

## Norm Diffusion or Mercantilist Imperatives? Understanding the Politics of China's Intellectual Property Transition

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### Abstract

*As part of its national strategy to promote indigenous innovation and to develop an innovative economy, the Chinese government has adopted a series of policy initiatives since the beginning of market reforms to strengthen intellectual property (IP) standards and enforcement. Some interpret these reforms as the result of international norm diffusion; others see them reflecting the success of foreign pressures at work over the last few decades. Examining various shifts and outcomes in China's IP policies between 1978 and 2015, this paper critiques the constructivist analytical framework of norm diffusion and international socialisation, and argues that more attention needs to be paid to the effects of structural forces within the global economy, China's capitalist transition, and various competing, capital-seeking imperatives that influence the direction and implementation of China's IP policies. At different stages of China's development, IP serves different purposes for political elites and powerful corporate players.*

Keywords: China, intellectual property, constructivism, international socialisation, norm diffusion, historical materialism

### 1. Introduction

Since China began its market reforms in 1978, Chinese-made products have proliferated domestically and in overseas markets. As well as being the world's largest exporter, China is also notoriously known as the world's most productive pirating country, churning out goods that copy the designs and adopt the technological processes owned by others. Since the early 2000s, the Chinese Communist Party (CCP) has introduced a series of national plans aimed at promoting indigenous innovation and strengthening intellectual property (IP) standards and protection at home. With respect to promoting innovation, China has made some impressive progress. In 2021, China filed the highest number of patents via the Patent Cooperation Treaty (PCT)<sup>1</sup> of the World Intellectual Property Organization (WIPO), ahead of the US, Japan, South Korea and Germany (WIPO, 2022). In the same year, Chinese telecom equipment maker Huawei Technologies Co. (hereafter 'Huawei') once again ranked first in the number of PCT applications by a company, a position it has held since 2017 (WIPO, 2022).

China barely had an IP legal system at the onset of market reforms in the late 1970s. According to Alford (1995), the absence of an established system of legal protection for IP in China was attributed to the incompatibility of the notion of IP with certain Confucian values and practices embedded in Chinese societies. For example, Chinese culture, which was largely a manifestation of Confucian values, permitted and even encouraged copying and imitation of art and scholarship. The lack of a legal tradition of private property rights in Chinese legal ideology had made any attempt to protect IP futile. IP also bore an imprint of 'Western', 'imperialist' domination in Chinese history in the late Qing period, closely associated with foreign aggression and unfair treatment. However, as market reforms progressed, IP reforms were increasingly stressed by Chinese political elites; as a result, an initially foreign concept became a key development goal.

This paper asks how we are to explain China's turn to IP, that is, what are the driving forces behind the country's modern IP reforms? To answer this question, I proceed as follows. I first explore the constructivist literature on norm diffusion and the framework of international socialisation, which have been widely used to explain why and how novice state actors embrace certain international norms and standards of behaviour. Using China's IP reforms as a case study, I explain the limits of applying the constructivist approach in understanding IP policy shifts in China. Then, I draw upon macro historical-materialist approaches to explain how one can better understand China's contested IP development by considering interactions between the changing global economy and certain powerful states and corporate players at different times in China's trajectory. Analysing China's IP reforms during three different periods, I provide evidence to show that the policies, institutions and strategies tailored around IP did not arise naturally; rather,

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<sup>1</sup>A patent application filed under the PCT framework can enjoy protection in a large number of countries (currently standing at 156). A PCT patent is one of the indicators used by the WIPO to compare innovativeness of countries and companies.

they were structures promoted consciously by different agents (foreign and domestic), primarily out of rationalist calculations, at various junctures of China's reforms. The adoption of IP practices in China has been neither uniform nor consistent. Varying power relationships involving governments and corporate interests, as well as changing domestic conditions in China, have resulted in variegated patterns of reform and inconsistencies in policy outcomes. I conclude that the diffusion of IP norms into China is subject to several mediating factors which have been neglected in the international socialisation literature.

## **2. Normative explanations: Norms and compliance**

International relations scholars and political scientists have long sought systematic explanations for state behaviours. At the heart of the various interpretations lie several key questions: what shapes state interests, what informs actions, and what mediates outcomes? One of the explanations offered by the constructivist school of international relations is the way in which normative tendencies such as ideas, beliefs, norms and rules affect the identity, interests and behaviour of a state. State interests evolve with changes in state identity and as such, states are not necessarily utility maximisers in the way that rationalists have assumed. Ideas, identities and relationships, instead of being treated as given and pre-determined, are social constructs which mould the interests of a given state actor and, hence, determine the course of actions to be taken (Finnemore, 1996; Wendt, 1992, 1994). Actors may appeal to normative concerns, despite knowing that such responses would incur more costs than benefits. It therefore follows that in explaining what motivates states in their actions, it is not only purely material incentives that should be considered but also ideational imperatives (Finnemore & Sikkink, 1998). In the words of March and Olsen (2005, p. 3), actors can be influenced by 'a logic of appropriateness' as much as 'a logic of reason'.

