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**DEVELOPMENT OF CHINA’S TRADE SECRETS LAW IN THE  
US’ SHADOW: NEGATIVE CONSEQUENCES FOR CHINA  
AND SUGGESTIONS**

Yang Chen<sup>†</sup>

**ABSTRACT:**

China’s trade secrets protections are not the result of developments in its own industry, but rather the outcomes of US–China trade negotiations. This article is a first attempt at comprehensively examining how the US has affected the development of China’s trade secrets regime, primarily through its strong Special 301 process. Based on the historical development route, it is argued that every legal amendment to add stricter rules to the regime to enhance legislative protection levels in China followed US “recommendations.” Such a development path has resulted in the current trade secrets protection regime’s lack of accounting for local industry’s needs and interests. Evidence demonstrates that the current strict trade secrets regime in China exceeds the local industry’s needs and may impede local industrial innovations. The interests of local industry are being neglected because of the substantial representation of US industrial interests in China’s legal amendments. Since the US industry’s interests conflict considerably with the interests of local industry, the current strict regime in China may only benefit the US industry by preserving their competitive edge at the expense of unduly impeding the development of the local industry. Meanwhile, this evolutionary path has made many local scholars take trade secrets protection for granted and put the research focus mainly on further enhancing protections, without taking a step back to examine basic theories and limiting doctrines. In light of the development route and the accompanying negative consequences, this article suggests some directions that China may move towards at

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<sup>†</sup> 2020-2021 Zhao/Zeng Scholar and SJD candidate, University of Pennsylvania Carey Law School; LLM with distinction, University of Pennsylvania Carey Law School; LLM (Corporate and Commercial Law Specialism), London School of Economics and Political Science; LLB, China University of Political Science and Law; Admitted to PRC Bar; My sincere thanks to Gideon Parchomovsky, Victoria Cundiff, Sin Chit LAI, Kaidong Guo, and editors of the Asian Law Review.

the legislative, academic, and enforcement levels. The author seeks not to repudiate the benefits of the current strict Chinese rules for effectively protecting trade secrets and only suggests instituting more reasonable limiting doctrines to enable the country's trade secrets law to better serve its policy goals.

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## INTRODUCTION

2019 and 2020 were two landmark years in the history of the development of trade secrets protection in China. China's approach

of trade secrets protection witnessed significant changes or, more precisely, crucial enhancements in the past two years. Not only were statutes concerning trade secrets protection amended, but new judicial interpretations were also delivered and new regulations of trade secrets were released.<sup>1</sup> These new laws and regulations have become the focus of discussion among legal practitioners, with many of them optimistically expecting these new provisions to sufficiently protect trade secrets in the future.<sup>2</sup>

At first glance, it is understandable why China made these notable amendments or additions to its trade secrets protection. The simplest explanation is that trade secrets demand a stricter protection regime due to their importance. As a lately developed intangible right compared with traditional IP rights, trade secrets' importance is being increasingly recognized around the world. Trade secrets are considered a crucial mechanism for enterprises to compete with others and promote innovations.<sup>3</sup> US firms highly value trade secrets protection, as it can safeguard a wider range of sensitive information than patents, without governmental registration or approval

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<sup>1</sup> The Anti-Unfair Competition Law was amended in 2019 which mainly revised the trade secret protection provisions. For one example of a new judicial interpretation, see Fan Buzhengdang Jingzheng Fa (反不正当竞争法) [Anti-Unfair Competition Law], promulgated by Standing Comm. Nat'l People's Cong., Sept. 2, 1993, effective Dec. 1, 1993; rev'd by Standing Comm. Nat'l People's Cong., Nov. 4, 2017; rev'd by Standing Comm. Nat'l People's Cong., Apr. 23, 2019, CLI.1.331488(EN) (Lawinfochina) [hereinafter *2019 AUCL*]; Zuigao Renmin Fayuan Guanyu Shenli Qinfan Shangye Mimi Minshi Anjian Shiyong Falv Ruogan Wenti de Guiding, Fashi [2020] Qi Hao (最高人民法院关于审理侵犯商业秘密民事案件适用法律若干问题的规定, 法释 [2020] 7号) [Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Civil Cases Involving Infringements upon Trade Secrets No. 7 [2020]], promulgated by Sup. People's Ct., Sept. 10, 2020, effective Sept. 12, 2020, CLI.3.345991(EN) (Lawinfochina) [hereinafter *2020 Judicial Interpretation*]. For the new administrative regulation, see Shangye Mimi Baohu Guiding (Zhengqiu Yijian Gao) (商业秘密保护规定 (征求意见稿)) [Regulations on Trade Secrets Protection (Draft for Public Comment)], published by STATE ADMIN. MKT. REGUL., Sept. 4, 2020, [http://www.moj.gov.cn/news/content/2020-09/04/zlk\\_3255345.html](http://www.moj.gov.cn/news/content/2020-09/04/zlk_3255345.html) [<https://perma.cc/6QQB-AVWU>] [hereinafter *2020 Administration Regulation (Draft)*].

<sup>2</sup> See e.g., *Recent Changes to China's Trade Secret Protection Laws Ease the Challenge of Bringing Such Cases*, JONES DAY (Oct. 2020), <https://www.jonesday.com/en/insights/2020/10/recent-changes-to-chinas-trade-secret-protection-laws> [<https://perma.cc/9W9N-5A75>] (saying that adding burden shifting clauses into the AUCL eases the challenges of bring trade secrets cases in China).

<sup>3</sup> Dan Kim et al., *U.S. International Trade Commission's Trade Secrets Roundtable: Discussion Summary*, J. INT'L COM. & ECON. 1, 2 (Nov. 2016), [https://www.usitc.gov/publications/332/journals/linton\\_semanik\\_trade\\_secrets\\_summary\\_0.pdf](https://www.usitc.gov/publications/332/journals/linton_semanik_trade_secrets_summary_0.pdf) [<https://perma.cc/4AVJ-3M7W>].

processes.<sup>4</sup> Meanwhile, smaller companies or start-ups rely heavily on trade secrets rather than patents due to the high cost of patent application.<sup>5</sup> Chinese enterprises are also gradually realizing this importance, considering trade secrets as the core of their business assets.<sup>6</sup> Some countries, moreover, view trade secrets theft as serious conduct harming national security and economy.<sup>7</sup> Trade secrets' importance is also recognized internationally. For example, Article 39 of the TRIPS Agreement requires each WTO member to protect undisclosed information in their domestic law.<sup>8</sup> The APEC economies have classified trade secrets as a useful element of an intellectual property toolkit available to businesses, which can “promote APEC economies’ economic, innovation, and social policy goals.”<sup>9</sup> Given this significance of trade secrets protection, China’s substantial amendment of its trade secrets regime is understandable.

However, the story is not that simple. The main driver for enhancing protection is not the self-realization of the necessity for improving trade secrets protection but external pressure from the US.

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<sup>4</sup> *Id.* at 3.

<sup>5</sup> *Id.* at 4.

<sup>6</sup> Zhang Wei (张维), *Baohu Shangye Mimi Jiushi Baohu Qiye Zui Hexin Caifu* (保护商业秘密就是保护企业最核心财富) [*Protecting Trade Secrets is Protecting the Core of the Firm Asset*], FAZHENG YAOWEN (法政要闻) [LEGAL NEWS] (Sept. 26, 2017), <https://mp.weixin.qq.com/s/GacKybUcQDsWklYdjpJXNQ> [<https://perma.cc/9MLL-SXAE>].

<sup>7</sup> For example, the US government argued that trade secret theft “threatens national security and the U.S. economy, diminishes U.S. prospects around the globe, and puts American jobs at risk.” U.S. Trade Representative, 2013 Special 301 Report 13 (May 2013), <https://ustr.gov/sites/default/files/05012013%202013%20Special%20301%20Report.pdf> [<https://perma.cc/W9ZK-C9PJ>] [hereinafter *2013 Special 301 Report*]. Similar expressions can also be found in the Special 301 reports of 2014 to 2020. Some executives in PRC National Security Bureau also opined that protecting trade secrets is to protect national economic security. See Du Yongsheng (杜永胜) & Wang Tuanhui (王团辉), *Baohu Shangye Mimi Jiushi Baohu Guojia Jingji Anquan* (保护商业秘密就是保护国家经济安全) [*Protecting Trade Secrets is to Protect National Economic Security*], ZUGUO (祖国) [MOTHERLAND], no.6, 2014.

