

## China, the TRIPS Waiver, and the Global Pandemic Response

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In October 2020, India and South Africa submitted an unprecedented proposal to the Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS Council) of the World Trade Organization (WTO), calling for a temporary waiver to help combat the global pandemic.<sup>1</sup> This waiver aimed to suspend Sections 1, 4, 5, and 7 of Part II of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and the related enforcement obligations under Part III to facilitate the “prevention, containment or treatment of COVID-19.” This proposed waiver covered not only patents, but also copyrights, industrial designs, and the protection of undisclosed information (such as test or other data for pharmaceutical products).

Although China was neither a proponent nor a cosponsor of the waiver proposal, it supported the initiative. As the Chinese delegation declared at the TRIPS Council when the proposal was submitted in October 2020:

China is willing to discuss access to commodities in relation to the prevention and control of COVID-19, including medicines and vaccines under the framework of the TRIPS Agreement, and supports the discussions on possible waiver or other emergency measures to respond to the pandemic, which are “targeted, proportional, transparent and temporary”, and which do not create unnecessary barriers to trade or disruption to global supply chains.<sup>2</sup>

Such a middle-of-the-road position – or what Jeremy Youde has described as “ambiguous positioning” in global health governance<sup>3</sup> – put China between the proponents and opponents of the waiver, the latter of which included most notably

<sup>1</sup> Council for Trade-Related Aspects of Intellectual Property Rights [TRIPS Council], *Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19: Communication from India and South Africa*, WTO Doc. IP/C/W/669 (Oct. 2, 2020).

<sup>2</sup> TRIPS Council, *Minutes of Meeting: Held in the Centre William Rappard on 15–16 October and 10 December 2020*, ¶ 977, WTO Doc. IP/C/M/96/Add.1 (Feb. 16, 2021).

<sup>3</sup> Jeremy Youde, *China’s Role in Global Health Governance*, in *ROUTLEDGE HANDBOOK ON THE POLITICS OF GLOBAL HEALTH* 172, 172 (Richard Parker & Jonathan García eds., 2019).

the European Union, the United Kingdom, Switzerland, and, to some extent, the United States.

Thus far, China has played several important roles in the global pandemic response, which ranged from vaccine donation and distribution, to transfer of health and medical technology, to support for international intellectual property (IP) reforms. To provide a deeper understanding of these myriad roles, this chapter closely examines China's position in the debate on the COVID-19 TRIPS waiver at the WTO. While the chapter attributes that position to the country's changing pharmaceutical landscape and growing ambition to become an IP power, it identifies two additional contributing factors: complex international politics and choices for pandemic diplomacy.

This chapter further explores China's more assertive position toward the end of the waiver debate – specifically during the deliberations on the proposal that provided the basis of the Ministerial Decision on the TRIPS Agreement (Ministerial Decision) adopted at the Twelfth WTO Ministerial Conference in Geneva in June 2022 (MC12). This later position contrasts significantly with the deferential position China took in the first year and a half of the waiver negotiations at the TRIPS Council. Drawing eight lessons from the international debates on both the waiver and the Ministerial Decision, this chapter offers insights into the roles China can or will play in future international policy debates at the intersection of IP and public health, including those involving the next pandemic.

## 1 THE CHANGING PHARMACEUTICAL LANDSCAPE

Although some policymakers and commentators remain fixated on the somewhat outdated and oversimplified debate on China's piracy and counterfeiting problems, which have been widely documented in IP literature since the 1980s,<sup>4</sup> the country experienced an "innovative turn" in the mid-2000s, and its IP landscape has since dramatically changed.<sup>5</sup> In June 2008, the State Council adopted a National Intellectual Property Strategy, which "provided a comprehensive plan to improve the creation, utilization, protection, and administration of intellectual property rights."<sup>6</sup> Paragraph 7 specifically emphasized the need for the active development

<sup>4</sup> On my discussions of this old debate, see Peter K. Yu, *Intellectual Property, Economic Development, and the China Puzzle*, in *INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS-PLUS ERA* 173, 185–202 (Daniel J. Gervais ed., 1st ed. 2007); Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-first Century*, 50 *AM. U. L. REV.* 131 (2000); Peter K. Yu, *From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China*, 55 *AM. U. L. REV.* 901 (2006).

<sup>5</sup> Peter K. Yu, *A Half-Century of Scholarship on the Chinese Intellectual Property System*, 67 *AM. U. L. REV.* 1045, 1079–1087 (2018); Peter K. Yu, *China's Innovative Turn and the Changing Pharmaceutical Landscape*, 51 *U. PAC. L. REV.* 593, 599–608 (2020).

<sup>6</sup> Yu, *Half-Century of Scholarship*, *supra* note 5, at 1079–1085.

of independent or self-controlled IP (*zizhu zhishi chanquan*). Although this term has been frequently translated as indigenous IP – or, in a larger policy context, indigenous innovation – independent IP can be developed through the acquisition of foreign IP assets.<sup>7</sup> There is no requirement that the IP or innovation involved has to be home-grown.

A few months after the adoption of the National Intellectual Property Strategy, China undertook a complete overhaul of its Patent Law – the first revamp of a major IP law following the country’s WTO accession in December 2001. Known officially as the Third Amendment to the Patent Law, this overhaul allowed China to make substantial adjustments to the patent system based on internal needs, as opposed to external considerations.<sup>8</sup> As Guo He recounted, “The impetus for the early amendments [in 1992 and 2000] came from outside, whilst the need for the third amendment originated from within China, that is to say, the majority of the third amendment was to meet the needs of the development of the domestic economy and technology originating in China.”<sup>9</sup>

Since the Third Amendment, China has introduced important legislative amendments in different areas of IP law, including trademark, unfair competition, copyright, and patent yet again. In the pharmaceutical area, for instance, China adopted the Fourth Amendment to the Patent Law amid the pandemic in October 2020. Entering into effect on June 1, 2021, article 42 of the amended statute grants a limited extension of the patent term for up to five years to compensate for the time lost when a pharmaceutical product undergoes regulatory review.<sup>10</sup> This new provision parallels the Hatch–Waxman Act of 1984 in the United States and similar provisions on patent term extension in TRIPS-plus bilateral, regional, and plurilateral agreements. Article 76 of the amended Patent Law, along with the Provisional Measures for the Implementation of Early Resolution Mechanisms for Drug Patent Disputes, further introduced a new patent linkage system that would prevent the marketing approval of the generic version of a patented drug until after the expiration of its patent. Similar provisions can also be found in TRIPS-plus bilateral, regional, and plurilateral agreements.<sup>11</sup>

<sup>7</sup> DAN PRUD’HOMME, *DULLING THE CUTTING-EDGE: HOW PATENT-RELATED POLICIES AND PRACTICES HAMPER INNOVATION IN CHINA* 76–89 (2012); Peter K. Yu, *Five Oft-Repeated Questions about China’s Recent Rise as a Patent Power*, 2013 CARDOZO L. REV. DE NOVO 78, 93–95.

<sup>8</sup> GUO HE, *Patents*, in CHINESE INTELLECTUAL PROPERTY AND TECHNOLOGY LAWS 25, 28 (Rohan Kariyawasam ed., 2011); Peter K. Yu, *The Transplant and Transformation of Intellectual Property Laws in China*, in GOVERNANCE OF INTELLECTUAL PROPERTY RIGHTS IN CHINA AND EUROPE 20, 27–28 (Nari Lee, Niklas Bruun & Li Mingde eds., 2016).

<sup>9</sup> GUO, *supra* note 8, at 28.

<sup>10</sup> Yu, *China’s Innovative Turn*, *supra* note 5, at 604.

<sup>11</sup> Brook K. Baker, *Ending Drug Registration Apartheid: Taming Data Exclusivity and Patent/Registration Linkage*, 34 AM. J.L. & MED. 303 (2008); Carlos M. Correa, *Bilateralism in Intellectual Property: Defeating the WTO System for Access to Medicines*, 36 CASE W. RESV. J. INT’L L. 79, 88–91 (2004).