Norms are broadly defined as socially and morally acceptable behaviour and practices. In contemporary societies, some widely recognised international norms include human rights protection, observation of international law and humanitarian relief. If international norms are important in explaining state behaviour, through what processes are they channelled and diffused? Why do states accept norms that are alien to them? One often-studied area of norm activities is international organisations. According to some scholars, state actors are found to be gradually socialised into international norms through their engagement with intergovernmental organisations (Bearce & Bondanella, 2007; Checkel, 2005; Johnston, 2001). Drawing heavily on constructivist claims, theorists of international socialisation posit the international system as a social environment—one that is highly institutionalised and embedded with particular beliefs, norms and practices (Johnston, 2001; Schimmelfennig, 2000). The various ideational and institutional elements that constitute the international environment influence how state actors identify themselves, classify their relationships with others and pursue their interests. In this sense, socialisation theorists reject the rigid and pre-deterministic approach of realists and liberals who claim that anarchy is the fundamental, distinctive structural feature of the 'self-help' international system (Waltz, 1979). Instead, they argue that since 'anarchy is what state makes of it' (Wendt, 1992, p. 395), other social forms and patterns of interaction, such as relationships that are formed around rules of international institutions, are also possible in inter-state relations (Johnston, 2001, p. 487).

A novice actor, through participating in rule-based international organisations, will learn about new norms, gradually internalise them and display sustained compliant behaviour deemed socially acceptable by the community (Johnston, 2001). During the process of socialisation, a state actor experiences a transition from following a 'logic of consequences' to a 'logic of appropriateness'. In other words, on some occasions, state actors will choose to take norm-compliant actions at the expense of material gains. The final stage of the social learning process involves new states internalising constitutive beliefs and practices, for example compliance with international law, which are institutionalised in the international environment (Schimmelfennig, 2000).

### **2.1. Socialising China into international norms?**

Scholarly interest in the study of norm dissemination emerged against the backdrop of a rapid expansion of international organisations which took place from the 1980s onwards. United Nations (UN) affiliated agencies as well as non-governmental organisations charged with implementing development strategies and promoting humanitarian values mushroomed. The creation of the European Union (EU) as a supranational institution (in 1993) generated further interest in studying the various ways that member states were integrated into EU norms and practices (Lewis, 2005; Schimmelfennig, 2000, 2005). Socialisation scholars also turned their attention to China, with several studies focusing on the changing strategies of the Chinese government following China's broader engagement with the UN and its affiliated agencies (Kent, 1999, 2002). There was optimism that China, an authoritarian state, could be moderated and changed by having it tied to the myriad of international institutions that had been purposely set up to promote neoliberal ideas and maintain the liberal international order. This was reflected in US China foreign policy under the Clinton administration, which advocated 'constructive engagement', as opposed to 'containment' with respect to China (Blitzer, 1997).

Among various works analysing China's foreign policy using the international socialisation framework is Ann Kent's (2002) examination of China's participation in international organisations including the Conference on Disarmament, the UN Environment Programme and various UN human rights bodies. Kent argues that consequential to its involvement in these organisations as a novice, China redefined its national interests in several policy areas. This is reflected, for example, in China's acceptance of and commitment to nuclear non-proliferation, the introduction of new domestic legislation in human rights and the construction of bureaucracies to facilitate capital inflows as part of its broader commitment to free trade (Kent, 2002, pp. 350–352). Furthermore, China shows readiness to renegotiate its sovereignty over humanitarian intervention and is willing to accept costs and burdens associated with joining international organisations. That said, Kent concludes that given China's concern about regime legitimacy and other domestic problems, its compliance with international norms will remain selective and unpredictable (Kent, 2002, p. 358). Twenty years later, such an observation remains true.

Another major work on the socialisation of China is Alastair Johnston's (2007) research on China's participation in the international security regime. Johnston identifies three micro-processes that occur in stages during the process of socialisation, namely mimicking, social influence and persuasion (Johnston, 2007). These processes further explain how a novice state learns new norms, copies role models, evaluates self-image and, eventually, accepts the value of norms and willingly adopts norm-conforming behaviour. Johnston argues that as China aims to become a responsible major power, it is confronted with 'new trade-offs between security and image' (Johnston, 2007, p. 146). He concludes that China's agreement to a host of arms control treaties and the changes in its security policies from 1980 to 2000 reflect a learning process that has taken place through its relations with international organisations.

Have China's national interests in relation to IP changed as a result of its deeper engagement with international organisations and broader commitment to international treaties? To what extent can we ascribe the CCP's new embrace of IP to the workings of the 'logic of appropriateness'? Below, I identify two major limitations of the international socialisation approach in explaining China's IP progression. In brief, each phase of China's IP policy formation and execution reveals competition and negotiation among various segments of interests at both domestic and international levels, very often overriding the normative considerations stressed by international socialisation scholars.

