are able to exert less influence over trading
partners, therefore, practitioners cognizant of the impending constraints imposed by a
condition of hegemonic decline sought to implement a plan that could be enacted quickly
and effectively. The result was a comprehensive, two-part strategy developed to secure
American economic dominance in high-tech markets.

The creation of TRIPS represents one of two facets of U.S. IPR policy. The other
component is the threat of unilateral trade sanctions to be used against nations unwilling
to accede to the universal norms stipulated in the TRIPS agreement. Two competing
theories of international relations, realism and post-hegemonic stability theory, when
integrated, provide a strong explanation as to why the United States worked to establish
an international intellectual property rights regime such as TRIPS. The effective
enforcement of intellectual property right norms established in the TRIPS agreement,
however, has proven difficult in developing nations. The case of China is a perfect
example. Each developing country is faced with varying political systems and diverse
cultural heritages that inhibit a seamless integration of Western law with non-Western
societies and non-Western political structures. The fashioning of an effective policy
designed to address enforcement problems in developing nations is not possible using the
prescriptive framework of traditional realism. Post-Hegemonic Stability Theory is also
inadequate in providing an appropriate policy framework. Certain considerations,
consistent with liberalism, preclude a policy based on the proverbial “black box.” To
solve the problem of weak enforcement of international intellectual property right norms,
the “black-box” must be opened.
Consistent with liberalism, post hegemonic stability theory recognizes that a combination of related events and actions can build to establish certain predictable relationships that facilitate cooperation. Post hegemonic stability theory departs from conventional liberalism in its recognition of coercive means and exploitation of discord among nations as salient factors leading to cooperation. The latter hypothesis of PHST is consistent with a realist conception of international relations. Like realism, PHST posits that international relations are defined by a state of anarchy. According to realists, this condition of anarchy makes cooperation very difficult because it forces nations to concern themselves with individual survival above all else. In an environment of distrust and suspicion, states are not likely to join international arrangements that might work against individual state interests in the future. The chances of an international organization working to satisfy the interests of all states to an equal extent is highly unlikely according to realists. States are imbued with different capabilities derived from varying concentrations of natural resources. Different capabilities naturally render states unequal in their relations with one another. The interests of a state that is rich in natural wealth will differ from those of a nation that lacks basic natural resources. Furthermore, diverse cultures, ideologies, political systems, and social hierarchies also work to distinguish states from one another. A plethora of interstate differences undermine the prospects for cooperation in an anarchic world.

Unlike realism, post-hegemonic stability theory contends that cooperation can occur as a direct result of conflict between states. Realists aver that conflict is a likely
occurrence between states. PHST embraces this assumption and then explains why inherently contentious conditions actually foster accord.

An international environment defined by a declining hegemonic state marks the core assumption of post-hegemonic stability theory. As the ability of a hegemonic state to shape the international environment deteriorates, the potential for conflict increases. Without the political influence to induce other nations to behave in a certain manner, the international arena grows less centralized around a singular core. Other nations will grow more inclined to test the resolve of the declining hegemonic state, thereby resulting in increased conflict over several issue areas.

In the case of the United States, once policy-makers recognized a condition of relative hegemonic decline, efforts were made to secure U.S. dominance in a crucial sector of the international economy: high-tech goods and services. Rampant intellectual property piracy presented the greatest threat to continued U.S. preeminence in high-tech trade. American trade officials identified the potential for increased conflict and subsequently constructed a comprehensive cooperative plan with international scope that would serve to minimize future disagreements. The creation of a universal intellectual property rights regime mirroring the high standards upheld in the United States effectively placed the burden of reform on developing nations with lax IPR systems. If developing nations did not take significant steps to restructure inadequate intellectual property right systems, the United States would impose crippling economic sanctions. If the United States truly believed in the efficacy of absolute gains, perhaps the United States would have provided positive inducements in the form of trade preferences or financial assistance to help ease the burden of reform. Furthermore, the value of
intellectual property piracy is highest in the United States in certain key sectors (software for example). This statistic is easily masked by the fact that piracy accounts for only a small percentage of the total U.S. market. If the United States were truly concerned about absolute gains, the greatest efforts would be applied to improving enforcement at home. Instead, U.S. foreign policy officials are quick to praise the flawed American system of intellectual property right protection. The entire TRIPS Agreement contains standards that are borrowed directly from the U.S. system. This standard of protection was not chosen because it afforded the highest degree of protection, but because it granted U.S. business interests a considerable comparative advantage. U.S. businesses did not have to make costly changes as a result of the establishment of a "new" international benchmark of intellectual property protection. Companies based in foreign countries are faced with two likely scenarios as a result of the implementation of TRIPS: either foreign companies will be forced out of business in their respective home markets, or the companies will be forced to restructure so that more capital is invested in research and development. In either case, U.S. firms stand to gain a considerable share of foreign markets as a result of the TRIPS Agreement. Relative gains provide a sound explanation as to why the United States worked to establish an international intellectual property rights regime.