In addition, in April 2018, the National Medical Products Administration of China released the draft Provisional Measures for the Implementation of Test Data Protection for Pharmaceutical Products. Article 5 provides six years of market exclusivity to undisclosed test or other data for innovative drugs (*chuangxin yao*) and twelve years of similar protection for innovative therapeutic biological products (*chuangxin zhiliao yong shengwu zhipin*). While the WTO accession protocol already required China to offer the former, the latter would put China in parity with the United States, which offers similar protection.<sup>12</sup> The proposed standard would also increase the protections for biological products in China to a level higher than those found in regional and plurilateral trade agreements, such as the Trans-Pacific Partnership Agreement (which has been incorporated into the Comprehensive and Progressive Agreement for Trans-Pacific Partnership following the United States' withdrawal), the United States–Mexico–Canada Agreement, and the Regional Comprehensive Economic Partnership (RCEP) Agreement.<sup>13</sup>

As if these recent and proposed legislative and regulatory changes were not revealing enough, the past decade has seen the State Council issue important policy documents that called for the strengthening of the biotechnology sector and the active development of medical products and technologies. Released in May 2015, the *Made in China 2025* strategic plan identified biomedicine and high-performance medical devices as among the ten priority sectors.<sup>14</sup> The medical products and technologies that China intended to develop included “biologic-based therapeutics, such as antibody drugs, antibody-drug conjugates, new structural proteins, polypeptide drugs, and new vaccines; technologies to support individualized drug treatments (i.e., precision medicine); and breakthrough technologies, such as induced pluripotent stem cells.”<sup>15</sup>

More recently, the State Council released the Outline for Building a Powerful Intellectual Property Nation (2021–2035), setting the 2025 targets for contributions of the local patent industries to the country's gross domestic product at 13 percent. This new fifteen-year plan brings to mind the earlier National Patent Development Strategy that the State Intellectual Property Office (now the China National Intellectual Property Administration) adopted in November 2010.<sup>16</sup> That earlier plan

<sup>12</sup> 42 U.S.C. § 262(k)(7)(A).

<sup>13</sup> Yu, *China's Innovative Turn*, *supra* note 5, at 607. Later reports suggested that China might offer only ten years of protection, similar to what is found in the United States–Mexico–Canada Agreement. Mark Cohen, *Unpacking the Role of IP Legislation in the Trade War*, CHINA IPR (May 19, 2019), <https://chinaipr.com/2019/05/19/unpacking-the-role-of-ip-legislation-in-the-trade-war> (last visited Dec. 13, 2023).

<sup>14</sup> U.S. CHAMBER OF COMMERCE, *MADE IN CHINA 2025: GLOBAL AMBITIONS BUILT ON LOCAL PROTECTIONS* 10 (2017).

<sup>15</sup> GRYPHON SCIENTIFIC, LLC & RHODIUM GROUP, LLC, *CHINA'S BIOTECHNOLOGY DEVELOPMENT: THE ROLE OF US AND OTHER FOREIGN ENGAGEMENT: A REPORT PREPARED FOR THE U.S.–CHINA ECONOMIC AND SECURITY REVIEW COMMISSION* 38 (2019).

<sup>16</sup> Yu, *supra* note 7, at 80–82.

set a highly ambitious target of 2 million patents per year by 2015, which China surpassed three years before.<sup>17</sup>

The country's ambition in the IP and pharmaceutical arenas is clear. No longer content to serve only as the world's leading supplier of active pharmaceutical ingredients (API),<sup>18</sup> China now wants to become a major player in the development of research-based pharmaceutical and biological products.<sup>19</sup> As I observed in a recent book chapter:

Today, [China] has the world's second largest pharmaceutical market, behind only the US. With a market "worth more than \$120 billion," China "account[s] for 20% of total global API output" and "produces over 2000 API drug products, with annual production capacity exceeding 2 million tons." In addition, the country produces about 4 percent of the world's new pharmaceutical products. It also has a strong and vibrant market in traditional medicine, which in 2015 "account[ed] for 28.55% of the total [output value] generated by the country's pharmaceutical industry."<sup>20</sup>

In terms of health patent publications, the *Global Innovation Index 2019* report placed China among the top three in the world in the areas of biotechnology, pharmaceuticals, and medical technology, based on publications from 2010 to 2017.<sup>21</sup>

In the past decade, China has made important strides in pushing for the greater use and development of artificial intelligence and machine learning in the health area. As Tencent CEO Ma Huateng observed in the same *Global Innovation Index* report:

Th[e] growth in national health expenditures is creating opportunities for medical AI in China. According to Tractica's forecast, China's AI medical market is developing rapidly, with the market size soaring from 9.661 billion yuan in 2016, and 13.65 billion yuan in 2017, to 20.4 billion yuan in 2018, maintaining a compound annual growth rate of more than 40%. At the same time, Chinese medical institutions and businesses are taking a proactive attitude towards AI. Nearly 80% of

<sup>17</sup> Peter K. Yu, *When the Chinese Intellectual Property System Hits* 35, 8 QUEEN MARY J. INTELL. PROP. 3, 5 (2018).

<sup>18</sup> WORLD HEALTH ORGANIZATION, CHINA POLICIES TO PROMOTE LOCAL PRODUCTION OF PHARMACEUTICAL PRODUCTS AND PROTECT PUBLIC HEALTH 17–18 (2017) (prepared by Frederick Abbott); Peter K. Yu, *Access to Medicines, BRICS Alliances, and Collective Action*, 34 AM. J.L. & MED. 345, 363 (2008).

<sup>19</sup> GRYPHON SCIENTIFIC, LLC & RHODIUM GROUP, LLC, *supra* note 15, at 3; WORLD HEALTH ORGANIZATION, *supra* note 18, at 17, 29; Peter K. Yu, *Data Exclusivities and the Limits to TRIPS Harmonization*, 46 FLA. ST. U. L. REV. 641, 694 (2019).

<sup>20</sup> Peter K. Yu, *From Struggle to Surge: China's TRIPS Experience and Its Lessons for Access to Medicines*, in INTELLECTUAL PROPERTY LAW AND ACCESS TO MEDICINES: TRIPS AGREEMENT, HEALTH, AND PHARMACEUTICALS 172, 179 (Srividhya Ragavan & Amaka Vanni eds., 2021).

<sup>21</sup> Soumitra Dutta et al., *The Global Innovation Index 2019*, in GLOBAL INNOVATION INDEX 2019: CREATING HEALTHY LIVES – THE FUTURE OF MEDICAL INNOVATION 1, 48 (Soumitra Dutta, Bruno Lanvin & Sacha Wunsch-Vincent eds., 2019).

hospitals and medical companies are planning to, or already have, carried out medical AI applications and more than 75% of hospitals believe that such applications will become popular in the future.<sup>22</sup>

From 1985 to 2017, “China ranked fourth in the total number of healthcare AI patent applications filed, contributing to 12% of the total.”<sup>23</sup> In 2016, China already “surpassed Japan and the European Union to become the world’s second largest healthcare AI applicant . . . which reflects the strong momentum of medical technology innovation in China.”<sup>24</sup>

Taken together, all of these developments illustrate the dramatic transformation of China’s pharmaceutical landscape following its innovative turn in the mid-2000s and the country’s growing ambition to become an IP power. The push for a TRIPS waiver that would suspend close to half of the provisions in the TRIPS Agreement during the COVID-19 pandemic therefore did not sit well with the country’s current policy position, even if such a waiver would have benefitted certain sectors in China as well as those in need of greater access to COVID-19 vaccines, diagnostics, and therapeutics. Being at the forefront of the waiver debate could also have created complications, if not confusion, over the country’s overall strategic direction in the IP area. After all, the rhetoric used in many recent IP policy documents in China goes in the opposite direction of the arguments used to support the waiver.<sup>25</sup>

## 2 COMPLEX INTERNATIONAL POLITICS

Although China’s changing pharmaceutical landscape and growing ambition to become an IP power have explained its reluctance to move to the forefront of the debate on the COVID-19 TRIPS waiver, there were two other contributing factors. The first concerned the complex international politics at the intersection of IP and public health. These politics caused China to maintain a lower profile than many policymakers and commentators would expect from a country with strong developmental needs and serious pandemic-related public health challenges.<sup>26</sup> The second contributing factor, which the next section will discuss, related to the availability of a wide array of choices for the country’s pandemic diplomacy.