<sup>8</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights art. 39, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement]; Rambod Behboodi, *Trade Secrets in International Law: The WTO’s Secrets of the Trade*, JDSUPRA (Aug. 24, 2018), <https://www.jdsupra.com/legalnews/trade-secrets-in-international-law-the-26679> [<https://perma.cc/MGP9-L2AW>].

<sup>9</sup> APEC, *Best Practices in Trade Secret Protection and Enforcement Against Misappropriation*, USTR Press Release 1, 1 (Nov. 21, 2016), <https://ustr.gov/sites/default/files/11202016-US-Best-Practices-Trade-Secrets.pdf> [<https://perma.cc/2VQ7-HSRY>].

All these new legal changes in China are related to the US–China trade war and the recently signed “U.S.–China Economic and Trade Agreement (Phase One agreement).”<sup>10</sup> Trade secrets are a significant issue in the US–China trade war and also a crucial part of the Phase One agreement.<sup>11</sup> Apart from the recent trade war and its related agreement, trade secrets protection in China has always been one of the primary targets of US criticism.<sup>12</sup> China has responded to US criticism several times through many statutory amendments, judicial interpretations, and other related regulations.<sup>13</sup>

Very few works in the extant literature in China touch upon the development of a trade secrets regime or discuss how it is affected by external pressure. Although many works discuss how the US pushed China to enhance its intellectual property protections in general,<sup>14</sup> not many specifically examine the trade secrets law. Only one work published in early 2019 is targeted at the US influence on China’s trade secrets protection.<sup>15</sup> However, it mainly provides a

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<sup>10</sup> See U.S. Trade Representative, 2020 Special 301 Report 41–42 (Apr. 2020), [https://ustr.gov/sites/default/files/2020\\_Special\\_301\\_Report.pdf](https://ustr.gov/sites/default/files/2020_Special_301_Report.pdf) [https://perma.cc/QY2S-A9X5] [hereinafter *2020 Special 301 Report*]. See also *The Facts and China’s Position on China-US Trade Friction*, Info. Off. PRC St. Council 1, 35–36 (Sept. 2018), [http://english.scio.gov.cn/whitepapers/2018-09/25/content\\_63998615.htm](http://english.scio.gov.cn/whitepapers/2018-09/25/content_63998615.htm) [https://perma.cc/W8L6-PMUR].

<sup>11</sup> The whole section B of the Phase one agreement is dealing with the trade secret protections. See Economic and Trade Agreement Between the Government of the United States of America and the Government of the People’s Republic of China, PRC-U.S., sec. B, Jan. 15, 2020, OFF. USTR, <https://ustr.gov/countries-regions/china-mongolia-taiwan/peoples-republic-china/phase-one-trade-agreement/text> [https://perma.cc/7QTE-JMLU] [hereinafter *Phase One agreement*]. See also 2020 Special 301 Report, *supra* note 10, at 41–42; U.S. Trade Representative, 2019 Special 301 Report 41–42 (Apr. 2019), [hereinafter *2019 Special 301 Report*], [https://ustr.gov/sites/default/files/2019\\_Special\\_301\\_Report.pdf](https://ustr.gov/sites/default/files/2019_Special_301_Report.pdf) [https://perma.cc/J3F7-S5Q3].

<sup>12</sup> Ever since 2012, trade secret protections in China have become one of the main discussion themes of US Trade Representatives in their yearly realized special 301 reports. These reports discuss the current situation of trade secret protections in China and provide suggestions for China to improve the system. For details of this special 301 report mechanism, see *infra* part I.

<sup>13</sup> For details of how China responded to US’s criticisms, see *infra* part II.

<sup>14</sup> See e.g., Xiong Jie (熊洁), *Meiguo “Tebie 301 Baogao” Yu Zhongmei Jingmao Guanxi Zhong de Zhishi Chanquan Wenti* (美国“特别301报告”与中美经贸关系中的知识产权问题) [*The IP Related Issues in China-US Trade Relations in US Special 301 Reports*], MEIGUO WENTI YANJIU (美国问题研究) [FUDAN AME. REV.], no.1, 2019 (discussing the IPR issues raised by the US in the Special 301 Reports and US-China trade relations and how these affected China).

<sup>15</sup> See Song Shiyong (宋世勇) & Xing Yuxia (邢玉霞), *Meiguo Tebie 301 Baogao Shangye Mimi Wenti Zongshu Yu Zhongguo Duice Fenxi* (美国《特别301报告》商业秘密

summary of what trade secrets issues in China were identified each year between 2012 to 2018 by the US government, without identifying the exact relationship between these identified issues and China's legal responses.<sup>16</sup> The said work also does not touch the years 2019 and 2020, when trade secrets protection in China was again significantly enhanced due to the US pressure. In this sense, this article intends to serve as a first attempt at thoroughly discussing how the US pressure gradually pushed China's trade secrets law into an increasingly stricter regime. Using historical facts, this article argues that because of the huge influence from the US on such an evolution, China's trade secrets protection has been enhanced to a considerably high level. This has resulted in a lack of consideration for the interests of local industry in the current strict regime, which may harm the local industry's development. Moreover, this article argues that such a development path under US pressure makes local academia misplace their research focus by taking basic theories and stricter protection for granted, without questioning why or whether we really need such enhanced protection. In light of these negative consequences, the article hopes to provide some preliminary suggestions and rough directions for China to move towards in the future.

To put forward these arguments and suggestions, this article is structured as follows: Part 1 introduces the basics of trade secrecy and the mechanisms used by the US to exert influence on China's trade secrets protection regime. Part 2 discusses the history of China's trade secrets protection regime and how it is influenced by US pressure. Part 3 sets forth the problems caused by such a development route—insufficient consideration of local industry needs and a weak local theoretical basis. Part 4 provides some suggestions for China based on the discussion and is followed by the Conclusion.

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密问题综述与中国对策分析 [Summary of the Trade Secrets Issues in US Special 301 Reports and the Analysis of China's Responsive Measures], FAXUE ZAZHI (法学杂志) [L. MAG.], no. 5, 2019 (discussing the trade secrets related issues in Special 301 reports generally and China's legal reforms on trade secrets law).

<sup>16</sup> See *id.*

## I. TRADE SECRETS PROTECTION AND THE US POLICY TOWARDS CHINA

Trade secrets can be defined as undisclosed information that is deliberately kept secret from the public by firms. Trade secrets do not require nonobviousness of information as required by patents and can cover unpatentable information.<sup>17</sup> Thus, trade secrets can cover a very wide range of information, including but not limited to business information such as customer lists, price lists, and marketing strategies and technical information such as technical processes or methods.<sup>18</sup> All such information can be treated as trade secrets, as long as it satisfies the requirements. Modern trade secrets law requires keeping such information secret from the public, deriving independent commercial value from the information, and ensuring reasonable efforts to keep the information secret.<sup>19</sup> But trade secrets protection law does not protect against independent development and reverse engineering.<sup>20</sup> Even though the protections afforded by trade secrecy is more limited compared to patents, many firms still desire to protect patentable ideas through trade secrets instead of patents. This is potentially because trade secrets do not have an expiration date and do not necessitate an expensive and costly application process as with patents.<sup>21</sup> Empirical studies show that many firms

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<sup>17</sup> See Robert G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, 86 CAL. L. R. 241, 248 (1998).