## 2.2. Limitations of international socialisation theory

The first deficiency of the literature of norms, compliance and international socialisation is its general neglect of the underlying motives and catalysts of specific norms, and how they serve as variables to mediate outcomes. Supporters of international socialisation have concluded that international institutions exert influence on member states which, over time, will lead to a convergence of state interests (Bearce & Bondanella, 2007). It follows that as a result of the subtle power and influence of international organisations, an increase in compliant behaviour of states can be anticipated as novice states 'learn' to embrace international norms and rules. However, such a proposition is contradicted by certain actual outcomes observed in China. Despite its membership in various international organisations, China has consistently been criticised for its failure to adequately meet treaty obligations. In fact, since the beginning of China's economic reform in 1978, piracy in China has not been kept under control. Despite the strengthening of domestic legislation, enforcement has not been able to keep up with new channels of infringements, such as software piracy and online counterfeiting, that have been supported by rapid developments in information technology. No doubt, the international socialisation literature is more interested in the initial, if not superficial, stage of state compliance at the international level than in realities at the domestic level. But the action–identity gap (Davis, 2013) in the context of China's IP landscape requires more in-depth investigations into the variables leading to different outcomes, and a better comprehension of how well certain norms are observed and internalised by some but ignored or rejected by others. In short, the conditions for norm diffusion require not only a better understanding of international normative pressures and institutional effects, but also sensitivity to the domestic environment which facilitates or hinders such processes.

The fact that the framework of international socialisation falls short of accounting for the variegated pattern of compliance is closely linked to the second deficiency in the literature—a simplistic treatment of the norm being studied. In the socialisation literature, the emphasis on the outcome of socialisation—that is, compliance—has overshadowed the need to attend to the intrinsic complexity of the norm in question. The creation, rationalisation and promotion of a particular norm are strongly linked to specific agendas of distinct stakeholders at particular times and spaces. For example, parties pushing broader human rights protection may be different from those that reap benefits from stronger safeguards in IP. Meanwhile, some norms are more controversial than others, featuring more contentious relationships amongst stakeholders and hence requiring more intense negotiations during the process of institutionalisation. IP protection is one example, given its inherent function to distribute resources that could lead to capital accumulation. Since 'ownership of property is held against other claimants' (May, 2010, p. 53), the protection of IP confers exclusive ownership of property in things and ideas to the few against the majority.

The institutionalisation of property inevitably serves to advance the interests of specific groups in society (May, 2010, p. 46). Understanding the norm itself and the motives of norm stakeholders is as important as assessing the outcome of socialisation.

### **3. An alternative analytical framework: State interests and corporate power**

This section proposes an alternative framework to understand institutional change in relation to IP in China. It begins with a discussion of IP as a controversial subject which is primarily driven by the logic of self-interested gains by powerful rights holders who then frame it as appropriate and universal. Following this, I analyse three different phases in China's IP reform, explaining how institutional changes were driven less by socialisation effects than by interactions between structural changes in the global economy and particular powerful interests. Even when socialisation mechanisms have initially facilitated the dissemination of IP norms in China, the process of diffusion is contentious, and the outcomes vary. The analysis shows that, because it ignores the differential power of various players in influencing IP norm creation and diffusion, the socialisation approach is limited in explaining the multifaceted aspects and contested nature of IP in China. Drawing on insights from historical-materialist approaches, I examine how macro-structural forces emanating from a neoliberal global economy and interacting with local conditions have promoted (or hindered) IP reforms in China. Among various players, one set of material interests—that is, corporate interest—has been particularly successful in influencing the institutionalisation of IP, both in China and globally.

#### **3.1. The controversy of IP protection as an international norm**

The idea that IP protection should be made universal and strictly enforced is a controversial one. The institutionalisation of property safeguards originates from classical economics and the neoliberal tradition in which property laws are deemed necessary to protect private property against public/government expropriation. Before people invest in productive activity, certain appropriate institutional arrangements need to be in place which give them the freedom to use and profit from the tangible and intangible assets they own. Intellectual property rights (IPRs), as codified in laws, grant the creator certain exclusive rights over an original idea that he/she owns, allowing the creator to enjoy rewards from commercialising such an idea. Common types of IPRs include patents (ideas and knowledge), trademarks (brands and names), copyright (artistic, literary and intellectual works) and trade secrets. For neoclassical economists, IPRs raise the 'private rate of return from developing new technologies' (North, 1981, p. 164) and therefore contribute to the growth of an economy.

However, the potential economic and social benefits of comprehensive IP protection are subject to debate. Fundamentally, IP covers new ideas and knowledge so that the originator not only owns them but can also distribute them for returns. IP rules protect rights holders and in so doing, change social relations through giving privileges to certain individuals and groups, further facilitating them to accumulate capital through the exploitation of intangible assets. As Braga and Fink (1998, p. 164) point out, 'IP creates a static distortion in an economy as application of IP rules often limit availability of existing knowledge and restrict their current consumption by strengthening the market power and even monopolistic positions of certain rights holders'. The exclusive nature of IPRs has proven to bear high social costs, for example in public health where monopolistic control by pharmaceutical companies over life-saving drugs has hindered public access to essential, affordable medicine.

Despite the controversy underlying it, IP protection has been consciously pushed by specific interest groups at different historical junctures for wider and deeper application. The Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works, signed by some European countries in the 1880s, were initial attempts to establish an international IP regime (Drahos, 1998). Further efforts to extend and deepen the institutionalisation of IP protection and governance culminated in the establishment of the WIPO in 1967. However, for the US and Western European countries, these safeguards were inadequate for protecting their IP in foreign countries as exclusions contained in the legal provisions exempted certain industries (including pharmaceuticals, biotechnology and agricultural chemicals) from basic protection. By the 1980s, transformations in the global economy had provided the necessary momentum for rights holders in advanced economies to promote a global agenda. The rise of technology-intensive industries and the growing importance of technological innovation in fuelling national competitiveness had rendered IP protection more important than ever. Many US manufacturers, encountering stronger competition from Japanese and European firms, started to outsource production to less developed countries where production costs were lower. These US corporations demanded better IP protection of their innovation and brands in overseas territories.