Historically, China has kept a rather low profile in international organizations – be it the WTO, the World Health Organization (WHO), or the World Intellectual

<sup>22</sup> Ma Huateng, *Application of Artificial Intelligence and Big Data in China’s Healthcare Services*, in GLOBAL INNOVATION INDEX 2019, *supra* note 21, at 103.

<sup>23</sup> *Id.* at 104.

<sup>24</sup> *Id.*

<sup>25</sup> On the important role of rhetoric in advancing IP reforms in China, see E. Richard Gold, Erica Shadede & Jean-Frédéric Morin, *Does Intellectual Property Lead to Economic Growth? Insights from a Novel IP Dataset*, 13 REGUL. & GOVERNANCE 107, 108–109 (2019); Yu, *China Puzzle*, *supra* note 4, at 188–193.

<sup>26</sup> On China’s reluctance to take a stronger leadership role in global health governance, see Youde, *supra* note 3, at 173–175.

Property Organization (WIPO).<sup>27</sup> Such a low profile can be traced back to former Chinese leader Deng Xiaoping's plea for practicing self-restraint in the early 1990s, or even earlier.<sup>28</sup> Among his guiding words were "hide our strength and bide our time" (*taoguang yanghui*) and "be good at keeping a low profile" (*shanyu shouzhuo*).<sup>29</sup> Despite the plea of the late elder statesman, the past decade has seen China becoming more assertive in the international arena. Examples include the country's dominant role in the RCEP negotiations,<sup>30</sup> its high-profile development of the Belt and Road Initiative,<sup>31</sup> and its active mask and vaccine diplomacy during the COVID-19 pandemic. Beyond the IP arena, one could also add other instances where China has shown what commentators have referred to as the "wolf warrior" mentality, a term derived from the name of a popular nationalistic Chinese film franchise.<sup>32</sup> This mentality was on full display in the highly contentious exchange between Chinese Communist Party politburo member and former foreign minister Yang Jiechi and US Secretary of State Antony Blinken in the first major US–China meeting under the Biden Administration in Alaska in March 2021. This heated exchange was widely covered by mainstream media and China observers.

There are at least four reasons why China kept a low profile during most of the debate on the COVID-19 TRIPS waiver at the WTO. First, China struggled considerably at the domestic level in the early days of the pandemic. It was also conscious of the need to prepare for later waves of the pandemic and the emergence

<sup>27</sup> Henry S. Gao, *China's Participation in the WTO: A Lawyer's Perspective*, 11 SING. YB. INT'L L. 41, 69 (2007); Peter K. Yu, *Sinic Trade Agreements and China's Global Intellectual Property Strategy*, in INTELLECTUAL PROPERTY AND FREE TRADE AGREEMENTS IN THE ASIA-PACIFIC REGION 247, 273–277 (Christoph Antons & Reto M. Hilty eds., 2015); Peter K. Yu, *The Middle Kingdom and the Intellectual Property World*, 13 OR. REV. INT'L L. 209, 229–237 (2011).

<sup>28</sup> GERALD CHAN, CHINA AND INTERNATIONAL ORGANIZATIONS: PARTICIPATION IN NONGOVERNMENTAL ORGANIZATIONS SINCE 1971 (1989); CHINA JOINS THE WORLD: PROGRESS AND PROSPECTS (Elizabeth Economy & Michel Oksenberg eds., 1999); HAROLD K. JACOBSON & MICHEL OKSENBERG, CHINA'S PARTICIPATION IN THE IMF, THE WORLD BANK, AND GATT: TOWARD A GLOBAL ECONOMIC ORDER (1990).

<sup>29</sup> Teng Chung-chian, *Hegemony or Partnership: China's Strategy and Diplomacy toward Latin America*, in CHINA AND THE DEVELOPING WORLD: BEIJING'S STRATEGY FOR THE TWENTY-FIRST CENTURY 84, 88 (Joshua Eisenman, Eric Heginbotham & Derek Mitchell eds., 2007). The difficult-to-translate phrase *taoguang yanghui* "literally means 'hide light, nurture obscurity.'" TOM MILLER, CHINA'S ASIAN DREAM 26 (2017).

<sup>30</sup> Peter K. Yu, *The RCEP Negotiations and Asian Intellectual Property Norm Setters*, in THE FUTURE OF ASIAN TRADE DEALS AND IP 85, 103–105 (Liu Kung-Chung & Julien Chaisse eds., 2019).

<sup>31</sup> On the Belt and Road Initiative in the IP context, see Lee Jyh-an, *The New Silk Road to Global IP Landscape*, in LEGAL DIMENSIONS OF CHINA'S BELT AND ROAD INITIATIVE 417 (Lutz-Christian Wolff & Xi Chao eds., 2016); Peter K. Yu, *Building Intellectual Property Infrastructure along China's Belt and Road*, 14 U. PA. ASIAN L. REV. 275 (2019); Peter K. Yu, *China, "Belt and Road" and Intellectual Property Cooperation*, 14 GLOBAL TRADE & CUSTOMS J. 244 (2019).

<sup>32</sup> COLIN KAHL & THOMAS WRIGHT, AFTERSHOCKS: PANDEMIC POLITICS AND THE END OF THE OLD INTERNATIONAL ORDER 107–111 (2021); MARGARET MYERS, CHINA'S COVID-19 DIPLOMACY IN LATIN AMERICA AND THE CARIBBEAN: MOTIVATIONS AND METHODS 8–11 (2021).

of new variants, such as Delta, Lambda, and Omicron. When a country was busy addressing domestic challenges and priorities, it understandably devoted less attention to international matters. This experience brings to mind China's approach in the first few years of the WTO accession. As Henry Gao observed in the mid-2000s:

As a newly-acceded Member, China [was] required to undertake a lot of commitments, many of which [were] more onerous than those of existing WTO members. It [was] already a humongous challenge for China to try to implement these commitments. After having been in the spotlight for fifteen years, what China need[ed was] some quiet breathing space. Shouldering a leadership role would put China back on the front stage again and encourage other Members to pressure China to make more concessions.<sup>33</sup>

Second, because the outbreak of the SARS-CoV-2 virus was first reported in Wuhan, the origin of the virus continued to attract attention from the United States and other members of the international community.<sup>34</sup> In early 2021, the WHO undertook an investigation in China as part of a larger global study of the origins of the SARS-CoV-2 virus.<sup>35</sup> Although the WHO released its report in March, many countries and mainstream media remained dissatisfied with that report, with some calling for a new investigation. Policymakers, commentators, and the media also expressed concern about the lower efficacy of the COVID-19 vaccines produced in China, which were developed using an inactivated SARS-CoV-2 virus rather than the more innovative mRNA or adenovirus technologies.<sup>36</sup>

Third, China remained entangled in disputes over the TRIPS Agreement with both the United States and the European Union. In 2018, the United States Trade Representative (USTR) released a lengthy report on its Section 301 investigation into Chinese laws, policies, and practices in the areas of IP, innovation, and technology development.<sup>37</sup> This report was quickly followed by a substantial

<sup>33</sup> Gao, *supra* note 27, at 70.

<sup>34</sup> Peter K. Yu, *Modalities, Challenges, and Possibilities: An Introduction to the Pharmaceutical Innovation Symposium*, 7 TEX. A&M J. PROP. L. 1, 22 (2021).

<sup>35</sup> WHO-Convened Global Study of Origins of SARS-CoV-2: China Part, WORLD HEALTH ORGANIZATION (Apr. 6, 2021), [www.who.int/docs/default-source/coronaviruse/final-joint-report\\_origins-studies-6-april-201.pdf](http://www.who.int/docs/default-source/coronaviruse/final-joint-report_origins-studies-6-april-201.pdf) (last visited Dec. 13, 2023).