<sup>18</sup> See Unif. Trade Secrets Act § 1 (4) (Unif. Law Comm'n 1985) [hereinafter *UTSA*]; Katherine Linton, *The Importance of Trade Secrets: New Directions in International Trade Policy Making and Empirical Research*, J. INT'L COM. & ECON. 1, 3 (Sept., 2016), [https://www.usitc.gov/publications/332/journals/katherine\\_linton\\_importance\\_of\\_trade\\_secrets\\_0.pdf](https://www.usitc.gov/publications/332/journals/katherine_linton_importance_of_trade_secrets_0.pdf) [<https://perma.cc/7WUL-PQ33>].

<sup>19</sup> TRIPS Agreement, *supra* note 8, at art. 39 (2); USTA § 1 (4); 2019 AUCL, *supra* note 1, at art. 9; Mark A. Lemley, *The Surprising Virtues of Treating Trade Secrets as IP Rights*, 61 STAN. L. REV. 311, 317–18 (2008); KONG XIANGJUN (孔祥俊), FANBUZHENGDANG JINGZHENG FA XINYUANLI FENLUN 360–61 (反不正当竞争法新原理分论) [THE NEW PRINCIPLES OF ANTI-UNFAIR COMPETITION LAW: SUBSECTION] (2019).

<sup>20</sup> See USTA § 1; TRIPS Agreement, *supra* note 8, at art. 39; AUCL 2019, *supra* note 19, at art. 9; Zuigao Renmin Fayuan Guanyu Shenli Buzhengdang Jingzheng Minshi Anjian Yingyong Falv Ruogan Wenti de Jieshi, Fashi [2007] No. 2 (最高人民法院关于审理不正当竞争民事案件应用法律若干问题的解释, 法释[2007]2号) [Interpretation of the Supreme People's Court on Some Issues Concerning the Application of Law in the Trial of Civil Cases Involving Unfair Competition, Judicial Interpretation [2007] No. 2] (promulgated by the Judicial Comm. Sup. People's Ct., Jan. 12, 2007, effective Feb. 1, 2007), art. 12, CLI.3.83311(EN) (Lawinfochina) [hereinafter *2007 Judicial Interpretation on AUCL*]; Lemley, *supra* note 19, at 318; KONG, *supra* note 19, at 448–53.

<sup>21</sup> Linton, *supra* note 18, at 4–5.

prefer trade secrets rather than other IP rights, especially patents.<sup>22</sup> Economic theories demonstrate that firms are more likely to keep information as a trade secret, and not patent it when “they believe that patent protection is too costly relative to the value of their invention, or that it will give them a reward substantially less than the benefit of their invention” because the length (or other conditions) of patent protection is insufficient.<sup>23</sup> Widely endorsed by firms to maintain their competitive edge, trade secrets’ significance to businesses and the entire economy has gradually been realized by the US government. In 2013, the US government issued the “Administration Strategy on Mitigating the Theft of U.S. Trade Secrets,” highlighting “U.S. efforts to combat the theft of trade secrets that could be used by foreign governments or companies to gain an unfair economic advantage by harming U.S. innovation and creativity.”<sup>24</sup> To address trade secrets protection concerns in other countries, the US has maintained its original mechanism in dealing with other IPR concerns, namely, the Special 301 process.<sup>25</sup>

The Special 301 process, albeit a domestic legal process, is the unilateral but proven effective mechanism of the US government to influence the intellectual property law and practice in other countries. Its aim is to “persuade” US trading countries to reform their intellectual property protection regime to promote the adequate and effective protection of intellectual property rights.<sup>26</sup> Every year, pursuant to Section 182 of the Trade Act of 1974 (as amended by the 1988 Omnibus Trade and Competitiveness Act), the office of the United States Trade Representative (USTR) is required to provide a Special 301 Report outlining the situation of IP protection among US trading partners and identify countries that do not provide adequate and effective protection of IP rights.<sup>27</sup> Specifically, the USTR

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<sup>22</sup> *Id.* at 6.

<sup>23</sup> David D. Friedman et al., *Some Economics of Trade Secret Law*, 5 J. ECON. PERSP. 61, 64 (1991).

<sup>24</sup> 2013 Special 301 Report, *supra* note 7, at 13–14; *Administration Strategy on Mitigating the Theft of U.S. Trade Secrets*, U.S. Exec. Off. President (Feb. 2013), <https://www.justice.gov/criminal-ccips/file/938321/download> [https://perma.cc/7LUJ-F84J].

<sup>25</sup> See *supra* Part II (about how the US used the special 301 process to address its trade secrets protection concerns in China).

<sup>26</sup> Judith H. Bello & Alan F. Holmer, *Special 301: Its Requirements, Implementation, and Significance*, 13 FORDAM INT’L L. J. 259, 259 (1989).

<sup>27</sup> 19 U.S.C § 2242 (a) – (b) (1988); 2020 Special 301 Report, *supra* note 10, at 4; Myles Getlan, *TRIPs and the Future of Section 301: A Comparative Study in Trade Dispute*

identifies foreign countries that have the most onerous or egregious acts, policies, or practices that deny adequate and effective intellectual property rights and have the most adverse impact on US products, as priority foreign countries.<sup>28</sup> However, if such “countries are entering into, or making significant progress in, good faith negotiations, the USTR is precluded by the statute from identifying them as priority countries.”<sup>29</sup> Additionally, the USTR creates a priority watch list and a watch list for certain trading partners who meet “some, but not all, of the criteria for priority foreign country identification” and therefore require further monitoring.<sup>30</sup> The USTR can, at any time, identify additional priority foreign countries or revoke any identification.<sup>31</sup> Within 30 days after identifying a priority foreign country, the USTR is required to initiate an investigation on the IP protection status of that country.<sup>32</sup> This involves conversations with the foreign country to seek negotiable bilateral solutions, to be typically completed within 6 months.<sup>33</sup> If such a country is not making substantial progress in addressing the identified IP protection problems within the investigation period, the USTR is authorized to take trade-related actions such as suspending or withdrawing trade concessions, imposing additional duties or import restrictions, or recommending initiating the WTO dispute resolution process.<sup>34</sup> The ultimate purpose is to push identified countries to amend their current IP protection regime, either “voluntarily” or through bilateral agreements, according to the USTR’s suggestions in the Special 301 Report.

History has shown the Special 301 process to be a success. In order to gain more access to the global market controlled by

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*Resolution*, 34 COLUM. J. TRANSNAT’L L. 173, 182 (1996); Paul C.B. Liu, *U.S. Industry’s Influence on Intellectual Property Negotiations and Special 301 Actions*, 13 UCLA PAC. BASIN L.J. 87, 95 (1994).

<sup>28</sup> 19 U.S.C § 2242 (b) (1988).

<sup>29</sup> U.S. Trade Representative, 1989 Special 301 Report 1 (May 1989) [hereinafter *1989 Special 301 Report*], <https://ustr.gov/sites/default/files/1989%20Special%20301%20Report.pdf> [https://perma.cc/LE3V-HFEZ]; see 19 U.S.C § 2242 (b) (C) (1988).

<sup>30</sup> Liu, *supra* note 27, at 95; see U.S. Trade Representative, 2016 Special 301 Report 1 (Apr. 2016), <https://ustr.gov/sites/default/files/USTR-2016-Special-301-Report.pdf> [https://perma.cc/A7G7-KEKQ] [hereinafter *2016 Special 301 Report*].

<sup>31</sup> 19 U.S.C § 2242 (c) (1988).

<sup>32</sup> 19 U.S.C § 2412 (b)(2)(A) (1988).

<sup>33</sup> 19 U.S.C § 2414 (a)(3)(A)–(B) (1988); Bello & Holmer, *supra* note 26, at 262.