The case of the Brazilian pharmaceutical industry provides further evidence in support of relative-gains concerns as the impetus behind U.S. behavior. Domestic pharmaceutical manufacturers in Brazil engaged in piracy in order to "beat" the comparative advantage enjoyed by large multinational pharmaceutical companies that could afford to invest hundreds of millions of dollars in researching and developing
drugs. Once the Brazilian government was coerced into instituting intellectual property right reform, some domestic producers were forced out of business and others had to contend with the high costs involved in restructuring operations. Prior to the implementation of TRIPS, a trade deficit had developed between the United States and Brazil where the United States was importing far more goods and services than it was exporting to Brazil. After the institutionalization of TRIPS, the trade deficit turned into a substantial trade surplus nearly overnight. 212 Although a marked increase in the consumption of U.S. goods and services in Brazil cannot be attributed solely to the acceptance of TRIPS standards, an increase in intellectual property right protection undoubtedly contributed to this phenomenon.

The creation of an international regime mirroring U.S. laws obviously served the primary interests of one state alone: the United States. According to post-hegemonic stability theory, regimes are established and subsequently shaped by their most powerful members, often through coercion and threat. U.S. foreign policy practitioners anticipated non-compliance on the part of developing nations, otherwise they would not have made provisions for the use of trade sanctions as a secondary measure. In order to speed up the implementation process, U.S. trade officials advocated the threat of unilateral trade sanctions as a means by which recalcitrant nations could be coerced into cooperating with U.S. demands. Through coercion and threat manifest in the form of trade sanctions, the United States altered the behavior of states by aggressively redefining their preferences.

A final question raised by the formation of TRIPS relates to the behavior of America's major trading partners: why did the major trading partners of the U.S. offer little opposition to the creation of TRIPS? Again, post-hegemonic stability theory offers
a compelling explanation. PHST distinguishes between harmony (a confluence of interests) and cooperation. Cooperation results from the alteration of behavior. Harmony, on the other hand, does not require a reevaluation of preferences. According to PHST, U.S. intellectual property right policy resulted in a harmony of interests among the Great Powers. Faced with the prospect of few changes as a result of accepting the norms established by TRIPS, major trading partners of the U.S. such as Japan and the EU decided to refrain from sabotaging U.S. efforts. Increased market share far outweighed the cost of minor adjustments to domestic intellectual property systems for developed nations. With little to lose and much to gain by the formation of TRIPS, the EU and Japan did not attempt to thwart U.S. efforts to raise the bar of international intellectual property protection.

The case of Brazil played an instrumental role in U.S. efforts to establish TRIPS. Brazilian opposition to U.S. pressure afforded the United States an ample opportunity to demonstrate to the world the magnitude of its resolve. Brazilian foot-dragging coincided with the on-going debate at the Uruguay Round of GATT over the efficacy of an international intellectual property rights regime. By threatening unilateral trade sanctions against Brazil if Brazil refused to acquiesce to American demands, the United States emphasized the importance of intellectual property to U.S. interests. Brazil was used as an international example of what would happen if states did not voluntarily accede to the standards embedded in TRIPS. Rather than face trade sanctions, a plurality of states agreed to TRIPS at the Uruguay Round. An aggressive unilateral policy stance by the U.S. proved successful in the case of Brazil. A similar approach was used against China during the same time period, resulting in equivalent success: China reformed its domestic
IPR system to agree with international standards. Unlike Brazil, China is still plagued by problems of IPR enforcement. Disparities between Brazil and China call attention to the need for a case by case approach in addressing enforcement problems. The two-part U.S. strategy of international regime formation coupled with unilateral action is ineffective in dealing with problems arising from within the political and social structure of states.

WHAT DOES THE FUTURE HOLD FOR U.S. IPR POLICY?