An international campaign led by a coalition of IPR holders to rationalise IP protection as an international norm quickly gathered pace in the 1980s. These IPR holders represented a coalition of fractions of capital<sup>2</sup> largely comprising corporate interests in the US and the more advanced economies in Europe, which campaigned for stronger IP standards, legislation and enforcement on a global scale. The political influence of these capitalist interests should not be overlooked; they had ‘pertinent effects at the political level’ and were ‘represented by the parties to various political conflicts’ (Clarke, 1978, p. 35). Leading the charge in advocating for the broader diffusion of US and European IP laws and practices were corporate players from innovation- and technology-intensive sectors, including pharmaceutical, automotive and information technology industries; the commercial success of these corporations was contingent on the ability (and the provision of a favourable legal environment) to create and commercialise new ideas and cutting-edge knowledge. These corporations were transnational in nature with markets and production facilities extending beyond home territories; they were also monopolistic in terms of market dominance.

To further advance their market-driven interests, powerful corporate players formed coalitions of capital across a range of industries. Notable examples were the Intellectual Property Committee, a cross-industry organisation representing large multinational corporations (MNCs) including General Electric, Johnson & Johnson, General Motors and others; and the Pharmaceutical Manufacturers’ Association formed by leading global drugs companies. Copyright-based industries were represented by the International Intellectual Property Alliance (IIPA) which covers computer software, educational publishing, music and entertainment businesses in the US. The IIPA participates in discussions with WIPO regarding copyright standards and protection. It is a powerful organisation which influences the Section 301 reviews of the US Office of Trade Representative (USTR), which tracks copyright enforcement progress in over 80 countries around the world.

Throughout the 1980s and 1990s, leading US and European multinational firms sought to position IP as a trade issue by citing poor IP protection overseas as the cause of their diminishing competitiveness (Bird, 2006). Working with governments, transnational capital framed and rationalised IP protection as key to safeguarding national interests. Their lobbying effort eventually culminated in the landmark passage of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in 1994, marking the beginning of a global IP regime. As the first global agreement to cover all forms of IP under a single set of legal mechanisms, TRIPS requires less developed economies to harmonise their domestic IP legislation and enforcement procedures with a set menu of global rules and standards, despite the diverse political, economic and social contexts of the member countries.<sup>3</sup> Signatories to TRIPS—currently standing at 164—agree to observe (at least on paper) minimum terms of IP protection, follow enforcement and dispute settlement procedures and allow for punitive trade sanctions in the event of non-compliance.

The passage of a global IP agreement binding countries across the developed and developing worlds was a victory for the select few. The agreement would have been inconceivable ‘without the concerted efforts of US-based corporate executives’ (Sell, 1999, p. 170); it was largely drafted by lawyers and economists hired by a group of US MNCs (May, 2010, p. 47). The pharmaceutical-related patent rules in TRIPS were strongly influenced by the agenda of global pharmaceutical companies at that time (Gad, 2003). TRIPS offers certain protection of intangible assets to the owners but in doing so, also perpetuates what Pagano (2014) describes as ‘intellectual monopoly capitalism’. Thus, the emergence of IP protection as a norm did not occur naturally but was influenced by leading corporate players in advanced economies. Through TRIPS and the repeated manoeuvres of US capital, the protection of IP was formalised in legal stipulations, globalised through its broad applicability to a large number of economies and, most importantly, universalised as a norm and a standard form of practice.

### 3.2. Constructing a modern IP regime in China: Drivers and rationale

Understanding how dominant interests have created and shaped the global IP regime is instructive for conceptualising China’s national IP development. China, as a late developer hoping to catch up with the advanced economies through deeper integration with the world economy, was exposed to rules and conventions crafted by the incumbents the moment it opened its door to the outside world. Among the many challenges facing China in the early 1980s, it had to battle with global capitalism, address demands from foreign (state and non-state) interests, and pursue modernisation while tactically maintaining social stability and political legitimacy at home. The nature and evolution of China’s IP strategy did not reflect a simple, straightforward norm-learning and diffusion process, but comprised a series of contentious political struggles fought on multiple fronts by state and non-state actors to maximise national interests and material gains. Global forces were also influential in shaping these battles.

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<sup>2</sup>Fractions of capital are defined as ‘some forms of political organisation of a number of individual capitals who have an interest or interests in common’ (Clarke, 1978, p. 35).

<sup>3</sup>Less developed economies were given transition periods before they fully comply with TRIPS.

Over time, different forms, coalitions or networks of interests emerged and faded, resulting in the variegated patterns of IP practices, legislation and enforcement in China. This section identifies three important phases of IP development in China and discusses the forces driving IP-related institutional change and policy outcomes.