<sup>34</sup> 19 U.S.C § 2411 (c) (1988); 19 U.S.C § 2414 (a)(3) (1988); 19 U.S.C § 2416 (b) (1988).

developed countries, especially the US, and fearing potential trade sanctions, developing countries normally follow the suggestions to enhance their IP protections.<sup>35</sup> For example, in response to US pressure from the Special 301 process, China has made several concessions through different China–US bilateral agreements, such as the 1992 China–US Memorandum of Understanding,<sup>36</sup> the US–China IPR Enforcement Agreement,<sup>37</sup> and the Phase One agreement.<sup>38</sup> The US consistently uses this Special 301 process to successfully push its trading partners who enjoy a trade surplus with the US, especially China, to address its IPR concerns. Though the most frequently addressed concerns are still copyright, patents, and trademarks,<sup>39</sup> recent years have seen increasing focus of the USTR on trade secrets. Starting in 2012, “Trade Secrets and Forced Technology Transfer” has become one of the main aspects of the

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<sup>35</sup> See Ke Shao, *What May Validate Intellectual Property in a Traditional Chinese Mind? Examining the U.S.-China IP Disputes Through a Historical Inquiry*, 1 J. Info. L. & Tech. 1, 3 (2006)

<sup>36</sup> Memorandum of Understanding Between the Government of the United States of America and the Government of the People’s Republic of China on the Protection of Intellectual Property, Jan. 17, 1992, T.I.A.S No. 12,036 [hereinafter *1992 Memorandum*]. This memorandum was responding to the USTR’s listing of China as priority country in 1991. See U.S. Trade Representative, 1991 Special 301 Report 2 (Apr. 1991), <https://ustr.gov/sites/default/files/1991%20Special%20301%20Report.pdf> [https://perma.cc/Z6T7-BH4L] [hereinafter *1991 Special 301 Report*]; Dexin Tian, *The USTR Special 301 Reports: An analysis of the US hegemonic pressure upon the organizational change in China’s IPR regime*, 1 Chinese J. Commc’n 224, 228 (2008).

<sup>37</sup> See U.S. Trade Representative, 1995 Special 301 Report 3 (Apr. 1995), <https://ustr.gov/sites/default/files/1995%20Special%20301%20Report.pdf> [https://perma.cc/SMT6-29BK] [hereinafter *1995 Special 301 Report*]. This agreement was responding to the USTR’s listing of China as potential priority foreign country in 1994 report. See U.S. Trade Representative, 1994 Special 301 Report (Apr. 1994), <https://ustr.gov/sites/default/files/1994%20Special%20301%20Report.pdf> [https://perma.cc/8TSR-K6TN] [hereinafter *1994 Special 301 Report*]; Xiong, *supra* note 14, at 27.

<sup>38</sup> Phase One agreement, *supra* note 11; This agreement was responding to the Special 301 investigation initiated by the USTR in 2017. See *USTR Announces Initiation of Section 301 Investigation of China*, USTR Press Release (Aug. 18, 2017) (announcing investigation of Chinese trade practices), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/august/ustr-announces-initiation-section> [https://perma.cc/6FH9-5U9D]; Xiong, *supra* note 14, at 28; 2020 Special 301 Report, *supra* note 10, at 39.

<sup>39</sup> From 1989 to date, every Special 301 reports address the concerns of copyright, patents, and trademark protections in US trading countries. The effectiveness of the enforcement of these IP rights are also addressed in reports. In contrast, trade secrets protection started to be detailly discussed in 2012. Previous reports before 2012 either do not mention trade secrets or only provide very abstract description of trade secrets.

Special 301 Report published by the USTR.<sup>40</sup> Meanwhile, after 2012, China has been consistently identified by the Special 301 report as a country whose trade secrets protection is far from complete, which causes harm to US companies, and economic and security interests.<sup>41</sup> The US suggestions for improving China's trade secrets protection regime range from broad recommendations for a PRC standalone trade secrets law to detailed requests, such as, promoting the availability of preliminary injunctions, and reducing the difficulty of gathering evidence in trade secrets cases.<sup>42</sup> As elaborated in the next section, China has consistently made concessions in response to Special 301 process requests concerning trade secrets protection issues. These concessions provide proof of the substantial influence the US exerts on the current strict trade secrets regime in China.

## II. HISTORY OF TRADE SECRETS PROTECTION IN CHINA: THE US INFLUENCE

The current trade secrets protection regime in China encompasses different areas of law such as contract law, employment law, employment contract law, criminal law, and Anti-Unfair Competition Law (AUCL).<sup>43</sup> With regard to commercial and administrative remedies, the main part of the protection regime is still the AUCL and its related judicial interpretations and administrative regulations. Other laws such as contract law and employment-related law only provide limited or symbolic protection, with the most

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<sup>40</sup> See U.S. Trade Representative, 2012 Special 301 Report 17–18 (Apr. 2012) (reporting developments in intellectual property rights protection and enforcement) [hereinafter 2012 Special 301 Report], [https://ustr.gov/sites/default/files/2012%20Special%20301%20Report\\_0.pdf](https://ustr.gov/sites/default/files/2012%20Special%20301%20Report_0.pdf) [<https://perma.cc/862E-5862>].

<sup>41</sup> See e.g., 2013 Special 301 Report, *supra* note 7, at 13; 2020 Special 301 Report, *supra* note 10, at 18.

<sup>42</sup> See e.g., U.S. Trade Representative, 2017 Special 301 Report 30 (Apr. 2017) (outlining current Chinese IP challenges) <https://ustr.gov/sites/default/files/301/2017%20Special%20301%20Report%20FINAL.PDF> [<https://perma.cc/A2HN-H5UM>] [hereinafter 2017 Special 301 Report]; U.S. Trade Representative, 2015 Special 301 Report 36 (Apr. 2015), <https://ustr.gov/sites/default/files/2015-Special-301-Report-FINAL.pdf> [<https://perma.cc/ACT8-RSG9>] [hereinafter 2015 Special 301 Report].

<sup>43</sup> See Yang Zhengyu (杨正宇), *Meiguo Shangye Mimi Dandu Lifa Moshi* (美国商业秘密单独立法模式探究与启示) [*The Research on and Insights From the Stand-Alone Trade Secret Law in the US*], *MINSHANG FA LUNCONG* (民商法论丛) [COLLECTION CIV. & COM. L.], vol. 70, no.1, 2020, at 219–21 (reporting innovations in trade secrets law).

substantial protection still being provided in the AUCL.<sup>44</sup> This article only discusses the main parts of the protection regime, rather than all of it. The historical development of this trade secrets protection regime can be divided into four phases. The development phase before 1993 was a period when China was exploring how to protect “trade secrets” without substantial outside influence. However, as discussed below, the “trade secrets” protection then was very different from that after this period because, at that time, “trade secrets” were protected through contractual obligations. The doctrines in contract law were mainly relied upon to provide limited protection. Thus, the development of the current protection regime mainly started in 1993. Every development phase after 1993 (including 1993) was substantially affected by US influence. As elaborated in subsequent parts, this article argues, through historical analysis, that each time the US triggered further enhancements of trade secrets’ legislative protection in China, and even, in substance, stipulated which stricter rules China should add to the regime. China bowed to the pressure, nearly every time after 1993.

#### A. *Pre-1993*

No historical material before the enactment of AUCL in 1993 shows that China’s development of a “trade secrets” protection regime at the time was affected by the US. We can thus attribute the development of the law in that period to China’s local needs. The trade secrets protection can be traced back to 1985 when the PRC State Council enacted the Regulations on the Administration of Technology Acquisition Contracts (Hereinafter the 1985 Regulation). In article 7, the regulation required contracting parties to undertake the duty of confidentiality, if agreed in a contract, for any undisclosed secrets.<sup>45</sup> In other words, the validity of the confidentiality clause for trade secrets was recognized by this regulation, and contracting

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<sup>44</sup> *Id.* at 220.