When combined, realism and post-hegemonic stability theory go a long way in explaining state behavior contributing to the formation of TRIPS. Both theories inform the analysis of the final structure of TRIPS, and the Agreement’s shortcomings; however, both realism and PHST do not provide an adequate prescriptive framework for future U.S. intellectual property policy. One of the central challenges to U.S. policy-makers over the next several years will be to address widespread piracy in foreign markets resulting from inadequate enforcement. The myriad problems associated with enforcement in developing nations are easily recognized when viewed in the context of China.

Given the apparent success of trade sanctions as a policy tool used to initiate reform, it stands to reason that perhaps continued threats of trade sanctions might induce nations to provide more effective levels of IPR enforcement. The repeated threat of sanctions was successful in bringing China to the negotiating table. When faced with loss of access to the U.S. market for selected goods, China relented to U.S. pressure year after year during the early to mid-1990s. By 1997, China had developed a sophisticated
IPR system commensurate with standards of Western law embodied in the TRIPS Agreement. The threat of trade sanctions, although effective when used sparingly to force state officials to reform that which they can control, are not effective when government officials are constrained from producing the desired outcome. In other words, when state officials are faced with either political or structural constraints endemic to a particular nation’s system of government, compliance with the demands of a foreign nation is not always feasible.

In the case of China, evidence supports the observation that central government officials recognize the importance of a strong intellectual property rights system for future economic growth and development. Chinese officials quickly accommodated U.S. demands calling for intellectual property reform. In only fifteen years, China completely integrated Western legal concepts into its system of law. Chinese officials want very much to be afforded the respect of a legitimate world power. World power status comes with designation as a developed nation with a robust economy. The next step in China’s ascendance to higher international status is admission to the World Trade Organization. The United States currently holds the key to China’s acceptance. U.S. trade officials presently admonish China for allowing the existence of extraordinarily high levels of piracy in several sectors of the Chinese market. Consistent criticism by the U.S. is an embarrassment for China’s leadership. The aforementioned considerations underscore the fact that China’s leadership has indubitably recognized that a strong intellectual property right system is in the best interest of the Chinese government.

An aggressive unilateral trade policy vis a vis China will only serve to exacerbate tensions between the United States and China. As mentioned earlier, the threat of trade
sanctions is most effective when used with reservation. The threat of trade sanctions generally implies that a particular country is willing to risk a trade war in order to achieve its goals. A trade war is a serious consequence with high costs incurred by both parties involved in the dispute. China’s trade officials might start to doubt the willingness of the U.S. to follow through on its threats if relied upon repeatedly as a method of coercion. Moreover, aggressive U.S. behavior will only serve to frustrate and potentially alienate Chinese officials. If China’s officials have indeed recognized that a strong intellectual property rights system is in China’s best interest, then consistent bullying will make a policy of constructive engagement that much more difficult to pursue.

Given the apparent failure of trade sanctions as a viable policy tool, what options, if any, are presented by the TRIPS Agreement that might promote increased enforcement in China without straining relations? China has unofficially acceded to most of the major tenets of the TRIPS Agreement, however, technically, China is not a signatory to the TRIPS regime. Like most international conventions and agreements, the TRIPS Agreement is extremely weak in dealing with issues of enforcement. According to international law, respect for state sovereignty precludes the establishment of an international mechanism of enforcement in the case of TRIPS. If a state decides to breach the Agreement, there is very little multilateral action that can be taken aside from the issuance of a general statement condemning the action. Legitimate unilateral action can be taken under the TRIPS Agreement, but only after bilateral negotiations have broken down. The first step in settling an intellectual property right dispute under TRIPS is participation by both parties in the dispute resolution mechanism of GATT. The
problem with this course of action in relations with China is that China is not a member of the WTO, nor is it a signatory to TRIPS.