<sup>36</sup> China Power Team, *Is China's Covid-19 Diplomacy Succeeding?*, CENTER FOR STRATEGIC & INTERNATIONAL STUDIES (Nov. 9, 2023), <https://chinapower.csis.org/china-covid-medical-vaccine-diplomacy/> (last visited Dec. 13, 2023); Julia Hollingsworth, Saruul Enkhbold & Amy Sood, *Why Covid-19 Outbreaks in Countries Using Chinese Vaccines Don't Necessarily Mean the Shots Have Failed*, CNN (Jul. 3, 2021), <https://edition.cnn.com/2021/07/02/china/vaccines-sinovac-sinopharm-intl-hnk-dst/index.html> (last visited Dec. 13, 2023). From a public health standpoint, Chinese vaccines are still efficacious and have helped combat COVID-19.

<sup>37</sup> OFFICE OF THE U.S. TRADE REPRESENTATIVE, FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974 (2018).



update.<sup>38</sup> Among the problems identified were forced technology transfer, discriminatory licensing restrictions, computer hacking, trade secret theft, and industrial espionage. Based on the first report, the United States filed its second TRIPS complaint against China, alleging that “China deprive[d] foreign intellectual property rights holders of the ability to protect their intellectual property rights in China as well as freely negotiate market-based terms in licensing and other technology-related contracts.”<sup>39</sup>

More than two months later, the European Union filed a similar but more extended complaint in *China – Certain Measures on the Transfer of Technology*.<sup>40</sup> Like its US counterpart, this complaint concerned what commentators have referred to as “forced technology transfer.”<sup>41</sup> That issue directly relates to the COVID-19 TRIPS waiver, a key goal of which is to bypass the protections offered by the TRIPS Agreement to facilitate the transfer of technology to developing countries in need. Although the issues involved in the waiver debate differed from those implicated by the TRIPS complaints filed by the United States and the European Union against China – with the former focusing on a public health emergency that has claimed millions of human lives and caused worldwide devastation and disruption – both the waiver and the WTO complaints concerned efforts to transfer technology without the authorization of IP rights holders.<sup>42</sup>

Finally, China might have engaged in the practice of strategic deference, considering that article 4 of the TRIPS Agreement will extend “any advantage, favour, privilege or immunity . . . immediately and unconditionally” to China regardless of its position. Such strategic deference also resembles China’s past engagements in the international arena. For example, during the RCEP negotiations, the country did not advance any proposal for the negotiating text. The four texts that provided the basis of the early rounds of the negotiations originated from the Association of Southeast Asian Nations (ASEAN), India, Japan, and South Korea.<sup>43</sup> To be sure,

<sup>38</sup> OFFICE OF THE U.S. TRADE REPRESENTATIVE, UPDATE CONCERNING CHINA’S ACTS, POLICIES AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION (2018).

<sup>39</sup> Request for Consultations by the United States, *China – Certain Measures Concerning the Protection of Intellectual Property Rights*, WTO Doc. WT/DS542/1 (Mar. 26, 2018). The first TRIPS dispute concerned the high thresholds for criminal procedures and penalties in the IP area, the failure of the Chinese customs authorities to properly dispose of infringing goods seized at the border, and the denial of copyright protection to works that have not been authorized for publication or dissemination within China. On this dispute, see Peter K. Yu, *The TRIPS Enforcement Dispute*, 89 NEB. L. REV. 1046 (2011); Peter K. Yu, *TRIPS Enforcement and Developing Countries*, 26 AM. U. INT’L L. REV. 727 (2011).

<sup>40</sup> Request for Consultations by the European Union, *China – Certain Measures on the Transfer of Technology*, WTO Doc. WT/DS549/1 (Jun. 6, 2018).

<sup>41</sup> For my discussion of forced technology transfer, see Peter K. Yu, *The U.S.–China Forced Technology Transfer Dispute*, 52 SETON HALL L. REV. 1003 (2022).

<sup>42</sup> *Id.* at 1039–1047.

<sup>43</sup> Yu, *supra* note 30, at 89; Peter K. Yu, *The RCEP and Trans-Pacific Intellectual Property Norms*, 50 VAND. J. TRANSNAT’L L. 673, 683–684 (2017).

China was interested in including an obligation to disclose in patent applications the origin of the biological resources and traditional knowledge used in inventions, similar to article 26 of the Chinese Patent Law.<sup>44</sup> Nevertheless, it strategically deferred to other RCEP negotiating parties that were pushing for a similar position. Notably, India, which was active in the negotiations before its eventual withdrawal in November 2019, advanced a ten-paragraph proposal to cover the area of genetic resources, traditional knowledge, and folklore.<sup>45</sup>

Even before the RCEP negotiations, China repeatedly engaged in the practice of strategic deference. When the United States proposed to “issue a joint statement in support of the Doha agenda,” China declined.<sup>46</sup> Likewise, when Argentina and Brazil made their now famous proposal for the establishment of the WIPO Development Agenda, China did not join them, even though it was one of the major leaders in the developing world.<sup>47</sup> The deferential position China took in the waiver debate was actually not that different from its previous policy positions, especially those taken in the first few years of its WTO membership. The waiver-related position only stood out because it differed significantly from the more assertive positions that China has taken in the international arena in recent years. That many observers remain fixated on the old narrative on China’s piracy and counterfeiting problems has also led them to mistakenly assume that the country’s IP positions would align more closely with those of the Global South.

### 3 CHOICES FOR PANDEMIC DIPLOMACY

A third contributing factor that accounted for China’s position in the debate on the COVID-19 TRIPS waiver was the availability of a wide array of choices for the country’s pandemic diplomacy. Following the outbreak of COVID-19, countries across the world actively engaged in such diplomacy – whether the country was developed (such as the United States or members of the European Union) or emerging (such as China or India). A key goal of pandemic diplomacy is to gain soft power and goodwill through the donation or delivery of health products and technologies to other countries or through the support of policy positions taken by these countries,<sup>48</sup> such as those relating to the proposed COVID-19 TRIPS waiver.

<sup>44</sup> Yu, *supra* note 43, at 716–717.

<sup>45</sup> *Id.* at 716.

<sup>46</sup> Julia Ya Qin, *China, India and WTO Law*, in CHINA, INDIA AND THE INTERNATIONAL ECONOMIC ORDER 167, 188 (Muthucumaraswamy Somarajah & Wang Jianguy eds., 2010).

<sup>47</sup> Yu, *Middle Kingdom*, *supra* note 27, at 225.

<sup>48</sup> On China’s pandemic diplomacy, see MARÍA EUGENIA BRIZUELA DE ÁVILA, RIYAD INSANALLY, CLAUDIA TREVISAN & BOSCO MARTI, US–CHINA VACCINE DIPLOMACY: LESSONS FROM LATIN AMERICA AND THE CARIBBEAN (Wazim Mowla ed., 2022); MYERS, *supra* note 32; Peter K. Yu, *Vaccine Development, the China Dilemma, and International Regulatory Challenges*, 55 N.Y.U. J. INT’L L. & POL. 739 (2023); Denny Roy, *China’s Pandemic Diplomacy* (East–West Center, Asia Pacific Issues No. 144, 2020); China Power Team, *supra* note 36. On pandemic

In the early days of the pandemic, China was very eager to send face masks, other personal protective equipment, and ventilators abroad, especially to developing and least-developed countries. A recent study conducted by the Center for Strategic and International Studies on China's pandemic diplomacy also reported that the country had "dispatched teams of medical professionals and advisors to assist at least 63 countries in handling the pandemic."<sup>49</sup> At the opening of the 73rd World Health Assembly in May 2020, President Xi Jinping pledged "\$2 billion over two years to help other countries respond to the impact of the coronavirus pandemic."<sup>50</sup> As locally developed vaccines became available through Sinopharm and Sinovac, the country also sent hundreds of millions of doses abroad. Meanwhile, more than twenty countries hosted trials of Chinese vaccines.<sup>51</sup> By October 2021, China had already delivered more than a billion doses of COVID-19 vaccines to over 100 countries, out of which at least tens of millions were donations.<sup>52</sup>

Although China did not immediately join the COVID-19 Vaccines Global Access (COVAX) Initiative – much to the disappointment of its developing country allies and the supportive nongovernmental organizations – it became more active on the vaccine front after joining the initiative in October 2020.<sup>53</sup> (By comparison, the United States did not join COVAX until a few months later.) In August 2021, at an international forum on vaccine cooperation in China, President Xi pledged the supply of 2 billion doses of COVID-19 vaccines to other countries by the end of the year.<sup>54</sup> He also promised to contribute \$100 million to the Gavi COVAX Advance

diplomacy in general, see PETER J. HOTEZ, PREVENTING THE NEXT PANDEMIC: VACCINE DIPLOMACY IN A TIME OF ANTI-SCIENCE (2021); KAHL & WRIGHT, *supra* note 32.