<sup>45</sup> Jishu Yinjin Hetong Guanli Tiaoli (技术引进合同管理条例) [Regulations on the Administration of Technology Acquisition Contracts] (promulgated by ST. COUNCIL, May 24, 1985, effective May 24, 1985), at art. 7, CLI.2.2416(EN) (Lawinfochina); Cui Wangwei (崔汪卫), *Yi Quanli Wei Zhongxin Goujian Wanshan de Shangye Mimi Falv Tixi (以权利为中心构建完善的商业秘密法律体系)* [Establish a More Perfect Legal System of Trade Secret Protections Through the Center of Rights], HUANAN LIGONG DAXUE XUEBAO (SHEHUI KEXUE BAN) (华南理工大学学报 (社会科学版)) [J. S. CHINA UNIV. TECH. (SOC. SCI. EDITION)], vol. 18, no. 2, 2016, at 58.

parties were free to use contract clauses to protect their secrets. Thus, this regulation did not add more protections to trade secrets than normal contract law, as the applied protection was just respecting the contracting parties' autonomy within their specific contract.

Apart from this regulation, some scholars argue that article 118 of the 1986 General Principles of Civil Law (Hereinafter 1986 GPCL) indirectly recognized trade secrets as a form of intangible property rights.<sup>46</sup> Article 118 said that copyright, patents, trademarks, rights of discovery, rights of inventions, or *any other technological achievements* are protected from infringement.<sup>47</sup> The phrase "other technological achievements" is argued as including trade secrets so that the 1986 GPCL actually provided the same level of protection for trade secrets as other intellectual property rights.<sup>48</sup> However, this argument is not correct. One of the legislators of the 1986 GPCL said that "other technological achievements" included the right of rationalization, the right to technological improvement, and the right to scientific and technological progress, without mentioning trade secrets.<sup>49</sup> The inclusion of trade secret provisions in the 1993 AUCL was meant to deal with the problem of lack of trade secrets protection in China before 1993.<sup>50</sup> Therefore, it is more reasonable to interpret "other technological achievements" in the 1986 GPCL as not including trade secrets.

The first time the phrase "trade secrets" was mentioned was in the 1991 Civil Procedure Law. Article 66 thereof required that any evidence concerning trade secrets should be kept secret.<sup>51</sup> Article 120 allowed parties to apply for closed hearings if the case involved trade secrets.<sup>52</sup> However, as we can see from these two provisions, both

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<sup>46</sup> Cui, *supra* note 45, at 58.

<sup>47</sup> Minfa Tongze (民法通则) [General Principles of Civil Law], promulgated by Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987), at art. 118, CLI.1.2780(EN) (Lawinfochina).

<sup>48</sup> See Cui, *supra* note 45, at 58; Zhou Peng (周澎), *Zhongmei Shangye Mimi Baohu Wenti Ji Duice Yanjiu* (中美商业秘密保护问题及对策研究) [Research on the Trade Secret Protection in China & the US and on the Responsive Measures], FAXUE ZAZHI (法学杂志) [L. MAG.], at 133 (comparing the methods of protecting trade secrets in the US and China, while the latter adopts the method of protecting through different laws).

<sup>49</sup> KONG, *supra* note 19, at 354.

<sup>50</sup> *Id.*

<sup>51</sup> Minshi Susong Fa (民事诉讼法) [Civil Procedure Law], promulgated by Nat'l People's Cong., Sept. 4, 1991, effective Sept. 4, 1991), at art. 66, CLI.1.5110 (EN) (Lawinfochina).

<sup>52</sup> *Id.* at art 120.

were procedural rules, and neither provided any true protection for trade secrets in infringement cases. Accordingly, we can conclude that during this pre-1993 phase, the self-developed trade secrets protection regime did not provide any substantial or real protection for trade secrets in China in addition to contractual protection. Instead, information that fulfilled the requirements of trade secrets back then could only be protected through contract law. The development of a “true” trade secrets protection regime began with the 1993 AUCL.

### **B. 1993 to 2012**

In 1991, the Special 301 Report published by the USTR mentioned the trade secrets protection situation in China for the first time. In the report, China was identified as the priority foreign country because it did not offer adequate patent protection or copyright protection, and trademarks were granted to the first registrant, and “*trade secrets [were] not adequately protected in China.*”<sup>53</sup> This was also the first time that China was classified as a priority foreign country by the Special 301 Report. Accordingly, an investigation into China’s alleged inadequate protection of intellectual property was initiated by the USTR.<sup>54</sup> The listing as a priority foreign country and the consequent investigation posed a significant threat to China at that time because China was in fear of potential trade sanctions from the US and also the US’ negative stance on China’s return to the WTO.<sup>55</sup> All these factors triggered negotiations between China and the US; for example, two rounds of negotiations were held, in June 1991 in Beijing and in August 1991 in Washington.<sup>56</sup> After 6 rounds of negotiations, the US and China reached the 1992 China–US Memorandum of Understanding.<sup>57</sup> Vide article 4 of the Memorandum, the Chinese government promised to

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<sup>53</sup> 1991 Special 301 Report, *supra* note 36, at 2 (*emphasis added*).

<sup>54</sup> Wayne M. Morrison, *Enforcing U.S. Trade Laws: Section 301 and China*, CONG. RSCH. SERV. (Jul. 23, 2018), <https://www.hsdl.org/?view&did=813691> [<https://perma.cc/W4W5-9555>].

<sup>55</sup> See Ke, *supra* note 35, at 5; WU HAIMING (吴海民), *DAGUO DE JIAOLIANG: ZHONGMEI ZHISHI CHANQUAN TANPAN SHILU 16–17* (大国的较量:中美知识产权谈判实录) [POWER CONTEST: THE RECORD OF US-CHINA NEGOTIATION ON INTELLECTUAL PROPERTY ISSUES] (2009).

<sup>56</sup> WU, *supra* note 55, at 38, 44.

<sup>57</sup> For details of 6 rounds of negotiations, see *id.* at 38–110.

provide trade secrets protection, which required China to prevent trade secrets' misappropriation, in accordance with article 10 bis of the Paris Convention for the Protection of Industrial Property.<sup>58</sup> It also obliged China to allow protection for trade secrets to continue so long as the conditions requiring such protection are met (indefinite period).<sup>59</sup> The deadlines by which the law providing such levels of protection were to be submitted to the legislative body (July 1, 1993) and enacted (January 1, 1994) were specified in this provision as well.<sup>60</sup> As we can infer from the wording of article 4, the required trade secrets protection in the Memorandum was not contractual protection but something more akin to other intellectual property protections.<sup>61</sup> This marks the beginning of the development of the current trade secrets protection regime in China.

The 1993 AUCL was thus drafted and promulgated under the pressure of the 1992 Memorandum. Trade secrets protection became one of the main planks of the 1993 AUCL. However, because of the tight legislative schedule, China had to transplant nearly wholly from other countries' laws or from institutional rules in designing the trade secrets protection regime.<sup>62</sup> The trade secrets protection regime in the 1993 AUCL, in particular, was derived substantially from article 39 of the TRIPS agreement.<sup>63</sup> According to article 10 of the 1993

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<sup>58</sup> See 1992 Memorandum, *supra* note 36, at article 4 (reporting China's commitment to preventing trade secrets disclosure in a manner contrary to honest commercial practices).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> For example, article 4 required protections for trade secrets in the scenarios when third parties misappropriated trade secrets. Such protections are not available in contract law doctrines because of the principle of privity. *See id.*

<sup>62</sup> See Hou Yangkun (侯仰坤), *Lun Shangye Mimi Baohu de Lishi Juxianxing Ji Qi Yuanyin* (论商业秘密保护的历史局限性及其原因) [Discussions on the Historic Limitations and Reasons of Current Trade Secret Protections], ZHONGGUO MINSHANG FALV WANG (中国民商法律网) [CHINA CIV. & COM. L. WEBSITE], no. 11, 2006, at Part 2.2, <http://old.civillaw.com.cn/article/default.asp?id=37292> [https://perma.cc/QJX2-CTGN]; Guanyu Zhonghua Renmin Gongheguo Fanbuzhengdang Jingzheng Fa (Caoan) de Shuoming (关于《中华人民共和国反不正当竞争法(草案)》的说明) [Notes on "The People's Republic of China Anti-Unfair Competition Law (Draft)"], ZHONGGUO RENDA WANG (中国人大网) [CHINA PEOPLE'S CONG.] (Jun. 22, 1993), at part 2, [http://www.npc.gov.cn/wxzl/gongbao/2000-12/28/content\\_5003002.htm](http://www.npc.gov.cn/wxzl/gongbao/2000-12/28/content_5003002.htm) [https://perma.cc/H5B6-7Y9F] (mentioning that for drafting this law, the relevant authority collected and researched into many foreign legal materials and cases. It also sent representatives to the US and the South Korea for research purposes during the process of drafting this law).