If the United States were to grant China membership to the WTO, China would automatically become a signatory to the TRIPS Agreement as well. In this case, the United States would be able to negotiate with China under the more legitimate auspices of the GATT. Should bilateral negotiations break down, the United States would be able to impose unilateral trade sanctions on China as a last resort if and only if the GATT review board determines that China did indeed violate some norm of international trade. Under the rules of the GATT, however, U.S. sanctions would be limited to goods that are directly in dispute. Once China becomes a member of the WTO the U.S. will be unable to threaten unilateral sanctions without first attempting negotiation through some sort of multilateral body. International mediation is often a lengthy, drawn-out process. China might be able to prolong any action on its part by stalling in the negotiation process. The United States is restrained from acting unilaterally during GATT negotiations. Currently, the U.S. may threaten to impose sanctions on China whenever it sees fit. Under the status quo, the United States enjoys more freedom of choice in selecting an appropriate policy. In addition, the current situation affords the U.S. greater leverage in negotiations in that China has not been admitted to the WTO. The U.S. can use WTO membership as an incentive to coerce China into behaving a certain way. Once China is admitted to the WTO, U.S. leverage in trade disputes with China will decline.

Even though China's government officials may have recognized that strong intellectual property right protection is an imperative component in its development strategy, the effective enforcement of Western notions of intellectual property still
presents an enormous challenge. Several factors, both internal and external, have combined to affect China's ability to provide an acceptable level of property right enforcement. The endogenous variables are unique to most developing nations, whereas the exogenous variables have affected states occupying multiple levels of development.

Both TRIPS and unilateral U.S. efforts managed to redefine China's preferences so that China effectively acceded to international IPR norms. Problems arose when these same traditional policies formed the basis of an initiative directed at lax enforcement in China. Inefficiencies within China's system of administrative government proves that state behavior is not always defined by state preferences. The preferences of state officials do not always translate into state action. This realization highlights a deficiency within the system of interstate relations. Under the present system, most states operate under the assumption that state behavior is a direct result of preferences put into action.

When China fails to enforce intellectual property right norms, U.S. foreign policy practitioners perceive Chinese inaction as deriving from official state policy. In reality, official state policy calls for enforcement, yet local officials either consciously decide not to enforce state directives or are simply incapable of carrying out assignments due to a lack of resources. In this case, the central state apparatus is unable to exercise control over regional and local agencies responsible for enforcement. All legal and executive mechanisms are in place, yet enforcement still does not occur. The United States has repeatedly threatened to impose punitive sanctions on a central government that is struggling within its own limited capabilities to appease foreign concerns. What is needed is not increased external pressure, but internal reform that addresses the source of
the problem. In the case of China, the source of inefficiency is the confused coexistence of a liberalized market economy with the remnants of a decentralized socialist state.

Corruption is widespread in developing nations. From the highest government offices on down to local administrative officials, corruption knows no bounds. In the case of China, military officers and high-ranking government officials often have investments tied up in the pirate factories that are targeted for closure. Lower-ranking government officials are often reluctant to blow the whistle on their superiors for fear of retribution. During the liberalization of China's economy during the 1980s, local government officials wrested from Beijing considerable authority relating to the oversight of local production. As a result, the line between the private and public sectors became blurred. Government officials responsible for enforcing the laws would conveniently fail to take action whenever personal investments were jeopardized.

Corruption often results from rapid economic liberalization that occurs too quickly for state regulation to keep pace. From rapid liberalization spring economic dislocation and exploitation by public officials. The negative effects of internal corruption are further exacerbated by rapid external changes collectively referred to as globalization. At dizzying speeds, capital and information can be transferred around the globe. The increase in technological innovation has outpaced the development of associated governmental regulation. States find themselves in increasingly vulnerable positions, unable to control vital resources. Once the process of market liberalization begins, rarely is a state able to fully prepare for the problems that might arise. As the liberalization process speeds up, old social structures can be turned upside down. Conditions of instability are a central concern for government officials overseeing the
liberalization of a developing economy. Realism does not account for the effect that internal factors might have on the ability of a nation to carry out policy. Strains of liberal thought, such as embedded liberalism, assume that the state can exercise considerable control over domestic concerns ranging from economic liberalization to legal reform. Both theories appear outdated in a contemporary world characterized by dynamic evolution. Technology is the catalyst behind modern day change. The state that controls the catalyst controls the future shape of the international environment.

Given the limitations of traditional theories of international relations in addressing the problem of eroding state power, what options remain for foreign policy practitioners? In regard to China, the best possible solutions involve collaborative efforts between public and private actors. The proven impotency of the Chinese government in combating piracy means that an incentive for legitimate action must come from a different source. Joint ventures between software manufacturers and pirates represent a win-win situation for all involved. Pirates no longer have to fear the law (as if they ever did in the first place), and they still retain the right to distribute software. Initially, pirates will most likely face a loss in revenue, but that’s the price of security. Instead of operating in fear of a future government crack-down, former pirates are transformed into capitalists, free to pursue profits for as long as possible. As a result of joint ventures, consumers are guaranteed quality goods, and the software manufacturers actually turn a profit.