<sup>49</sup> China Power Team, *supra* note 36.

<sup>50</sup> Evelyn Cheng, *China's Xi Pledges \$2 billion to Help Fight Coronavirus*, CNBC (May 18, 2020), [www.cnbc.com/2020/05/18/chinas-xi-pledges-2-billion-to-help-fight-coronavirus-at-who-meeting.html](http://www.cnbc.com/2020/05/18/chinas-xi-pledges-2-billion-to-help-fight-coronavirus-at-who-meeting.html) (last visited Dec. 13, 2023).

<sup>51</sup> China Power Team, *supra* note 36.

<sup>52</sup> Bridge Consulting (Beijing) Co., *China COVID-19 Vaccine Tracker*, <https://bridgebeijing.com/our-publications/our-publications-1/china-covid-19-vaccines-tracker/> (last visited Jul. 16, 2022); Song Wanyuan, *Covid-19 Vaccines: Has China Made More than Other Countries Combined?*, BBC (Oct. 10, 2021), [www.bbc.com/news/58808889](http://www.bbc.com/news/58808889) (last visited Dec. 13, 2023).

<sup>53</sup> Hemant Adlakha, *Did China Join COVAX to Counter or Promote Vaccine Nationalism?*, DIPLOMAT (Oct. 23, 2020), <https://thediplomat.com/2020/10/did-china-join-covax-to-counter-or-promote-vaccine-nationalism/> (last visited Dec. 13, 2023); Colin Qian & Stephanie Nebel, *China Joins WHO-Backed Vaccine Programme COVAX Rejected by Trump*, REUTERS (Oct. 8, 2020), [www.reuters.com/article/us-health-coronavirus-china-covax/china-joins-who-backed-vaccine-programme-covax-rejected-by-trump-idUSKBN26U027](http://www.reuters.com/article/us-health-coronavirus-china-covax/china-joins-who-backed-vaccine-programme-covax-rejected-by-trump-idUSKBN26U027) (last visited Dec. 13, 2023).

<sup>54</sup> Wu Huizhong, *China Pledges 2 Billion Vaccines Globally through Year's End*, ASSOCIATED PRESS (Aug. 6, 2021), <https://apnews.com/article/joe-biden-business-health-china-coronavirus-pandemic-7b3a7ef05f949b6976d4cf7f69bba71d0> (last visited Dec. 13, 2023).

Market Commitment, enabling the provision of donor-funded doses of COVID-19 vaccines to low- and middle-income countries.<sup>55</sup>

Considering that China had already made a conscious and deliberate choice to provide vaccines to other parts of the world, the country might not have felt compelled to push aggressively for the adoption of the COVID-19 TRIPS waiver as part of its pandemic diplomacy. Indeed, the export of Chinese vaccines to countries in need, especially those in the developing world, would have allowed China to score more diplomatic points and attain greater soft power than the mere endorsement of a proposal that was advanced by India and South Africa and that had already earned the support of over sixty WTO members.

There are other reasons. First, there were many different policy and diplomatic options that would help China achieve the end goal of promoting global solidarity and enhancing access to vaccines, treatments, and other health products and technologies.<sup>56</sup> These options included vaccine donation and distribution, transfer of health and medical technology, support for the creation of regional or local production capacity, and active participation in international IP reforms (including the negotiation of the COVID-19 TRIPS waiver at the WTO). Because these options were not mutually exclusive, China could easily have supported multiple options simultaneously. The more options there were, the less urgent it would be for China to push aggressively for the adoption of the waiver at the WTO.

Second, the waiver remained controversial in the international arena, especially in the developed world. Even the United States, which made a high-profile announcement of its support for text-based negotiations at the WTO, declined to extend support beyond the narrow area of patents in vaccines. In such a polarized environment, it is understandable why China found it worthwhile to take a step back and hedge the risks of supporting the waiver. Had the proposed instrument been adopted, China would have shown its support. The WTO's most-favored-nation treatment would also have enabled the country to benefit from this new arrangement. Given that the waiver was rejected – or at least adopted in a substantially different form – China successfully preserved its hard-earned political capital by maintaining a healthy distance from the proposal.

Finally, Sinopharm and Sinovac derived substantial financial benefits from the international sale of COVID-19 vaccines. In July 2021, the COVAX Initiative entered into an agreement to purchase 550 million doses from China, earning the ire of US politicians, commentators, and the mass media.<sup>57</sup> Likewise, studies have shown that

<sup>55</sup> *China Pledges US\$100 Million towards Equitable Access to COVID-19 Vaccines for Lower-Income Countries*, GAVI (Aug. 6, 2021), [www.gavi.org/news/media-room/china-pledges-us-100-million-towards-equitable-access-covid-19-vaccines](http://www.gavi.org/news/media-room/china-pledges-us-100-million-towards-equitable-access-covid-19-vaccines) (last visited Dec. 13, 2023).

<sup>56</sup> On China's health diplomacy in Africa, see Youde, *supra* note 3, at 175–177.

<sup>57</sup> Julia Hollingsworth, *COVAX Signs Deal for 550 Million Chinese Covid-19 Vaccines amid Questions over Efficacy*, CNN (Jul. 13, 2021), [www.cnn.com/2021/07/13/asia/covax-china-vaccines-intl-hnk/index.html](http://www.cnn.com/2021/07/13/asia/covax-china-vaccines-intl-hnk/index.html) (last visited Dec. 13, 2023).

a significantly large portion of the COVID-19 vaccines produced in China were sold rather than donated.<sup>58</sup> Thus, the proposed waiver would have undermined these commercial activities.

In short, it is not difficult to understand why China took a middle-of-the-road position in the debate on the COVID-19 TRIPS waiver at the WTO. There was simply no urgent need for the country to move to the forefront of that debate to maximize its global pandemic diplomacy. All it needed to do was refrain from taking actions that would undermine the waiver's support.

#### 4 THE WTO MINISTERIAL DECISION

As the previous sections have shown, China was rather deferential in the first year and a half of the waiver negotiations at the TRIPS Council. Nevertheless, it became significantly more assertive toward the end of the debate – specifically during the deliberations on the proposal that provided the basis of the Ministerial Decision adopted at MC12.<sup>59</sup> This section explores why China changed its position in the run-up to this decision.

A month after the United States changed its negotiating position on the waiver in May 2021, the WTO membership agreed to begin text-based negotiations. Nevertheless, these negotiations were stalled by such contentious issues as the scope of the waiver (in relation to both the products and IP rights covered), the waiver's duration, implementation issues, and the protection of undisclosed information (including regulatory data).<sup>60</sup> In December 2021, the European Union, India, South Africa, and the United States, with the support of the WTO Secretariat, began their own consultations to find a compromise. While China initially welcomed the use of small-group negotiations to break the impasse,<sup>61</sup> it found those negotiations highly problematic when they produced an outcome document that sought to single out China for exclusion.

Although the WTO did not immediately release this document despite announcing a major negotiation breakthrough in March 2022, *Stat News* published a leaked version of the document online.<sup>62</sup> Footnote 1 of that document limited the eligibility

<sup>58</sup> China Power Team, *supra* note 36.