<sup>63</sup> See He Ming (赫敏), *Zhongguo Shangye Mimi de Lifa, Bohu Kunjing Ji Duice* (中国商业秘密的立法、保护困境及对策) [The China's Trade Secrets Legislation, Difficulties, and Solutions], MEIZHONG SHIBAO [美中时报] [SINO US TIMES] (Jun. 21, 2018),

AUCL, trade secrets are considered technology or business information with commercial value and practical applicability, which were kept secret (unknown to the public) through confidential measures.<sup>64</sup> Most requirements for classification as trade secrets in the 1993 AUCL, except for the requirement of practical applicability, were similar to the requirements in article 39 of the TRIPS agreement.<sup>65</sup> Additionally, the 1993 AUCL provided a similar level of protection for trade secrets as TRIPS, whereby they both prevented trade secrets from being misappropriated, defined as being disclosed to, acquired by, or used by others (including third parties who know or ought to know of the misappropriation) in a manner contrary to honest commercial practices (i.e., breach of duty of confidence, theft, inducement).<sup>66</sup> One point to note, however, is that article 39 of TRIPS was also significantly influenced by the US. Firstly, the trade secrets protection was added to the TRIPS agreement mainly through the efforts of US negotiators, which were later supported by the European Community and other industrialized groups.<sup>67</sup> Secondly, because of the influence the US had in adding trade secrets protection to TRIPS, article 39 of TRIPS, to a great extent, incorporated principles from the Uniform Trade Secrets Act (UTSA).<sup>68</sup> The definition and requirements of trade secrets contained in the subsections (a) through (c) of Article 39(2) are modeled after the definition of ‘trade secret’ that is contained in the USTA.<sup>69</sup> The non-exclusive list of practices that are deemed as conduct contrary to

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<http://sinoustrimes.com/contents/323/25503.html> [https://perma.cc/68UB-ZJT9]; Luo Yuzhong (罗玉中) & Zhang Xiaojin (张晓津), *Trips Yu Wo Guo Shangye Mimi De Falv Baohu (Trips与我国商业秘密的法律保护)* [*Trips and the Legal Protection of Trade Secrets in China*], ZHONGWAI FAXUE (中外法学) [PEKING UNIV. L. J.], no.3, 1999, at 27.

<sup>64</sup> Fan Buzhengdang Jingzheng Fa (反不正当竞争法) [Anti-Unfair Competition Law], promulgated by Standing Comm. Nat’l People’s Cong., Sept. 2, 1993, effective Dec. 1, 1993), art. 10, CLI.1.6359(EN) (Lawinfochina) [hereinafter *1993 AUCL*].

<sup>65</sup> TRIPS Agreement, *supra* note 8, at art. 39.2 (a) – (c); The requirement of practical applicability limited the scope of trade secrets in China substantially and makes the trade secret protection in China not adequate as required in the TRIPs. Therefore, this requirement was abandoned in 2017.

<sup>66</sup> See 1993 AUCL, *supra* note 64, at art 10; TRIPS Agreement, *supra* note 8, at art. 39.2 and footnote 10; Luo & Zhang, *supra* note 63, at 27.

<sup>67</sup> See Sharon K. Sandeen, *The Limits of Trade Secret Law: Article 39 of the TRIPS Agreement and the Uniform Trade Secrets Act on which it is Based*, in THE LAW AND THEORY OF TRADE SECRECY 537, 537, 541, 552, 567 (2011). For a history of how article 39 was included and drafted into TRIPS, please see pages 541–552 of this chapter; see also, Hou, *supra* note 62, at part 2.1.

<sup>68</sup> Sandeen, *supra* note 67, at 552.

<sup>69</sup> *Id.* at 538.

honest business practices contained in footnote 10 of TRIPS is similar to the UTSA's definition of misappropriation.<sup>70</sup> However, because article 10 of the 1993 AUCL was significantly modeled on article 39 of TRIPS, not only was China's trade secrets protection regime established because of US pressure but substantial contents of the regime were also greatly influenced by US frameworks.

After China established the trade secrets protection regime in the 1993 AUCL, the US did not pay attention to trade secrets issues in China anymore until 2012. This can be seen in the Special 301 Reports from 1992 to 2011, none of which mention any trade secrets issues with China.<sup>71</sup> During this period, China on its own began to add details to the trade secrets protection regime, without any longer substantially increasing the level of protection. In 1995, the first trade secrets related administrative regulation was promulgated by the State Administration of Industry & Commerce (hereinafter 1995 Administrative Regulation).<sup>72</sup> This administrative regulation was based on the 1993 AUCL and simply repeated the definition and requirements of trade secrets, and the non-exclusive list of misappropriation behaviors in the 1993 AUCL.<sup>73</sup> It also provided some examples of what is included in the technology and business information as defined in the 1993 ACUL,<sup>74</sup> which is similar to the broad inclusion of what is protected in international standards such as TRIPS and in other countries such as the US.<sup>75</sup> The only details this administrative regulation added to the protection regime were regarding how administrative remedies for trade secrets

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<sup>70</sup> *Id.*

<sup>71</sup> The focus of the reports during this period was other IPRs such as IP enforcement, patents, copyright, and trademarks. *See e.g.*, U.S. Trade Representative, 2002 Special 301 Report (May 2002), [hereinafter 2002 Special 301 Report], [https://ustr.gov/archive/assets/Document\\_Library/Reports\\_Publications/2002/2002\\_Special\\_301\\_Report/asset\\_upload\\_file628\\_6354.pdf](https://ustr.gov/archive/assets/Document_Library/Reports_Publications/2002/2002_Special_301_Report/asset_upload_file628_6354.pdf) [https://perma.cc/SU67-XECS].

<sup>72</sup> Guojia Gongshang Xingzheng Guanli Ju Guanyu Jinzhi Qinfan Shangye Mimi Xingwei de Ruogan Guiding (国家工商行政管理局关于禁止侵犯商业秘密行为的若干规定) [Several Provisions on Prohibiting Infringements upon Trade Secrets], promulgated by State Admin. Indus. Com., Nov. 23, 1995, effective Nov. 23, 1995; revised by State Admin. Indus. Com., Dec. 3, 1998, effective Dec. 3, 1998), CLI.4.23598(EN) (Lawinfochina) [hereinafter 1995 SPPJ]. Note the 1998 revision did not make significant changes to the 1995 version.

<sup>73</sup> *See id.* at art. 2 & art. 3.

<sup>74</sup> *See id.* at art. 2.

<sup>75</sup> *See* Cui Mingxia (崔明霞) & Peng Xuelong (彭学龙), *Shangye Mimi Falv Baohu Shiji Huigu* (商业秘密法律保护世纪回顾) [The Century Reflections on Trade Secret Protections], FAXUE LUNTAN (法学论坛) [LEGAL F.], no. 6, 2001, at 33.

misappropriation were granted to right holders.<sup>76</sup> Such details were based on the abstract provision (article 25) of administrative remedies for trade secrets in the 1993 AUCL<sup>77</sup> and were not meant to further increase the legislative protection level. Thus, this administrative regulation did not add any stricter rules to the regime to further increase the legislative level, as it simply added details to the existing regime without changing anything in substance.