In China, intellectual property is still a relatively foreign concept. What is needed is a comprehensive educational campaign. The public destruction of millions of pirated CDs by government-owned steamrollers is a start, but hardly worthy of being called a
media blitz. A relatively novel idea was attempted in Beijing where a half-hour sitcom designed to entertain and educate citizens about the computer world was aired for 26 episodes. Microsoft and Compaq underwrote the costs ($475,000) for producing the first series. More than 700,000 viewers saw the first episode when it was aired in Beijing ("Sitcom Plugs PCs on Beijing Television," South China Morning Post, February 14, 1996). More public-private initiatives are needed in this area.

A more long-term solution to China's enforcement problems is an increase in the involvement of U.S. delegations of legal specialists and government experts in reforming China's administrative system of intellectual property oversight. Judges within the Chinese judicial system are paid low salaries, making them susceptible to bribes and threats. U.S. officials who witness the inadequacies of the Chinese system first-hand will gain a greater appreciation of the challenges facing China's government officials. U.S. foreign policy practitioners will be able to temper American foreign policy accordingly. Liberalism posits that the emergence of epistemic communities between nations will foster greater understanding, thereby reducing the potential for conflict. The services of legal and political experts will be received much more favorably than a procession of trade officials brandishing threats of sanctions.

The cure to the problems plaguing contemporary U.S. IPR policy is not difficult to recognize, however, it is a difficult pill to swallow. The answer requires a non-traditional approach to international relations involving intrastate variables. The present predicament facing American IPR policy reminds me of a simple scenario observed years ago. As a child, I used to watch my cat play inside of a cardboard box. When standing away from the box, from one moment to the next, I could never predict in which direction
the box would move. When I peered over the edge of the box, I could view the actions of my cat and predict the effect those actions would have on the box’s walls. Throwing veiled threats at the outside of the proverbial black box will only push the box farther and farther away, making constructive dialogue impossible. An understanding of the workings of the inside of the box is fundamental to a correct interpretation of its movements. Only when U.S. foreign policy practitioners learn to look within the workings of the Chinese government and adapt American IPR policy accordingly, will positive change occur.

4 John Gerard Ruggie, Winning the Peace, pp. 135-156.
7 Ibid., pp. 85-88.
8 Benedicte Callan, Pirates on the High Seas: The United States and Global Intellectual Property Rights, pp. 10-11.
10 Callan, pp. 11-12.
11 Ryan, pp. 95-96.
14 Ryan, p. 95.
16 Ibid., pp. 101-102.

Ryan, pp. 144.


Grieco, pp. 485-507.


Ibid., p. 9.

Mastanduno, p. 255.


Mearsheimer, p. 10.

Ibid., "Anarchy..." p. 128.

Mastanduno, pp. 255-256.


Stein, p. 31.

Mearsheimer, p. 17.

Charles Lipson, "International Cooperation In Economic and Security Affairs," in Baldwin, p. 4.

Ibid., pp. 7-10.


Axelrod and Keohane, p. 87.

Keohane and Martin, pp. 45-46.

Axelrod and Keohane, p. 110.

Ibid., p. 87.

Stein, p. 52.

Axelrod and Keohane, pp. 91-92.

Mearsheimer, p. 18.

Stein, p. 31.

Lipson, p. 17.

Ibid., p. 18.

Oye, p. 17.

Axelrod and Keohane, p. 86; Oye, p. 22.

Keohane and Martin, p. 47.

Ibid., p. 49.


Keohane and Martin, p. 49.


Ibid., p. 86.

Ibid., p. 87.

See Grieco, *Cooperation Among Nations*.

Mastanduno, pp. 250-266 in Baldwin, ed.

Grieco, *Cooperation...*, p. 28.

Grieco, "Anarchy..." p. 128.


Mastanduno, p. 258.

See Ryan, Buscaglia and Long, Mayer, Weissman, Callan; for a case-specific, dependency theory critique, see Gefetti in Newfarmer.