### 3.2.1. Phase One: Fragmented IP reforms in return for market access (1978–2001)

Three distinctive phases of IP development are discernible in China's modern IP history. The first phase began with China's market reform in 1978 and lasted until its accession to the WTO in December 2001, a period which saw Chinese policymakers rushing to build a modern IP infrastructure under intense international pressure. China became a member of the WIPO in 1980 and a signatory to the Madrid Agreement Concerning International Registration of Marks in 1989. There were also important breakthroughs in domestic IP legislation: the CCP passed three major pieces of IP legislation—the Trademark Law (1982), the Patent Law (1984) and the Copyright Law (1991)—all modelled on international treaties and conventions.<sup>4</sup> Domestic IP institutions were also created, including the State Patent Bureau, the Trademark Office and the State Copyright Agency. In areas of enforcement, China established the special court of IP in 1992 to build more specialised expertise and institutions to deal with increasingly complex IP enforcement issues. Efforts were also made to reform civil courts and procedures in handling IP disputes throughout the 1990s. In 1998, the State Patent Bureau was reformed and became the State Intellectual Property Office (currently the China National Intellectual Property Administration), which became a vice-ministerial level agency reporting directly to the State Council (Dimitrov, 2009, p. 254).

The creation of the above IP institutions was very much driven by asymmetrical power relationships between China and the industrialised countries (led by the US). China largely succumbed to US demands to improve domestic IP legislation and protection in return for avoiding US trade sanctions, gaining access to foreign markets and obtaining US support for its WTO membership. CCP reformers had little to bargain with, given that Chinese leaders urgently needed to rebuild political legitimacy and economic activities after the devastating Cultural Revolution (1967–1977). For Chinese reformers, the passage of IP laws not only demonstrated the regime's commitment to harmonising domestic institutions with international ones (in response to US demands) but also helped lure foreign investors and instil confidence in them to form joint ventures with Chinese state-owned enterprises (SOEs). When firms are deciding where to invest, the scope of IP protection is a major consideration, given the positive link between IP protection and foreign direct investment (Dunning, 1994). Having access to Western technology was key to Chinese reformers as they made catching up with the West a national development goal.

Contrary to the belief that China's WIPO membership and its signature on international conventions would improve IP compliance in the country, product piracy in China escalated throughout the 1980s and 1990s. China's market reform and opening-up policies had led to a rapid rise in production and exports by Chinese manufacturers who leveraged China's relatively abundant supply of low-cost labour in the early years of reforms. Yet Chinese-made goods imitating foreign brands, ranging from apparel, records and tapes to sporting goods, also stormed the domestic market. Product counterfeiting caused serious financial damage to US IPR holders and negatively affected US trade balance with China. In the mid-1980s, it was estimated that counterfeiting of trademarks and related practices cost the US between US\$8 billion and US\$20 billion annually (Eastham, 1986). Copyright piracy from the ten most notorious countries was estimated to have caused annual damages to US businesses of up to US\$1.3 billion (Emmert, 1990, p. 1323). The software sector, with products including computer-related material and entertainment CDs/DVDs, was the worst hit. At the centre of IP disputes between China and the US in the mid-1990s was the strong dissatisfaction of US firms with Chinese violations of US copyrights on computer software, CDs, LaserDiscs and audiocassettes (Croix & Konan, 2002, p. 763).

Yet US–China frictions over IP were not simply a matter of differences in institutional arrangements between the two economies. New class relations, resulting from China's transition to a market economy, as well as the inaction of local state actors led to worsening IP violations across China. As Chinese policymakers shifted the command-economy model towards a more market-based economy, profit-seeking Chinese counterfeiters quickly emerged as a new capitalist class. They leveraged accessible foreign technology, an abundant supply of cheap labour and a huge consumer market to offer bargain-price pirated goods as alternatives to the more expensive authentic versions. They colluded with local officials, taking advantage of China's weak legal system to reap quick commercial gains in a more liberal trading environment. Despite the presence of large-scale counterfeiting activities, enforcement of IP rules by Chinese authorities remained half-hearted.

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<sup>4</sup>The Paris Convention formed the basis of the Chinese patent law, the Chinese trademark law was predicated upon the Madrid Convention, while the Chinese copyright law was based on the Universal Copyright Convention (see D. Yang & Clarke, 2005, p. 549).

It was a general pattern that local officials would organise a few high-profile campaign-style crackdowns on the production sites of counterfeiters, such as CD and cigarette factories, just days before the threatened deadlines for the US to impose trade sanctions. Yet these campaign-style raids were largely symbolic, ad hoc and ineffective (Dimitrov, 2009). Very often, they were seriously hampered by corruption, with officials taking side payments from counterfeiters, and by the inability of enforcement agencies to impose serious enough penalties for violations. As a result, it was common for counterfeiters to resume operations with the same or different products after their previous goods had been seized.<sup>5</sup> While the central government made pledges on tightening domestic IP compliance, enforcement was left to regional, provincial and local governments which had gained increased autonomy and control over local economic activities since the beginning of market reforms. It was not surprising that some local governments harboured counterfeiting activities as they were profitable and contributed to the local economy by creating hundreds or even thousands of jobs. In these cases, there was little evidence of China internalising IP norms following its broader commitment to international treaties; rather, the immediate material incentives from pirating activities and the lack of political will of local officials resulted in persistent IP violations.

### 3.2.2. Phase Two: Foreign discontent and domestic challenges (2001–2008)

Foreign pressure on China over IP compliance persisted during the second phase of IP reform in China. Adding to this were new development challenges faced by China and the demands from nascent Chinese technology companies to safeguard their new intangible assets. The CCP's approach to IP during this period underwent a fundamental shift, gradually moving away from using IP as a defensive tool to pursuing it to facilitate capital accumulation and economic growth. Meanwhile the struggle of enforcing newly established IP laws to combat counterfeiting activities continued.