<sup>59</sup> World Trade Organization, Ministerial Decision on the TRIPS Agreement, WTO Doc. WT/MIN(22)/30 (Jun. 22, 2022); Peter K. Yu, *The COVID-19 TRIPS Waiver and the WTO Ministerial Decision*, in *INTELLECTUAL PROPERTY RIGHTS IN TIMES OF CRISIS 1* (Jens Schovsbo ed., 2024).

<sup>60</sup> TRIPS Council, *Minutes of Meeting: Held in the Centre William Rappard on 20 July 2021*, ¶ 4, WTO Doc. IP/C/M/101 (Jul. 23, 2021).

<sup>61</sup> TRIPS Council, *Minutes of Meeting: Held in the Centre William Rappard on 13–14 October*; 5, 18 and 29 November; and 16 December 2021, ¶ 507, WTO Doc. IP/C/M/103/Add.1 (Feb. 24, 2022).

<sup>62</sup> Ed Silverman, *A Compromise Is Reached on an Intellectual Property Waiver for Covid-19 Vaccines, but Does It Go Far Enough?*, *STAT NEWS* (Mar. 15, 2022), [www.statnews.com/pharmalot/2022/03/15/covid19-vaccine-patents-wto/](http://www.statnews.com/pharmalot/2022/03/15/covid19-vaccine-patents-wto/) (last visited Dec. 13, 2023).

of the proposed arrangement to “any developing country Member that [had] exported less than 10 percent of world exports of COVID-19 vaccine doses in 2021.” Because China had slightly over a third of these exports in December 2021, according to the WTO–IMF COVID-19 Vaccine Trade Tracker, the country was de facto the only developing economy that would have been disqualified for the proposed arrangement. By the time the WTO officially released the outcome document on May 3, footnote 1 added new bracketed language stating that “[d]eveloping country Members with capacity to export vaccines are encouraged to opt out from this Decision.”

At the outset, it is not difficult to understand why some WTO members believed that the proposed arrangement should not be available to a country that had the world’s largest or second largest economy<sup>63</sup> and that accounted for a third of the world’s COVID-19 vaccine exports. After all, the arrangement was negotiated primarily to help countries in need – in particular, those with no or insufficient capacity to manufacture vaccines.<sup>64</sup> It is also no secret that the United States – and likely also the European Union – firmly believed that any negotiated concession in the COVID-19 context should not benefit a major trade power like China, whether due to domestic politics, global rivalry, or the developed countries’ growing effort to limit the special and differential treatment of developing countries.<sup>65</sup>

On China’s side, there were also good reasons why the country had limited interest in using the proposed arrangement. As noted earlier, China-based Sinopharm and Sinovac derived substantial financial benefits from the international sale of COVID-19 vaccines during the pandemic. Waiving IP rights, even temporarily, would undermine these commercial endeavors. It was quite telling that a month before the adoption of the Ministerial Decision, China announced in the General Council’s meeting its intention not to use the proposed arrangement provided that the WTO membership agreed to drop the exclusionary language in footnote 1.

Such language was particularly problematic for China. It is one thing to opt out of the proposed arrangement but quite another to be disqualified by other trade powers without ever being consulted. To a large extent, the proposed language had created a major diplomatic blunder by overlooking the border closure to Chinese visitors in the early days of the pandemic, the importance of “face” (*mianzi*) in Chinese culture,<sup>66</sup> and the country’s historical struggle with what historians have referred

<sup>63</sup> Whether China is the world’s largest or second largest economy depends on whether one calculates the gross domestic product or gross national income using purchasing power parity estimates.

<sup>64</sup> Jayashree Watal, *Analysis of the 12th WTO Ministerial Conference Decision on the TRIPS Agreement*, EJIL: TALK! (Jul. 8, 2022), [www.ejiltalk.org/analysis-of-the-12th-wto-ministerial-conference-decision-on-the-trips-agreement/](http://www.ejiltalk.org/analysis-of-the-12th-wto-ministerial-conference-decision-on-the-trips-agreement/) (last visited Dec. 13, 2023).

<sup>65</sup> Sangeeta Shashikant, *Intense IP Negotiations Are Underway, Resolution on Eligibility Criteria Outstanding*, TWN INFO SERVICE ON WTO & TRADE ISSUES (Jun. 16, 2022), <https://twn.my/title2/wto.info/2022/ti220623.htm> (last visited Dec. 13, 2023).

<sup>66</sup> Yu, *From Pirates to Partners II*, *supra* note 4, at 952.

to as the “century of humiliation” – an extended period in the nineteenth and early twentieth centuries during which China was reduced to a semi-colony.<sup>67</sup> The exclusion looked even worse when the consultations that generated the new proposal involved only 4 out of more than 160 WTO members – or less than a fifth of the WTO membership if all EU member states were counted (notwithstanding the fact that only some EU members opposed the waiver).

As a result of this proposed exclusion, China quickly moved from a deferential position to a more assertive one, similar to those policy positions it took when it perceived a threat to its state sovereignty. The resistance from China, along with the usual complications regarding eligibility, eventually caused footnote 1 to become the last issue to be resolved by WTO delegates.<sup>68</sup> When the Ministerial Decision was finally adopted in the wee hours of the last day of MC12, that footnote was changed to the following:

For the purpose of this Decision, all developing country Members are eligible Members. Developing country Members with existing capacity to manufacture COVID-19 vaccines are encouraged to make a binding commitment not to avail themselves of this Decision. Such binding commitments include statements made by eligible Members to the General Council, such as those made at the General Council meeting on 10 May 2022, and will be recorded by the Council for TRIPS and will be compiled and published publicly on the WTO website.

Even though the outcome is the same – that China would not use the new arrangement facilitated by the Ministerial Decision – China likely found the adopted language more palatable because it was not an imposition by other trade powers but a recognition of the country’s sovereign decision to opt out of the proposed arrangement.

As many commentators rightly recognize, the adopted language still posed a serious problem from a public health standpoint. Excluding a country like China would greatly reduce both the global demand and global supply of the COVID-19-related health products and technologies.<sup>69</sup> A very high volume of these products and technologies were produced or consumed in China. Nevertheless, the danger of introducing eligibility restrictions is outside the scope of this chapter.<sup>70</sup> Such restrictions would affect not only China, but all developed countries as well as those developing countries that opted out of the arrangement. To a large extent, the

<sup>67</sup> IMMANUEL C. Y. HSÜ, *THE RISE OF MODERN CHINA* 139–219, 295–350, 387–406 (6th ed. 2000).

<sup>68</sup> Shashikant, *supra* note 65.

<sup>69</sup> Frederick M. Abbott & Jerome H. Reichman, *Facilitating Access to Cross-Border Supplies of Patented Pharmaceuticals: The Case of the COVID-19 Pandemic*, 23 J. INT’L ECON. L. 535, 559 (2020); Carlos M. Correa & Nimalya Syam, *Analysis of the Outcome Text of the Informal Quadrilateral Discussions on the TRIPS COVID-19 Waiver* 3 (South Centre, Policy Brief No. 110, 2022); Yu, *supra* note 59, at 11.

<sup>70</sup> On such danger, see Peter K. Yu, *Deferring Intellectual Property Rights in Pandemic Times*, 74 HASTINGS L.J. 489 (2023).

public health problem posed by these restrictions was the same as the one confronting the opt-out mechanism in article 31*bis* of the TRIPS Agreement. It is therefore no surprise that, in the early days of the COVID-19 pandemic, a consortium of nongovernmental organizations and individual experts sought to address the latter problem by calling on WTO members that had previously opted out of the article 31*bis* system to reconsider their earlier position.<sup>71</sup>

## 5 LESSONS AND OBSERVATIONS

This chapter identifies three distinct reasons why China took a middle-of-the-road position in the debate on the COVID-19 TRIPS waiver at the WTO. The previous section also recounted the country's more assertive position in the run-up to the adoption of the Ministerial Decision. Drawing eight lessons from the international debate on the waiver and the subsequent Ministerial Decision, this section offers insights into the roles China can or will play in future international policy debates at the intersection of IP and public health, including during the next pandemic.