Ryan, pp. 141-144.
64 Mastanduno., p. 259.
65 Grieco, Cooperation..., p. 13.
66 Ibid., p. 228.
67 Ibid., p. 10.
70 Martin, pp. 91-93.
71 Grieco, pp. 129-130.
72 Ruggie, pp. 135-156.
74 Ibid., p. 173.
75 Ibid., p. 199.
76 Ibid., p. 174.
77 Grieco, "Anarchy...", p. 127.
79 For a constructivist opinion, see Hopf, p. 177, 185, and for a realist conception of state power and influence, see Mearsheimer, pp. 10-11.
80 Ruggie, pp. 156, 173.
81 Hopf, pp. 177-178.
82 Mayer, p. 385.
83 Ruggie, pp. 135-156.
85 Robert O. Keohane, After Hegemony, pp. 51-52.
86 Ibid., p. 32.
87 Ibid., p. 34.
90 Keohane, After Hegemony, pp. 35, 38.
91 Ibid., pp. 49-50.
92 Ibid., p. 50.
93 Stein, p. 132 in Krasner, and Keohane, After Hegemony, p. 56.
94 Keohane, After Hegemony, pp. 39, 46.
95 Ibid., p. 54.
96 Ibid., pp. 52-54.
97 Ibid., pp. 62-63.
99 Ibid., p. 290.
101 Ibid., p. 8.
107


Ibid., p. 24 of *FBIS* document 171.

Gereffi, p. 263.

Simonetti, p. 26 of *FBIS* document 171.


Ibid., p. 7.

Weissman, p. 1074.

Ibid., p. 1077.


Weissman, p. 1083.


Pechman, p. 182.

Weissman, p. 1083.

Pechman, p. 183.

Mayer, p. 383.

Weissman, p. 1097.


Ibid., art. 27.

Ibid., art. 41.

Ibid., art. 42.

Ibid., art. 44.

Ibid., art. 46.

Ibid., art. 45.

Ibid., art. 51.

Mayer, p. 385.

TRIPs, art. 63.

Pechman, p. 187.

Pechman, p. 179.

Callan, p. 11.

Weissman, p. 1078.

Callan, p. 12.

Weissman, pp. 1078-1079.


Mayer, p. (380).

Weissman, p. 1072.


Mayer, p. 395 and 398.


Ibid., p. 396 and p. 399.


Stein, pp. 35-38.


See Appendix: “U.S.-China Trade Data”


Griffin, p. 182.


Ansson, p. 7.
109

113 Ansson, p. 7.
114 Ibid., p. 7.
116 Griffin, p. 172.
117 Ansson, pp. 7-8.
118 Lam, p. 870.
119 Ibid., pp. 871-872.
120 Ibid., pp. 873-875.
122 Simpson, p. 576.
123 Butterton, p. 1085.
125 Cheng, p. 1968.
126 Butterton, p. 1086.
131 Butteron, p. 1088.
139 Ibid.
140 Ibid.
145 Griffin, pp. 184-185.
146 Ibid., pp. 183 and 185.
148 Griffin, p. 184.
150 Watson, p. 38.
151 See Appendix: “U.S.-Brazil Trade Data”
### United States–Brazil Trade Data: Exports, Imports, and Merchandise Trade: 1980-1998

#### United States' Exports to Brazil, Domestic and Foreign

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#### United States' General Imports From Brazil

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#### United States' Merchandise Trade Balance With Brazil

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All figures in millions of dollars.

UNITED STATES--CHINA TRADE DATA: EXPORTS, IMPORTS,

UNITED STATES' EXPORTS TO CHINA, DOMESTIC, AND FOREIGN

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UNITED STATES' MERCHANDISE TRADE BALANCE WITH CHINA

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* All data prior to 1989 includes combined trade figures for Taiwan and mainland China; all data following 1988 is for mainland China alone.

All figures in millions of dollars

APPENDIX C
REALISM

1) Nations are sensitive to changes in relative power.

2) Nation-states exist in an anarchical environment that perpetuates a pervasive condition of fear and distrust.

3) Anarchy is defined by realists as an ordering principle recognizing independent, sovereign states as the primary actors in the international arena; there is no higher authority above the nation-state.

4) With the ever-present possibility to war looming in the background, relations between nations are defined by constant security competition. At the extreme, nations worry that they will be either conquered or destroyed by more powerful states. In a more moderate sense, nations are fearful that a decrease in their power or an increase in another state's power relative to theirs will enable other countries to take advantage of their weakened political position.