China did not have a smooth first decade with the WTO. As more transnational companies shifted part of their production to Chinese factories, more Chinese counterfeiters also copied foreign designs and production processes and profited from their sales. The scale of piracy activities expanded with Chinese counterfeiters exporting products via physical shipments and newly available online platforms. Within China, piracy grew and affected a broad range of industries, from garments and consumer electronics to auto parts and pharmaceuticals (Cheung, 2009, p. 36), but these rampant activities were not met with adequate enforcement efforts from the CCP despite expectations that it would honour its treaty obligations. US discontent was aggravated by the increasing trade surplus that China was running against the US. Between 2000 and 2007, the US trade deficit against China recorded a threefold increase (from US\$83 billion in 2000 to US\$237 billion in 2007) as imports from China skyrocketed (Cheung, 2009, pp. 29–30).

Unlike the first phase of development, when foreign pressure was instrumental in the establishment of IP institutions in China, domestic realities played a major role in shaping China's IP development during this second period. Structural problems associated with China's economy came to the surface in the latter half of the 2000s; new socio-economic problems, such as rising cost of production, inequalities and social degradation, began to take their toll on the country. The development strategy of export- and investment-led industrialisation, which was based on abundant factors of production, gradually lost its edge. Rising costs of production also pointed to China's relative decline in competitive advantage as a manufacturing and investment location vis-à-vis neighbouring Southeast Asian countries. The global financial crisis of 2007–2008, during which Chinese exports suffered badly due to a sharp drop in overseas demand, reminded Chinese leaders that a heavy reliance on the global economy could be China's vulnerability. Failing to tackle these challenges would undermine social cohesion and political legitimacy.

One of the major responses of the CCP to address the structural impediments to growth was to boost domestic innovative capacity and technological standards, in the hope that indigenous innovation and technological upgrading would strengthen the competitiveness of Chinese industries and bring spillover effects to the economy. For example, innovations in the automotive sector, medical appliances and energy resources could help solve some of the acute social problems that China was trying to combat, such as pollution, water shortage and inadequate healthcare provision. The 15-year Medium and Long Term Plan of Science and Technology (2006–2020) (MLP), set out strategies to nurture a culture of innovation in Chinese enterprises, and identified sectors that were targeted for 'leapfrog' development in energy, information technology, advanced materials, biotechnology, aerospace and others (Suttmeier & Yao, 2011, p. 7). One of the priorities of national development was the promotion of indigenous innovation; the MLP set out the goal of reducing imports of foreign technology from an estimated 60 percent in 2006 to below 30 percent by 2020 (McGregor, 2010, p. 15). By the first decade of the 21st century, Chinese state elites had adopted a new political narrative in favour of innovation and IP, linking them to national interests and continued prosperity.

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<sup>5</sup>Interview with a private investigator employed by MNCs operating in China, 10 May 2018, Hong Kong.

Also lobbying for a stronger IP regime at home during this period were nascent Chinese technology companies which had begun to invest and expand overseas. Following the CCP's 'Going Out' strategy in the early 2000s, the state committed massive resources to facilitate Chinese firms tap foreign markets; meanwhile, many Chinese enterprises also developed successful internationalisation strategies to scale up overseas direct investment (see Hong & Sun, 2006). Huawei and ZTE Corporation (telecommunication equipment), Lenovo (computers) and Haier (home appliances) were some of the state-favoured enterprises which had diversified business interests at home and abroad in the early 2000s. As these bastions of the Chinese state expanded overseas, some of them faced IP charges from foreign competitors and thus became more aware of the need to protect their brands and product designs. Particularly for technology-intensive firms, building an international IP portfolio to safeguard against infringements had become a core corporate strategy. One example is Huawei. In 2003, the company was caught in a lawsuit with Cisco Systems Inc. (hereafter 'Cisco'), the leading US telecommunications network equipment maker. Cisco accused Huawei of infringing upon its IP by incorporating Cisco's proprietary software in the operating system of its routers and switches (Bose & Lyons, 2010, p. 197). It also charged Huawei for copying its user manuals and online help files of specific routers and switches (Hamblen, 2003). Both sides reached a settlement in July 2004. Huawei agreed to change the specifications of its routers and withdraw products that were based on Cisco's software from the market (Leyden, 2004).

As Cisco filed the suit at a time when Huawei was in the process of starting a new joint venture with 3Com Corp. (Cisco's competitor) to make competitive routers, Cisco's offensive could be interpreted as an attempt to block Huawei-3Com Corp. products in the US market. While IP generally protects the intangible assets of the rights holders, it can also be used as an instrument to block market entry of rivals and competitors. For Chinese policymakers and Chinese enterprises, Huawei represented an important lesson about modern international trade, highlighting the importance of technology companies building and strengthening their IP portfolios (particularly in innovation patents) in order to defend their commercial interests in cases of disputes. Huawei's interests changed as its competition with industry rivals changed, and because of its links to the political regime, its economic interests also wielded political influence on national policies. Following the settlement with Cisco, Huawei accelerated its filing of patent applications and prioritised IP in its R&D and overall business operations. It became a powerful force that pushed for stronger domestic IP institutions in terms of IP registration, legislation and enforcement, and efficient institutions that could settle disputes.