Another notable addition to the protection regime was the 2007 Judicial Interpretation of the 1993 AUCL.<sup>78</sup> This judicial interpretation also merely provided details for the trade secrets protection regime as framed in the 1993 AUCL, without adding stricter rules. For example, article 9 of the interpretation added a definition of the “unknown to the public” requirement to the 1993 AUCL and listed six circumstances when information can be deemed as “unknown to the public.”<sup>79</sup> Meanwhile, article 10 of the interpretation defined the “commercial value” and “practical applicability” requirements in the 1993 AUCL,<sup>80</sup> while article 11 defined the “reasonable measures” requirement and listed seven typical measures that can satisfy the requirement.<sup>81</sup> These better-clarified definitions did not add any stricter rules or change any doctrines. It is interesting to note that these expanded more or less transplanted the definitions from the US. For instance, the definition of the “unknown to public” requirement in the interpretation is the same as the definition of secrecy in section 1 (4) of the UTSA (“not being generally known” and “not being readily ascertainable”).<sup>82</sup> While not providing additional stricter protections, the 2007 Judicial Interpretation, however, added a limitation to the protection regime

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<sup>76</sup> See 1995 SPPI, *supra* note 72, at art. 4–9.

<sup>77</sup> See 1993 AUCL, *supra* note 64, at art. 25.

<sup>78</sup> Zuigao Renmin Fayuan Guanyu Shenli Buzhengdang Jingzheng Minshi Anjian Yingyong Falv Ruogan Wenti de Jieshi, Fashi [2007] Er Hao (最高人民法院关于审理不正当竞争民事案件应用法律若干问题的解释, 法释 [2007] 2号) [Interpretation of the Supreme People’s Court on Some Issues Concerning the Application of Law in the Trial of Civil Cases Involving Unfair Competition, Judicial Interpretation No. 2 [2007]], promulgated by Sup. People’s Ct., Jan. 12, 2007, effective Feb. 1, 2007), CLI.3.83311(EN) (Lawinfochina) [hereinafter *2007 Judicial Interpretation*].

<sup>79</sup> See *id.* at art. 9. An interesting point to note is that the definition of “unknown to public” requirement in the interpretation is the same as the definition of secrecy in the section 1 (4) of the UTSA (“generally known” and “readily ascertainable”).

<sup>80</sup> See *id.* at art. 10.

<sup>81</sup> See *id.* at art. 11.

<sup>82</sup> See UTSA, *supra* note 18, § 1 (4).

in the 1993 AUCL. Article 12 considered independent development and reverse engineering as non-infringing conduct, which reflected the common defenses put forward by defendants in local cases.<sup>83</sup> This limitation is widely accepted in other countries as well<sup>84</sup> and is arguably rooted in article 39 of TRIPS.<sup>85</sup> In this sense, not only did the 2007 Judicial Interpretation not add any stricter rules to the regime, but it even put a limitation on the protection, based on internationally accepted standards.

To summarize, during this development phase, the trade secrets protection regime was enhanced from mere contractual protection to property-like protection in the 1993 AUCL, mainly because of the US influence rather than due to local industry's needs or local academic support. The substantial framework for trade secrets protection in the 1993 AUCL was also hugely affected by the US. The 1995 Administrative Regulation and 2007 Judicial Interpretation, though promulgated without explicit US pressure, did not increase the legislative protection level any further, but mainly added some details to the regime to help with the enforcement. The perceived enhancement of the legislative protection level of trade secrets during this phase is mainly attributable to the US influence.

### C. 2012 to 2017

Starting in 2012, trade secrets protection issues in China have been consistently addressed in the Special 301 reports, perhaps because of the US' increasing awareness of trade secrets' importance for US companies and the US economy.<sup>86</sup> Apart from the Special 301 Reports, China and the US also increased their bilateral exchanges on trade secret issues in the 24<sup>th</sup> to 27<sup>th</sup> U.S.-China Joint Commission on Commerce and Trade (JCCT),<sup>87</sup> during which China

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<sup>83</sup> See 2007 Judicial Interpretation, *supra* note 78, at art. 12; Jiang Zhipei (蒋志培) et al., *Guanyu Shenli Buzhengdang Jingzheng Minshi Anjian Yingyong Falv Ruogan Wenti de Jieshi de Lijie yu Shiyong* (《关于审理不正当竞争民事案件应用法律若干问题的解释的理解与适用》[*The Understanding and Application of the 2007 Judicial Interpretation on Anti-Unfair Competition Law*], FALV SHIYONG (LEGAL APPLICATION), no. 3, 2007, at 27.

<sup>84</sup> See, e.g., UTSA, *supra* note 18, comment of § 1.

<sup>85</sup> See Sandeen, *supra* note 67, at 560–61.

<sup>86</sup> See, e.g., 2013 Special 301 Report, *supra* note 7, at 13–14.

<sup>87</sup> The U.S.-China Joint Commission on Commerce and Trade (JCCT), established in 1983, is the main forum for addressing bilateral trade matters and promoting commercial opportunities between the United States and China. The JCCT also includes 16 active working groups covering a wide variety of issues and industries including, intellectual

made many commitments to enhance the country's trade secrets protection regime.<sup>88</sup> Such pressures from the Special 301 process and the commitments made in the JCCT triggered China's further enhancements of trade secrets protection in the legislation.

The Special 301 Reports from 2012 to 2017 identified various deficiencies in China's 1993 AUCL with regard to trade secrets protection, and urged China to revise its AUCL to provide more adequate protection for trade secrets.<sup>89</sup> The 2016 and 2017 Special 301 Reports further urged China to consider a standalone trade secrets law, despite the fact that China had put much effort into reforming the 1993 AUCL then.<sup>90</sup> Specific problems of the trade secrets protection regime in the 1993 AUCL identified by these reports included limiting the scope of trade secrets by requiring information to have practical applicability,<sup>91</sup> limiting the law's application

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property, environment, information industry, pharmaceutical and medical devices, statistics, commercial law, and trade and investment, among others. *See Trade Policy Initiatives: U.S.–China Joint Commission on Commerce and Trade (JCCT)*, Export.gov (Nov. 20, 2015), [https://2016.export.gov/china/doingbizinchina/tradepolicydialog/eg\\_cn\\_026540.asp](https://2016.export.gov/china/doingbizinchina/tradepolicydialog/eg_cn_026540.asp) [<https://perma.cc/Y6KV-F7JS>].

<sup>88</sup> *See, e.g., 24th U.S.–China Joint Commission on Commerce and Trade Fact Sheet*, USTR (Dec. 20, 2013), <https://ustr.gov/index.php/about-us/policy-offices/press-office/fact-sheets/2013/December/JCCT-outcomes> [<https://perma.cc/7A28-58UH>] (hereinafter *24th JCCT Fact Sheet*); *U.S.–China Joint Fact Sheet on the 25th U.S.–China Joint Commission on Commerce and Trade*, USTR (Dec. 30, 2014), <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2014/december/us-china-joint-fact-sheet-25th-us> [<https://perma.cc/M6Y9-WDDX>] (hereinafter *25th JCCT Fact Sheet*).

<sup>89</sup> *See* 2013 Special 301 Report, *supra* note 7, at 31–33 (“Enforcement obstacles include various deficiencies in China’s Anti Unfair Competition Law”); U.S. Trade Representative, 2014 Special 301 Report 31-32 (May 2013), <https://ustr.gov/sites/default/files/USTR%202014%20Special%20301%20Report%20to%20Congress%20FINAL.pdf> [<https://perma.cc/4X87-NDYZ>] (hereinafter *2014 Special 301 Report*) (“Amendment of the Anti-Unfair Competition Law (AUCL), unrevised since first entering into force in 1993, is proceeding at a slower pace . . . the United States notes the need to move forward expeditiously with remaining revisions to its IP related laws, and underscores the urgent need to update and amend the AUCL and related trade secret laws, regulations, and judicial interpretations, including provisions regarding the protection and enforcement of trade secrets.”); 2015 Special 301 Report, *supra* note 42, at 32 (“The United States underscores the urgent need to update and amend the AUCL and related trade secret laws, regulations, and judicial interpretations.”)

<sup>90</sup> *See* 2017 Special 301 Report, *supra* note 42, at 30 (“to date, China has not signaled an intention to develop the standalone legislation that would best remedy concerns”); 2016 Special 301 Report, *supra* note 30, at 30 (“The United States urges China to consider drafting a stand-alone trade secrets law, which would provide an opportunity to address a broader range of concerns than possible as part of a reform to the AUCL.”)