5) A particular nation will take action in order to remedy changes in the distribution of power that serve to disadvantage the capabilities of that nation.

6) States can never be certain of the intentions of other states.

7) In a world of perfect information, state behavior is impossible to predict beyond a shadow of a doubt.

8) Calculated survival strategies enable states to generally act in a rational manner; however, misperceived intentions can result in irrational actions, thereby exacerbating the pervasive condition of fear and distrust in international relations.

9) Since states cannot rely upon one another for security, alliances may form, but they only represent temporary arrangements. According to realists, cooperation can and does occur despite numerous disincentives for collective arrangements. In order to succeed, cooperative endeavors must adequately address both relative-gains considerations and concerns about cheating.

10) Realists contend that states are concerned with both absolute gains and relative gains. Due to balance of power considerations, states are primarily motivated by relative gains. In an anarchic international environment, states are concerned with at least maintaining the status quo relative to another state when entering into an agreement. A related concern of states is that one or more states will defect from a cooperative arrangement, thereby gaining a relative advantage. This phenomenon is known as "cheating" in international relations parlance. To realists, institutions are manifestations of national self-interest based on the international distribution of power. The most powerful states create institutions to promote national concerns. Cooperation and institution building are possible in a realist world, but only if they coincide with individual state interests.

Implications for TRIPS

According to a realist conception of international relations, the United States worked to establish TRIPS after realizing that the U.S. was declining in economic strength relative to other nations. Trade losses were quite pronounced in the high tech sector of the American economy. Given the importance of technology derived from high tech industry to future U.S. economic and military security, U.S. foreign policy practitioners endeavored to establish a strong international intellectual property right system to protect U.S. intellectual property in foreign markets. American trade officials were faced with the task of securing the United States' high tech comparative advantage abroad. TRIPS was modeled on America's domestic intellectual property system; therefore, U.S. firms did not have to incur the high costs associated with altering business practices to conform to a new standard of protection. The TRIPS agreement was created to promote U.S. business interests in foreign markets at a significant cost to foreign producers.
NEOLIBERALISM

1) Neoliberalism agrees with the fundamental assumption of realism that nations exist in an anarchic environment; however, neoliberalism posits that realism severely underestimates the likelihood of cooperation in such an environment.

2) Government decisions are often the product of politically mediated coalition bargaining.

3) Cognition and perception define state interaction.

4) Neoliberalism contends that through an iterated Prisoner’s Dilemma, defections can be punished and coordinated conventions can develop. More specifically, an effort to respond to present cooperation with cooperation in the future and a threat to meet present defection with future defection can effectively improve the potential for cooperation. In order to achieve this objective of increased cooperation, actors’ motives must be relatively transparent, thereby resulting in an increased level of information sharing.

5) International institutions facilitate the emergence of cooperation. By providing information, institutions can work to assuage fears of unequal distribution of gains.

6) Institutions ensure that gains are evenly distributed over time. Distributional issues, or relative-gains concerns are essentially the same thing as concerns dealing with iterated reciprocity—a central focus of neoliberal theory. Neoliberals contend that solution to both dilemmas is the formation of institutions that promote the sharing of more perfect information.

7) Regimes do not enforce rules in a hierarchical manner. Instead, they reduce the level of uncertainty between nations by altering the transaction costs and by providing better information to the participants.

8) Once a regime is established on a smaller scale, it can be maintained and even expanded through patterned behavior and legitimacy. Legitimacy leads to the condition that future payoffs are valued more than current payoffs, making the incentive to defect today less important since the other members will retaliate tomorrow.

9) Regimes create issue-linkage that further induces states to act according to established rules instead of defecting in pursuit of short-term gains. States become reluctant to breach an agreement for fear that retaliation can occur in several different issue areas.

10) Once regimes are established, international norms and procedures can serve to alter the decision-making process of states, thereby inducing a greater willingness to cooperate due to greater transparency. In essence, decision making becomes a joint process.