### *3.2.3. Phase three: A patent-centred national innovation drive (2008–present)*

The launch of the National Intellectual Property Strategy Outline (NIPSO) in 2008 and the National Patent Development Strategy (2011–2020) (NPDS) marked another phase in China's IP history. They signalled a new national campaign to push domestic and overseas patent applications and to spur innovation in cutting-edge and futuristic technologies. The change in the political narrative of IP in China was clear: IP was valued by rights holders and state actors as an important asset in the global race for technology.

The need to sustain long-term economic growth, the diverse interests of Chinese enterprises in the global economy and setbacks suffered by Chinese companies against foreign competitors in IP litigation were drivers of a patent-centred national innovation campaign. Patented technology was framed by state leaders as the strategic resource for raising national core competitiveness in a knowledge-driven globalised economy (Government of the PRC, 2010). Key policies in relation to the NIPSO and NPDS included improving China's capacity to create, utilise, protect and administer IP, and encouraging more enterprises to become innovators (National Intellectual Property Strategy Outline, 2021). IP protection was also emphasised by policymakers. One of the stated objectives in the strategy was to significantly reduce product piracy and copyright violations in China.

Domestic demands and the changing geography of global competition had made Chinese state actors reconsider the strategic value of IP to various economic and political objectives. Meanwhile, Chinese policymakers were also answering the demands of favoured players, in particular those who had substantial stakes in a full-fledged IP system in China. By the mid-2000s, industries within China had diversified; those that owned and thrived on IP-related assets had also expanded. More engineers, scientists, entrepreneurs and other personnel engaged in research-linked and creative industries, desired a stronger national IP system to protect their intangible interests. Moreover, certain technology-intensive industries, including telecommunications, IT, automotive and biotechnology, had begun to gain prominence; for firms operating in these industries, profit maximisation had extended from the traditional realm of tangible assets to the new frontier of intangible capital. These changes put pressure on ruling elites to reconfigure institutions, making them more friendly to capitalisation and commercialisation of intangible assets owned by important corporate players in China. This was illustrated by, among other things, the third amendment to the Chinese patent law in 2008.

While the second amendment in 2000 was largely intended to harmonise with the external demands articulated in TRIPS, the third amendment responded directly to the imperative of spurring indigenous innovation. The amendment revised about half of the original 69 articles and added 12 new ones—all aimed at promoting indigenous innovation and reducing China's dependence on foreign-owned patents (Yu, 2013, p. 15). Certain revisions reduced the restrictions on foreign entities filing patents in China while encouraging local IP holders to file for overseas patents. The amendment tightened the novelty requirements for patent filing, aimed at reducing the number of applications and grants for 'junk' patents, that is those for products with low innovation levels and limited economic value (W. N. Yang & Yen, 2009). The amendment also tightened the public exploitation of patents held by SOEs (Guan, 2014, pp. 59–61). By giving greater recognition and exclusiveness to the patents held by state-linked capital, the 2008 amendment was an important step in incentivising and empowering state-linked capital to accumulate and commercialise its intangible assets.

Ambitious IP targets were included in major development plans in the 2010s as Chinese policymakers worked out new solutions for China to possibly escape the middle-income trap—a condition that thwarts the economic progress of many developing countries after they have reached middle-income status (Lewin, Kenney, & Murmann, 2016; Ma, 2016). The 13th Five-year Plan (FYP, 2015–2020) and the Made in China 2025 (MIC2025) industrial plan committed additional state funding and support in targeted strategic and emerging sectors (National Development and Reform Commission, 2016; State Council of the PRC, 2015). The 13th FYP put great emphasis on IP and ambitious targets were set: for example, increasing invention patent ownership from 6.3 per 10,000 people in 2015 to 12 per 10,000 in 2020 (Government of the PRC, 2016).<sup>6</sup> It also targeted a rise in the number of international patent applications, from 30,000 in 2015 to 60,000 by 2020 (China Daily, 2017). Yet while these national strategies reflected China's aim to lead in new technologies (in which IP plays an important role), some measures used by state actors and Chinese enterprises to acquire IP were problematic. For example, since the announcement of MIC2025, the CCP has actively supported Chinese enterprises to acquire overseas firms, particularly those with cutting-edge technology which falls into the MIC2025 strategic sectors. In Sweden, for instance, Chinese companies have targeted leading companies in industrial products and machinery, biotech, information and communications technology, and vehicle manufacturing (see Braw, 2019). Innovation capacity and strength in industrial machinery manufacturing have also made German companies attractive targets for Chinese acquisition. In 2016, Midea, China's home appliance maker, bought Kuka, a pioneering German firm specialised in industrial robots and automation technology (Ren, 2018). A total of 68 German companies, mainly in the engineering sector, were bought by Chinese entities in that year (Nicholson & Nelson, 2018).