First, the position China took in the waiver debate is indicative of the country's changing pharmaceutical landscape and its growing ambition to become an IP power. Because of these developments, China now takes policy positions that align more closely with those of developed countries than those of developing countries.<sup>72</sup> While some policymakers and commentators have been surprised that China did not take the developing countries' position in what they considered a traditional North–South debate, China has moved gradually away from the developing countries' policy position since its innovative turn in the mid-2000s. The waiver debate is just one of the latest iterations of this changing policy position. This policy shift also explains why China supported the consultations between the European Union, India, South Africa, and the United States until the outcome document included a footnote that would have excluded the country. As China declared in the TRIPS Council's meeting in December 2021, shortly after the launch of these consultations:

We appreciate the updates made by South Africa, the European Union, and others. We have also followed some media coverage on this important issue. It is good to know that recently there have been some small group discussions at ministerial level and between experts, and the momentum is building for an urgent resolution on the TRIPS waiver.<sup>73</sup>

<sup>71</sup> James Love, *Open Letter Asking 37 WTO Members to Declare Themselves Eligible to Import Medicines Manufactured under Compulsory License in Another Country, under 31bis of TRIPS Agreement*, KNOWLEDGE ECOLOGY INTERNATIONAL (Apr. 7, 2020), [www.keionline.org/32707](http://www.keionline.org/32707) (last visited Dec. 13, 2023).

<sup>72</sup> Peter K. Yu, *The Rise of China in the International Intellectual Property Regime*, in HANDBOOK ON THE INTERNATIONAL POLITICAL ECONOMY OF CHINA 424, 437 (Zeng Ka ed., 2019); Yu, *supra* note 7, at 113.

<sup>73</sup> TRIPS Council, *supra* note 61, ¶ 507.



Second, although China's ambition to become an IP power has caused the country to move away from the developing countries' traditional policy positions, it remains reluctant to give up leadership in the developing world and continues to value support for other developing countries, due in large part to the soft power generated from such support.<sup>74</sup> Given this policy dilemma, China will likely push for policies that strengthen IP protection while at the same time promoting the transfer of technology to countries that are less economically and technologically developed. The existence of these seemingly conflicting policy positions is not new. Even though China pushed for stronger IP protection to build national champions in the pharmaceutical sector, it has made strong commitments to promoting universal healthcare.<sup>75</sup> Likewise, although the Fourth Amendment to the Chinese Patent Law adopted during the pandemic strengthens the protection for pharmaceuticals by providing the Hatch–Waxman extension of the patent term and introducing a new patent linkage system, the revised statute provides a six-month grace period for filing patents that has been disclosed during a national emergency to promote the public interest. Articles 50–52 usher in further support for open patent licensing.

Third, China is in a good position to facilitate large-scale transfer of health and medical technology. Commentators have widely noted the importance and urgency of the development of regional supply centers and domestic production capacity.<sup>76</sup> China's Belt and Road Initiative – in particular, its "Health Silk Road" – will provide an ideal platform for facilitating such development.<sup>77</sup> As noted in a joint statement released in June 2020, China will work with other countries to

support mutual efforts in combating the COVID-19, and [to] cooperate to address, control and overcome the pandemic through the sharing of timely and necessary information, experiences and best practices for diagnosis and treatment of the COVID-19, strengthening and upgrading the capacity of public health system[s], promoting joint scientific research and international dialogues among health professionals, and providing assistance to countries in need.<sup>78</sup>

<sup>74</sup> JOSHUA KURLANTZICK, CHARM OFFENSIVE: HOW CHINA'S SOFT POWER IS TRANSFORMING THE WORLD (2007); THOMAS LUM, WAYNE M. MORRISON & BRUCE VAUGHN, CHINA'S "SOFT POWER" IN SOUTHEAST ASIA (2008).

<sup>75</sup> WORLD HEALTH ORGANIZATION, *supra* note 18, at 6–7; Yu, *China's Innovative Turn*, *supra* note 5, at 613–614.

<sup>76</sup> Abbott & Reichman, *supra* note 69, at 553–554; Germán Velásquez, *Re-thinking Global and Local Manufacturing of Medical Products after COVID-19* (South Centre, Research Paper No. 118, 2020).

<sup>77</sup> Kirk Lancaster, Michael Rubin & Mira Rapp-Hooper, *Mapping China's Health Silk Road*, COUNCIL ON FOREIGN RELATIONS (Apr. 10, 2020), [www.cfr.org/blog/mapping-chinas-health-silk-road](http://www.cfr.org/blog/mapping-chinas-health-silk-road) (last visited Dec. 13, 2023).

<sup>78</sup> *Joint Statement of the High-Level Video Conference on Belt and Road International Cooperation: Combating COVID-19 with Solidarity*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA (Jun. 19, 2020), [www.fmprc.gov.cn/mfa\\_eng/wjdt\\_665385/2649\\_665393/202006/t20200619\\_679632.html](http://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/202006/t20200619_679632.html) (last visited Dec. 13, 2023).

Thus far, the Health Silk Road has remained largely a concept, and the Belt and Road Initiative has focused primarily on connectivity and infrastructure development – which is likely to translate to hospitals, treatment centers, and other facilities in the health context. Nevertheless, researchers have found that “countries that have signaled their endorsement of [this] concept scored much higher” in terms of the scope and impact of China’s activities during the COVID-19 pandemic.<sup>79</sup> They also note that “China’s Covid-19 diplomacy was most significant in countries where China already had strong diplomatic relations and sizable influence before the start of the pandemic.”<sup>80</sup>

Fourth, unlike those countries that have actively donated vaccines to multilateral initiatives such as COVAX, China has taken a predominantly bilateral – and often decentralized – approach to vaccine diplomacy.<sup>81</sup> It reportedly has donated only a small portion of the COVID-19 vaccines produced in China,<sup>82</sup> although it is unclear whether and how much the sales price of those vaccines has exceeded their production costs. At the time of writing, comparative research on pandemic diplomacy remains scant. When more research in this area becomes available, it will be useful to compare the diplomatic efforts across the major players in the global health regime, including China, India, the European Union, and the United States. A deeper understanding of their differing approaches will help anticipate how these players will behave during the next pandemic. It will also provide insight into the competitive dynamics involving these players.<sup>83</sup>

Fifth, China’s predominantly bilateral approach during the COVID-19 pandemic recalls the country’s historical “reluctance to collaborate with surveillance systems or engage in other information-sharing activities that are at the heart of contemporary global health governance.”<sup>84</sup> Although there is a tendency to treat developments during the COVID-19 pandemic as unprecedented, extraordinary, or *sui generis*, China’s pandemic diplomacy resembles its earlier engagements in public health diplomacy during the SARS, H1N1, and H5N1 outbreaks.<sup>85</sup> As Jeremy Youde explained:

China’s preference for bilateral channels likely reflects its relative newness to the development assistance for health realm, the unsettled foreign aid bureaucracy within the country, its interests in increasing the sovereign capacities of its recipient

<sup>79</sup> China Power Team, *supra* note 36.

<sup>80</sup> *Id.*

<sup>81</sup> MYERS, *supra* note 32, at 11–14.

<sup>82</sup> China Power Team, *supra* note 36.

<sup>83</sup> María Eugenia Brizuela de Ávila, *Central America (Belize to Panama)*, in BRIZUELA DE ÁVILA ET AL., *supra* note 48, at 4.

<sup>84</sup> Youde, *supra* note 3, at 172.

