



Zach Gibson/Bloomberg via Getty Images

## U.S.-China Intellectual Property Issues in a Post-Phase-One Era

*Interview with Mark Cohen*

January 29, 2022

The phase-one trade agreement reached in early 2020 aimed to resolve long-standing U.S. objections to Chinese trade practices, including the enforcement of intellectual property (IP) rights. Victoria Huang interviewed Mark Cohen (Berkeley Center for Law and Technology) to examine the evolution of U.S.-

China engagement on IP rights, the potential role that the phase-one agreement played in recent IP reforms in China, and what's next for bilateral cooperation on the issue.

---

**What commitments did the phase-one trade agreement between the United States and China include to improve China's intellectual property (IP) protections?**

The phase-one agreement was signed on January 15, 2020, after an earlier effort to conclude an agreement with China was abandoned in May 2019. These two negotiating milestones need to be compared to the legislative and other changes that China was making in its IP system even before the proposed 2019 agreement. Causation from phase one is difficult to determine because many of the recent changes reflect China's own determination to reform its system and may not be attributable to U.S. pressure.

There were a number of other laws, particularly those involving pharmaceutical IP protection, that were enacted after the phase-one agreement. Those might more properly be called "phase-one commitments." With regard to effective implementation of new legislation, it is generally too early to say whether phase one has made a significant difference for American companies. We need to see how cases have been handled, and we need to collect relevant data to understand how effective phase one has been. We also need a higher degree of transparency from China. China did not commit to greater overall IP transparency in phase one; in fact, there have recently been renewed concerns about a diminishing commitment to publishing data and making cases available, compared to prior years.

Whether it was a past reform or a phase-one commitment, there have been significant changes in China's IP regime in the past several years. The pervasive problem of abusive trademark registration, which is when a Chinese entity hijacks another company's trademark in advance of the company seeking to register it in China, is beginning to be addressed through a variety of civil and administrative mechanisms. China has also improved its civil, criminal, and administrative trade-secret regime. Still, improvements for Americans in filing procedures at the Chinese courts have not yet fully materialized. Although the pharmaceutical sector was a major beneficiary of the phase-one commitments, concerns remain in some areas like patent term extension and patent linkage.

Furthermore, the lack of transparency in both the United States and China makes it difficult to judge overall progress due to the phase-one agreement. The agreement itself did not require greater enforcement transparency by China. To date, there has also been no public information available on negotiations around phase-one implementation or other trade-related discussions. The Office of the United States Trade Representative (USTR) has also been silent about the specifics of any new China strategy. None of the Chinese reports required by the phase-one agreement on enforcement actions have been released by the U.S. government. It is possible that China did not even prepare them. As has been the case since approximately 2012, U.S. government comments on the many new draft Chinese IP laws of the past few years are also not available to the public.

**Have the IP provisions in the phase-one agreement led to any meaningful improvements in China's IP laws and enforcement measures? What could the agreement have done better?**

Certainly, there have been improvements in Chinese laws. In some areas, such as trade secret protection and platform liability for IP infringement, the phase-one agreement helps place China ahead of the United States in terms of overall legislation. In other areas, such as the protection of financial technology, software, or genetic inventions, China has already surpassed the United States due to the weakening of the U.S. patent regime in recent years. For example, Chinese courts are at the forefront of using molecular markers to distinguish different varieties of plants—an area that was not under consideration in phase one. China's IP regime is complex. It responds to external pressure, but increasingly it is most responsive to its own demands to innovate and compete, particularly in emerging technological areas.

Phase one did little to address a long-standing issue facing the United States in engaging China: we utilize the IP enforcement regime in China to a very limited extent. Foreign-related cases constitute less than 1% of China's national IP docket. Moreover, according to a study I recently co-authored with the consulting firm Rouse, only approximately 50% of cases are published. Absent complete transparency around foreign-related IP cases, we will never know how well foreign companies are faring in the Chinese courts. The phase-one agreement did nothing to address this long-standing systemic issue, nor has the USTR sought to advance transparency through the World Trade Organization (WTO) or other mechanisms.

In addition to transparency, there were several key areas left out of the phase-one agreement, which most people assumed would be in a phase-two agreement. These include antitrust enforcement, regulatory data protection for pharmaceuticals, and overall improvements to the judicial system.

**USTR Katherine Tai has said there are no plans to renew the phase-one agreement, citing China's failure to fulfill purchase commitments. After the agreement expired in December 2021, what can the Biden administration do to improve IP enforcement in U.S.-China trade?**

It is important to recognize that IP-related engagement has been ongoing with China throughout the trade war. The U.S. Patent and Trademark Office has had cooperative relationships with China's IP agencies for many years. It also meets with China and the three other largest patent, trademark, and design protection offices in the world on an annual basis.