In a liberal trading environment, it is common for firms to engage in mergers and acquisitions. Yet many Chinese companies seeking international expansion operate on an uneven playing field, given the large amounts of state funding and subsidies they receive, which give them an unfair advantage over their competitors. With Chinese outbound mergers and acquisitions targeting innovative companies, Chinese firms can enjoy access to cutting-edge technologies and valuable talent while avoiding costly licence fees and royalties. These mercantilist actions have caused frictions with China's trading partners: the current US Biden administration continues most of the trade sanctions first imposed by the Trump administration in 2018 (Conrad, 2021); the EU has criticised China for not giving reciprocal treatment to EU businesses operating in China in terms of freedom of investment and trade and IP protection (see EU Chamber of Commerce in China, 2017). Arguably, some of the tactics used by the Chinese state and corporate players are the antithesis of open and fair trade—an international norm embraced by the WTO, of which China is a member.

More than 40 years after China joined the WIPO, China's record of IP is mixed and puzzling. On the one hand, the CCP's strong push in patent registration has led to an explosion of patenting activity in China (see Hu & Jefferson, 2009). Chinese patent applications filed under WIPO's PCT framework jumped from 782 in 2000 to 48,899 in 2017 and 69,540 in 2021, overtaking the US, Japan, South Korea and Germany (China Power Team, 2020; WIPO, 2022).<sup>7</sup> China has innovative and successful businesses across telecommunications equipment, e-commerce platforms, robotics and artificial intelligence. On the other hand, various forms of IP infringement continue and even escalate as e-commerce and online piracy become more prevalent. Underground markets in China, supported by e-commerce, produce a whole range of illicit products for domestic and overseas markets. Though Chinese leaders repeatedly stressed that achievements had been made in combating IP infringements (see China.org.cn, 2021), in 2020, China remained the main source of counterfeit products entering the US. Made-in-China products accounted for 44 percent of all product seizures made by the U.S. Customs and Border Protection, representing 50.5 percent of the total value of illegitimate products seized by the authorities (U.S. Customs and Border Protection, 2020, p. 25).

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<sup>6</sup>China filed 15.8 invention patents per 10,000 people in 2020, exceeding the target set (China.org.cn, 2021).

<sup>7</sup>There are concerns that China's patents generally have a lower grant ratio and less commercial value than those filed by the US, Japan and European countries (see He, 2021).

Products seized by US authorities included handbags, apparel, footwear, watches, jewellery, consumer electronics, as well as counterfeit and substandard COVID-19 related products, of which 51 percent originated from China (U.S. Customs and Border Protection, 2020, p. 5).

China's more recent IP reforms have developed not only as a reaction to foreign demands and pressures from international organisations, but also in response to elite interests and corporate interests to serve particular purposes in specific circumstances. The different approaches adopted, as evidenced by strong incentives driving high-value invention patent applications but weak enforcement related to piracy of lower-cost products, suggest that the diffusion of IP norms in China has been selective, largely contingent on rational calculations of state actors and corporate players. Explaining China's development patterns thus requires an understanding of how IP is used by dominant actors to serve different, sometimes conflicting, functions throughout China's development. At times, these norms were ignored as there were other more important objectives to meet, such as jobs and local economic performance. While socialisation mechanisms and international organisations may have provided some context for China to improve IP laws during the early years of market reform, changes in the global economy, the influence of corporate players and new challenges of national competitiveness all played their part in shaping China's IP policies.

#### 4. Conclusion

This paper began with a discussion of the constructivist approach to norm diffusion and the literature of international socialisation in explaining state behaviour. Using China's IP development as a case study, I argue that the constructivist approach—though helpful in highlighting the role of international organisations in disseminating certain norms to polities—neglects the bearing which politics and changing structural environments have on the creation and application of IP norms, hence rendering it inadequate to explain the complexity of state actions. Drawing on historical-materialist analyses, I propose an alternative framework to explain how emerging interests, alongside domestic and international structural changes, have led to variegated rather than consistent patterns of IP practices in China. Notably, global capitalism and the power of transnational capital played a large part in framing IP protection as a universal norm in the 1980s and 1990s. The emergence of an expanding, increasingly integrated and globalised market dominated by Western, cross-border capital during this period conditioned the ways in which China pursued modernisation and implemented IP policies during the first two decades of its market reforms.

While transnational capital (and state actors associated with it) had significant influence in transplanting Western-origin IP institutions into China in the early days, nascent domestic technology companies and new development challenges facing China have become the driving forces of IP reforms more recently. Yet despite Chinese state actors repeatedly stressing the national goal of building a robust domestic IP system, some forms of IP protection have been taken more seriously than others and the outcomes of policies pushing IP generation and enforcement have varied. These variations suggest that the diffusion of IP norms in China (as international socialisation theorists would describe it) is subject to several mediating factors, which have not been adequately addressed by the international socialisation literature.

As this paper has shown, at each phase of China's modernisation, asymmetric power relations (between China and other states), the influence of leading corporate actors and China's domestic conditions were important factors influencing how IP norms have been accepted, resisted or negotiated in China. Moreover, the policies, institutions and strategies tailored around building an IP regime in China did not arise and evolve naturally; nor were they products of mere international socialisation and social learning. The 'logic of appropriateness', advocated by constructivists, works only insofar as it is commensurate with the 'logic of the market' and material interests of dominant players in the polity. Chinese state actors, who have played a major role in modernising IP legislation in China, have been strategic and instrumental in their approach to IP reforms; when making IP policies they have been aware of the demands of influential domestic corporate players to make IP work in their favour, as well as the actual opportunities and constraints surrounding China's catch-up with the advanced economies.

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