<sup>85</sup> Peter K. Yu, *Virotech Patents, Viropiracy, and Viral Sovereignty*, 45 ARIZ. ST. L.J. 1563, 1589–1618 (2013).

states, and its concerns about the role of civil social organisations and nongovernmental organisations in service delivery.<sup>86</sup>

Outside the public health arena, one could further link China's current engagements in this arena with those in other areas, such as bilateral and regional trade agreements or the Belt and Road Initiative.<sup>87</sup> Given these similarities, it is no surprise that many China critics remain concerned that China would conduct pandemic diplomacy in the same way it has undertaken diplomatic engagements in trade, development assistance, and other contexts. As the Center for Strategic and International Studies' research on China's pandemic diplomacy reminded us, "China predominantly engages countries bilaterally to augment its bilateral influence."<sup>88</sup>

Sixth, China will assume influential positions in future debates at the intersection of IP and public health. These debates range from the ongoing discussions on the international treaty on pandemics under the WHO<sup>89</sup> to those concerning the greater deployment of artificial intelligence in public health. Yet it remains difficult to predict where China will stand in those debates in the near future. Thus far, we have rarely seen China take policy positions that differ significantly from those of either developed or developing countries. Instead, its positions often fall somewhere between these two traditionally polarized positions.<sup>90</sup>

Seventh, China can bring important benefits to the international community even if it does not move to the forefront of the IP debates at the TRIPS Council. Consider, for instance, the debate on the COVID-19 TRIPS waiver. Regardless of its support for this proposed instrument, China's donation of face masks, ventilators, vaccines, and other supplies had already helped alleviate the public health challenges in many developing countries. In addition, there was no clear-cut divide, especially at the WTO, between issues at the intersection of IP and public health and those in other trade or trade-related areas, such as agriculture, fisheries, steel, and textiles. Even if China did not take an active position in the former debate, its important role in the latter debates could ultimately influence discussions in the

<sup>86</sup> Youde, *supra* note 3, at 177.

<sup>87</sup> On these broader engagements, see Yu, *Global Intellectual Property Strategy*, *supra* note 27; Yu, *Building Intellectual Property Infrastructure*, *supra* note 31; Yu, *Belt and Road*, *supra* note 31; Peter K. Yu, *Sinic Trade Agreements*, 44 U.C. DAVIS L. REV. 953 (2011).

<sup>88</sup> China Power Team, *supra* note 36.

<sup>89</sup> Fernando dos Santos, Caroline B. Neube & Marisella Ouma, *Intellectual Property Framework Responses to Health Emergencies – Options for Africa*, 118 S. AFR. J. SCI. 12775, at 1 (2022); Obijiofor Aginam, *The Proposed Pandemic Treaty and the Challenge of the South for a Robust Diplomacy* (South Centre, SouthViews No. 218, 2021); Germán Velásquez & Nirmalya Syam, *A New WHO International Treaty on Pandemic Preparedness and Response: Can It Address the Needs of the Global South?* (South Centre, Policy Brief No. 93, 2021).

<sup>90</sup> Peter K. Yu, *Intellectual Property Negotiations, the BRICS Factor and the Changing North–South Debate*, in *THE BRICS-LAWYERS' GUIDE TO GLOBAL COOPERATION* 148, 148–149 (Rostam J. Neuwirth, Alexandr Svetlicinii & Denis De Castro Halis eds., 2017).

former. In the run-up to MC12, some commentators expressed concern that the proposed waiver might be linked to other trade items in a “take it or leave it” manner.<sup>91</sup> These concerns were understandable in view of the past practice of “linkage bargaining” in negotiations at the WTO and the General Agreement on Tariffs and Trade.<sup>92</sup> Indeed, the TRIPS negotiations provide a textbook example of such bargaining, which resulted in an agreement to introduce high IP standards in developing countries in exchange for developed countries’ concessions in textiles and agriculture.<sup>93</sup> While China did not play an active role in pushing for the adoption of the COVID-19 TRIPS waiver, its positions in other trade or trade-related areas, and its ability to strike side deals at the WTO and in other international fora, could have had a significant impact on the waiver negotiations had they continued.

Finally, although policymakers and commentators considered it self-serving when the pharmaceutical industry and its supportive politicians used China and Russia to explain their opposition to the waiver,<sup>94</sup> the competition between IP rights holders in China and those in Europe, the United States, and other developed and emerging countries cannot be overlooked. China has now reached the stage of development where it can compete effectively against other countries both at the technological level and in the pharmaceutical arena. To be sure, the country still does not have internationally recognized pharmaceutical brands that are comparable to those found in Europe or the United States, such as Johnson & Johnson, Merck, Novartis, Pfizer, Roche, and Sanofi.<sup>95</sup> Nevertheless, it is only a matter of time before the generous investment and substantial policy support in China provide the much-needed boost to create globally competitive national champions in the pharmaceutical sector.<sup>96</sup> The concerns in the European and US pharmaceutical industries are therefore not far-fetched. To some extent, such concerns remind us of their earlier unpopular comments about generic competition in HIV/AIDS medicines in Sub-Saharan Africa.<sup>97</sup> Around the time of the highly controversial lawsuit that the global pharmaceutical industry filed against President Nelson Mandela’s government in South Africa, an industry representative

<sup>91</sup> Third World Network, *Need to De-link TRIPS Waiver from Other MC12 Issues*, TWN INFO SERVICE ON WTO & TRADE ISSUES (Oct. 19, 2021), [www.twm.my/title2/wto.info/2021/ti21018.htm](http://www.twm.my/title2/wto.info/2021/ti21018.htm) (last visited Dec. 13, 2023).

<sup>92</sup> MICHAEL P. RYAN, *KNOWLEDGE DIPLOMACY: GLOBAL COMPETITION AND THE POLITICS OF INTELLECTUAL PROPERTY* 12–13 (1998).

<sup>93</sup> Peter K. Yu, *TRIPS and Its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369, 371–373 (2006).

<sup>94</sup> Hannah Kuchler & Aime Williams, *Vaccine Makers Say IP Waiver Could Hand Technology to China and Russia*, FIN. TIMES (Apr. 25, 2021), [www.ft.com/content/fae0d22-71f2-401f-9971-fa27313570ab](http://www.ft.com/content/fae0d22-71f2-401f-9971-fa27313570ab) (last visited Dec. 13, 2023); Third World Network, *Big Pharma to Block TRIPS Waiver at WTO, Citing China & Russia*, TWN INFO SERVICE ON WTO & TRADE ISSUES (Apr. 27, 2021), [www.twm.my/title2/wto.info/2021/ti210415.htm](http://www.twm.my/title2/wto.info/2021/ti210415.htm) (last visited Dec. 13, 2023).

<sup>95</sup> Yu, *China’s Innovative Turn*, *supra* note 5, at 594.

<sup>96</sup> *Id.* at 608; Yu, *supra* note 20, at 187.

<sup>97</sup> Peter K. Yu, *The International Enclosure Movement*, 82 IND. L.J. 827, 841 (2007).

“suggested that South Africa was a pawn used by India and Argentina to undermine TRIPS.”<sup>98</sup> The industry’s present concerns about the growing rivalry with Chinese companies in the COVID-19 context largely resemble its earlier concerns about generic competition.

## 6 CONCLUSION

The COVID-19 pandemic has forced countries in both the developed and developing worlds to make difficult policy choices at the intersection of IP and public health.<sup>99</sup> It has also made salient the fast-changing developments that are already underway in China and other emerging countries. Although many policymakers and commentators still have tendencies to link China’s IP developments to either the age-old debate on piracy and counterfeiting or the traditional North–South divide, a comprehensive reassessment of the country’s role in the international policy debates at the intersection of IP and public health is in order. Such reassessment will better recognize the country’s innovative turn in the mid-2000s, its ambition to become an IP power, and its changing pharmaceutical landscape. In the near future, China will likely subscribe to policy positions that lie somewhere between those adopted by developed countries and their less developed counterparts. Its middle-of-the-road position in the debate on the COVID-19 TRIPS waiver has provided a timely and instructive illustration.

<sup>98</sup> Debora Halbert, *Moralized Discourses: South Africa’s Intellectual Property Fight for Access to AIDS Drugs*, 1 SEATTLE J. SOC. JUST. 257, 267 (2002).

<sup>99</sup> Peter K. Yu, *Intellectual Property Paradoxes in Pandemic Times*, 71 GRUR INT’L 293, 294 (2022).