What the USTR sometimes lacks in depth on IP issues, it compensates for with a comprehensive perspective on U.S.-China trade relations and the possibility of bringing WTO disputes or even unilateral retaliation. The system works best when all government agencies are interacting and working from the same page and utilizing all available tools—diplomacy, trade disputes, technical engagement, research, and even training.

Sanctions imposed by the United States worked to accelerate Chinese IP reforms. They also put pressure on China in a range of other areas, though USTR Tai has indicated that China has not fulfilled its purchase commitments. However, lumping IP with purchasing soybeans suggests the problems are equally self-evident, when they are clearly not. Understanding how China's IP system works requires more patience and attention to China's own domestic court system. I hope that the U.S. government maps out a strategy to engage China on IP issues that is less dependent on trade sanctions and other weapons.

It is unclear how a U.S. withdrawal from engaging China on IP would affect Americans. China's IP regime will continue to reform without U.S. pressure, in ways that the United States may like or dislike. Problems of transparency will remain. Stormy bilateral relations will continue to have an impact on the nature of the engagements on IP and many other issues. China also appears intent to join plurilateral trade agreements, which may include extensive IP commitments, whereas the United States backed out of the Trans-Pacific Partnership (TPP).

It is important to note that before the trade war, IP-related engagement was a strength of U.S.-China trade relations. The United States facilitated many reforms without having to impose sanctions. This included establishing specialized IP courts, protecting design patents for graphical user interfaces, supporting China's emerging system of case law, improving the system for legitimate technology transfer, and many other areas. The Track 2 U.S.-China IP Dialogue, of which I am a part, was instrumental in introducing amicus briefs to China's court system and in recognizing the importance of protecting personality rights (such as one's name) in trademarks.

**Since 2020, China has issued at least four major global anti-suit injunctions (ASIs) in patent litigation, which prevent foreign plaintiffs from pursuing legal IP action anywhere else in the world. Do these injunctions signal a shift in Chinese IP policy, where the state is utilizing legal tools to secure domestic IP or prevent foreign enforcement of IP rights?**

I believe the number of ASIs may be five, but since only a small portion of the cases involving standard-essential patents are published, and many cases settle, it is difficult to tell. ASIs have been around for a long time, dating back hundreds of years in the United Kingdom, where they were used to resolve disputes between courts of law and courts of equity before these courts were merged. Historically, they were not used by civil law countries. Many civil law countries, such as Germany and France, still refrain from issuing ASIs. Some common law countries, such as India, also appear to have taken a more conservative approach to ASIs. It is important to note, however, that the tool did not originate in China.

Not all ASIs are created equal. If a Chinese court said to a German or U.S. court, "you have no right to adjudicate the validity, infringement, or licensing rate of a Chinese patent," that would be a "limited ASI" that may be consistent with U.S. practice. U.S. practice has generally been that absent consent or contractual obligations of the parties, ASIs should not determine the validity, infringement, or value of foreign patents.

Recently, China has been issuing what I would call "global ASIs." Global ASIs attempt to prohibit other courts from adjudicating matters that could affect the ability of a court to determine a global licensing rate for patented technology. They may also be part of broader industrial or judicial policies to increase national influence, extend judicial jurisdiction, or even retaliate against other courts or governments. As you can imagine, when a Chinese court tells a German, Indian, or U.S. court to stop considering issues involving German, Indian or U.S. law and patents arising under that law, it evokes a strong reaction. These courts may respond with counter-ASIs, or AASIs. A judge in the United States called this type of order an "anti-interference" injunction.

Global ASIs are especially concerning as they are intended to drive down the price of foreign technology and patents in order to support China's industrial policy efforts. They may also affect the ability of courts to make assessments of the comparative values of standard-essential patents in different markets as part of a global portfolio license. In many

cases, the ASIs have also been granted without notice to the affected party and the decisions have not been published, highlighting the broader transparency concerns. Moreover, Chinese law does not offer other avenues for effectively challenging the jurisdiction of the court. For example, a company may not be able to effectively argue that another court is the more “convenient” or “appropriate” forum. Foreign companies are also leveraging this ASI process to drive down the prices of foreign technology. The most recent public case was Samsung vs. Ericsson in the Wuhan intermediate court. Ericsson filed a parallel litigation in Texas, where it requested a limited ASI. Although Samsung is a foreign company, both companies do more business in the United States than in China. The case has since settled.

Chinese courts have also become more aggressive in handling high-value parallel litigation. In some respects, China has become an attractive destination for these courts: judges are well-trained, and the litigation is relatively inexpensive. Chinese courts also want to play a larger role in these disputes, as they have a direct impact on China’s goals regarding standards for emerging technologies (e.g., 5G+ or the Internet of Things). At the same time, China is keen to set prices for U.S., European, and Japanese technology worldwide, thus reducing the price for foreign technology inputs in Chinese manufactured products. For example, a German court case awarded a royalty rate eighteen times the rate of a Chinese court in a parallel litigation matter. China is also responding to the difficult situation that companies such as Huawei face in overseas markets, where they have been precluded from selling their products but nonetheless have rich patent portfolios. This problem is global in nature. Trade diplomats and others should be engaging with China to find ways to de-escalate the tensions in this important area.