Implications for TRIPS

According to neoliberalism, states are rational, “atomistic” actors that seek to maximize individual absolute gains while remaining indifferent to gains achieved by others. Therefore, the United States worked to create TRIPS in order to address problems associated with lax intellectual property right protection in foreign markets that was hurting the competitiveness of U.S. companies. By establishing a universal standard of intellectual property to be enforced through the dispute resolution mechanism of the World Trade Organization, the United States sought to legitimize a system of norms that would be voluntarily adopted by all nations, for the betterment of all nations. Once having acceded to TRIPS, member-states would refrain form breaching the Agreement in fear of retaliation by other members.
EMBEDDED LIBERALISM

1) Embedded liberalism attempts to explain what factors help to mitigate perceived threats to sovereignty that states evaluate when deciding whether or not to participate in a particular international institution.

2) Relative-gains considerations represent only one of numerous factors that may work to influence state behavior. Political variables matter more than the traditional constraints on collective action.

3) States are not simply unitary actors seeking to maximize their individual welfare.

4) Embedded liberalism sees anarchy as a structure of socially ordered states that define the system as easily as the system works to define the nation-state.

5) The definition of anarchy is never static. Relative-gains considerations only matter sometimes, if at all. Myriad factors ranging from domestic politics to state identity also affect the decision-making process of states. Embedded liberalism calls for states to pursue a policy of controlled liberalization in order to help mitigate the effects of globalization.

6) According to embedded liberalism, equilibrium can be reached between domestic and international stability. Federal governmental institutions can coexist harmoniously with international institutions resulting in improved cooperation and general welfare maximization. Central to this hypothesis is respect for state sovereignty. In order to control the effects of economic and political integration, individual states must retain a certain degree of sovereign power. The mechanisms for control must be normalized to the extent that they become "embedded" in international relations.

7) Like conventional constructivism, embedded liberalism recognizes the importance of the “power of practice” or iterated action in promoting cooperation.

Implications for TRIPS

Recognizing the disincentives for cooperation in the TRIPS regime confronting developing nations, U.S. policy-makers worked to establish TRIPS as an agreement designed with respect for state sovereignty. Developing nations would not be threatened by the TRIPS agreement because they could control the process of reform within their respective sovereign borders. As a concession to developing nations, the U.S. made sure to include provisions within TRIPS that granted developing nations a longer time schedule in which to institute reform. By giving up some sovereignty to the TRIPS regime, individual states would be guaranteed a hand in the reform process required by the new international standards. As more and more states start to accede to TRIPS, the new standard of intellectual property right protection will become firmly “embedded” as a controlling international norm.
POST-HEGEMONIC STABILITY THEORY (PHST)

1) As hegemonic conditions deteriorate, the prospects for regime formation and maintenance diminish as well, although cooperation is still feasible. In addition, as hegemonic stability declines, pre-existing international regimes may well continue to flourish. Certain conditions must be in place in order for cooperation to occur in spite of a deteriorating hegemonic order. The presence of shared interests is an obvious criterion for the promotion of cooperative agreements. A second, less obvious condition that may foster participation in an international regime is the existence of conflict.

2) A combination of related events and actions can build to establish certain predictable relationships that facilitate cooperation. In this conception of the process through which cooperation is achieved, coercive means and the exploitation of discord among nations can also be an equally important factor explaining why cooperation occurs. As control by a dominant state decreases, the potential for disagreement and conflict increases. Conflict is often an essential impetus for cooperation.

3) Harmony results from one nation’s policies, enacted in pursuit of self-interest, helping to inadvertently fulfill another country’s goals. No adjustments need to be made by either country as a result of the actions of the other. Harmony can occur without communication of the exertion of influence. Cooperation is accomplished by altering established patterns of behavior.

4) International change may spring from both positive and negative inducements. Cooperation should be viewed as a reaction to perceptions of actual or potential conflict.

5) The pursuit of self-interest leads to regime formation. Cooperation is difficult, but achievable. Regimes are established and subsequently shaped by their most powerful members, often through coercion and threat. Regimes can have an effect on state behavior by changing values and expectations.

Implications for TRIPS

According to realism, the U.S. worked to establish the TRIPS regime in order to reverse or at least arrest the general trend of declining American dominance relative to its economic competitors in high-tech industrial sectors. According to PHST, the U.S., in pursuing its own national interest created an international regime in order to further promote those interests. The prospect of future trade conflict over intellectual property rights, coupled with declining relative economic power, compelled the U.S. to take a hard-line approach vis a vis other nations in order to coerce, threaten, and punish recalcitrant nations into acceding to TRIPS standards. Both realism and PHST agree that TRIPS is a manifestation of American self-interest designed to afford the U.S. a short-term comparative advantage in high-tech goods and services.
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