### **How can the United States better cooperate with other countries to either change or respond to unfair Chinese IP practices?**

In July 2021 the European Union formally raised concerns at the WTO about the increasing aggressiveness of Chinese courts in their issuance of global ASIs and the lack of publication of critical IP cases affecting foreigners. However, when the EU filed a transparency request, the United States declined to support it. Despite its many challenges, the WTO remains an important venue to raise issues multilaterally and can still be used to resolve IP-related disputes. This was evidenced when the United States achieved a notable success in a dispute over Chinese technology licensing at the WTO during the Trump administration.

Many people also suggest that the United States should reconsider its position on joining the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). China has expressed an interest in joining, and already has an extensive free trade agreement in Asia, the Regional Comprehensive Economic Partnership (RCEP). The United States needs to consider what its role is in multilateral trade agreements and reassume a leadership position where it can effectively raise concerns about China.

The United States also may wish to rethink certain elements of U.S. IP and trade diplomacy. If our sanctions leverage has been compromised with China, we may find that it is difficult to “jaw-jaw” in light of our trade “war-war.” We should also be careful about the kinds of requests we make of China or other countries that may have little impact or are incapable of being effectively monitored.

As technology becomes increasingly key to U.S. trade diplomacy, the United States should be encouraging trading partners to develop stronger IP regimes to better protect IP-intensive goods that rely on extended supply chains to be produced. This means working more closely with countries like Mexico, Vietnam, and India so that the lessons we have experienced in China are not repeated and that these countries become reliable manufacturing and technology partners.

I would also like to see the U.S. government develop a deeper understanding of the competitive threats posed by China in civil and military technology, including the close relationship between these two types of technology. One step in that direction would be working with allies to develop more harmonized export control, investment, and technology transfer regimes, including developing a common nomenclature to describe technologies. One promising example is the Cooperative Patent Classification system, which describes over 250,000 technologies and is in current use in the EU and the United States. It is continually being expanded to include new technologies, and it maps to patent classifications used by other countries as well as to tariff and industrial classifications.

By using a common nomenclature, the United States and its allies can better assess how China's trade, industrial policy, talent, and other programs overlap in a more granular manner. We can also evaluate the United States' and China's relative strengths and weaknesses in technological research, patenting, and licensing. We need a better understanding of how our IP systems and other systems overlap in a global economy.

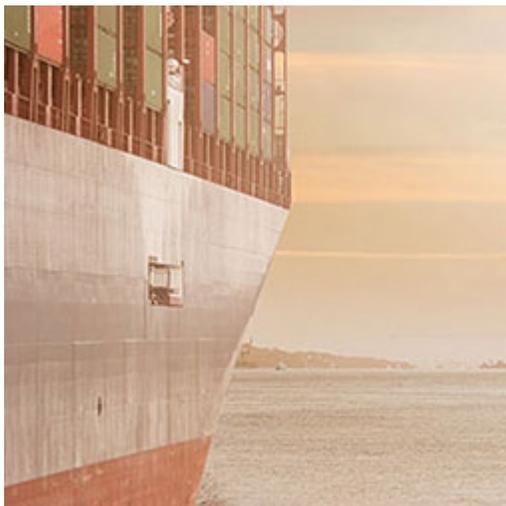
---

Mark Cohen is a Distinguished Senior Fellow at the Berkeley Center for Law and Technology and Director of the BCLT Asia IP Project. He previously served as senior counsel to the U.S. Patent and Trademark Office's China team and as director of international intellectual property policy at Microsoft. Overall, he has over 30 years of private, public sector, in-house, and academic experience on intellectual property in China.

This interview was conducted by Victoria Huang, an intern with the Center for Innovation, Trade, and Strategy at NBR.

## PROGRAMS

---



Center for Innovation, Trade, and Strategy.

SEARCH

---

intellectual property.

Trans-Pacific Partnership

pharmaceutical

Kenneth B. and Anne H.H. Pyle  
Center for Northeast Asia  
Studies

John M. Shalikashvili Chair in  
National Security Studies

Center for Innovation, Trade,  
and Strategy.

Slade Gorton Policy Center



ACCOUNT

SUBSCRIBE

 and follow us on  
Youtube

 Sign up for updates

©2023 The National Bureau of Asian Research

[Privacy Policy](#) | [Site Map](#) | [Terms of Use](#) | [Contact Us](#)

This site uses cookies. Please read our [Privacy Policy](#) to learn how and why we use cookies. 