<sup>91</sup> *See, e.g.,* 2014 Special 301 Report, *supra* note 89, at 32–33; 2015 Special 301 Report, *supra* note 42, at 36.

because AUCL appeared to apply primarily to commercial undertakings (business operators) rather than individual actors,<sup>92</sup> low damage awards for trade secret holders in infringement cases,<sup>93</sup> and lack of preliminary injunctions in trade secrets cases.<sup>94</sup> Perhaps because of these Special 301 reports, China committed to providing a stronger trade secrets protection regime in several bilateral exchanges with the US through the JCCT.<sup>95</sup> The commitments made by China included clarifying rules on preliminary injunctions or evidence preservation,<sup>96</sup> confirming that trade secrets in practice may be misappropriated by individual actors such as employees who are not commercial undertakings,<sup>97</sup> and agreeing to strengthen the protection of trade secrets in government proceedings.<sup>98</sup>

The pressures from the Special 301 Reports and China's commitments in JCCT gave rise to the amendments to the trade secrets provisions in the 1993 AUCL. The 1993 AUCL was, accordingly, revised on November 4, 2017, and came into effect on January 1, 2018 (hereinafter 2017 AUCL).<sup>99</sup> There were four notable amendments to the trade secrets protection regime in the 2017 AUCL. First, the practical applicability requirement was deleted from article 9 of the 2017 AUCL, which extended the scope of the information protected by trade secrets and was consistent with TRIPS' requirements regarding trade secrets.<sup>100</sup> Second, the 2017 AUCL

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<sup>92</sup> See, e.g., 2014 Special 301 Report, *supra* note 89, at 32–33; 2015 Special 301 Report, *supra* note 42, at 36.

<sup>93</sup> See, e.g., 2016 Special 301 Report, *supra* note 30, at 30.

<sup>94</sup> See, e.g., *id.*; 2017 Special 301 Report, *supra* note 42, at 30.

<sup>95</sup> See, e.g., 24th JCCT Fact Sheet, *supra* note 88; 25th JCCT Fact Sheet, *supra* note 88.

<sup>96</sup> See U.S.-China Joint Fact Sheet on the 26th U.S.-China Joint Commission on Commerce and Trade, USTR (Dec. 21, 2015), <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/December/US-China-Joint-Fact-Sheet-26th-JCCT> [<https://perma.cc/GQ2F-VACN>] [hereinafter *26th JCCT Fact Sheet*]; U.S.-China Joint Fact Sheet on the 27th U.S.-China Joint Commission on Commerce and Trade, USTR (Jan. 9, 2017), <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2017/january/us-china-joint-fact-sheet-27th-us> [<https://perma.cc/7D5S-VDDK>] [hereinafter *27th JCCT Fact Sheet*].

<sup>97</sup> See 27th JCCT Fact Sheet, *supra* note 96.

<sup>98</sup> See 25th JCCT Fact Sheet, *supra* note 88.

<sup>99</sup> Fan Buzhengdang Jingzheng Fa (反不正当竞争法) [Anti-Unfair Competition Law], (promulgated by Standing Comm. Nat'l People's Cong., Sept. 2, 1993, effective Dec. 1, 1993; revised by Standing Comm. Nat'l People's Cong., Nov. 4, 2017, effective Jan. 1, 2018), CLI.1.304262(EN) (Lawinfochina) [hereinafter *2017 AUCL*].

<sup>100</sup> See *id.* at art. 9; King & Wood Mallesons, *Amendment to China's Anti-Unfair Competition Law*, CHINA L. INSIGHT, at Part 6 (Nov. 14, 2017),

increased the damage awarded to trade secrets holders, in that article 17 raised the cap on statutory damage from RMB 1 million to RMB 3 million.<sup>101</sup> Such statutory damage is awarded at the court's discretion when the actual losses sustained by the right holders or the gains obtained by the infringer are difficult to determine.<sup>102</sup> Third, satisfying the commitments made in JCCT, the 2017 AUCL specifically added article 15 to impose a confidentiality duty on government officials, requiring them to keep confidential any trade secrets divulged in administrative proceedings.<sup>103</sup> Fourth, article 9 added that if third parties know or should have known of the misappropriation by *an employee or a former employee* or any other entity or individual, they may be deemed as infringing trade secrets if they still acquire, disclose, use, or allow others to use the trade secrets.<sup>104</sup> The emphasis on “an employee or a former employee” in article 9 can be construed as partly responding to the criticism that the AUCL only applies to “business operators” rather than individuals. However, this emphasis did not fully clarify the question of whether the AUCL could apply to individuals. In sum, we can see that the first three changes of trade secrets protection in the 2017 AUCL were either in response to US criticism in the Special 301 Reports or meeting the commitments made by China in its bilateral exchanges with the US. In other words, China added all these stricter rules into its regime under US influence to further enhance the legislative protection level. While the last change in the 2017 AUCL did not explicitly respond to US criticism, it also did not enhance the protection level. This change was arguably just to emphasize the importance of dealing with a certain type of case, by making it explicit in the legislation, wherein third parties acquired trade secrets from employees. We can say that this change gave more clarity to

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<https://www.chinalawinsight.com/2017/11/articles/intellectual-property/amendment-to-chinas-anti-unfair-competition-law> [https://perma.cc/Y8RC-DBS6].

<sup>101</sup> See *id.* at art. 17 ¶ 4; Ruixun Ran, et al., *Trade Secret Law In China: 3 Highlights From 2017*, LAW 360, 1, 2 (Jan. 26, 2018), [https://www.cov.com/-/media/files/corporate/publications/2018/01/trade\\_secret\\_law\\_in\\_china\\_3\\_highlights\\_from\\_2017.pdf](https://www.cov.com/-/media/files/corporate/publications/2018/01/trade_secret_law_in_china_3_highlights_from_2017.pdf) [https://perma.cc/8AV7-DA62].

<sup>102</sup> See Ran et al., *supra* note 101, at 2.

<sup>103</sup> See 2017 AUCL, *supra* note 99, at art. 15.

<sup>104</sup> See 2017 AUCL, *supra* note 99, at art. 9 (“Where a third party knows or should have known that *an employee or a former employee* of the right holder of a trade secret or any other entity or individual has committed an illegal act as specified in the preceding paragraph but still acquires, discloses, uses, or allows another person to use the trade secrets, the third party shall be deemed to have infringed the trade secret.” (*emphasis added*)).

the regime, but not that it substantially provided stricter rules for protecting employers' trade secrets.<sup>105</sup>

Moreover, to respond to the criticism concerning lack of preliminary injunctions in trade secrets cases, in early 2015 the Supreme People's Court of China (SPC) invited comments for the draft of "Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in Cases Involving the Review of Act Preservation in Intellectual Property Disputes," which was finally promulgated in 2018.<sup>106</sup> This judicial interpretation provided a legal basis for right holders to apply for preliminary injunctions or evidence preservation if they believe their trade secrets are being infringed.<sup>107</sup> The courts have been invested with the authority to issue such preliminary rulings upon application, based on this judicial interpretation.<sup>108</sup>

To conclude, the 2017 AUCL and 2018 Judicial Interpretation made certain amendments or additions to the trade secrets protection regime in China, which enhanced the legislative level of protection for trade secrets, making it much stricter than before. However, not only were all the enhancements triggered by the US, but also the substance of these stricter protections was significantly influenced by the US, either through its unilateral Special 301 process or through its bilateral exchanges with China. China's local industry's needs played a limited role, if any, in framing China's protection regime.

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<sup>105</sup> See King & Wood Mallesons, *supra* note 100, at Part 6; see also Wen Zhong, *Amendments of Anti-Unfair Competition Law*, LIU SHEN INTELL. PROP., at I. 1 (7), (Nov. 17, 2017), <http://www.liu-shen.com/Content-2729.html> [https://perma.cc/B9HV-X9CT].

<sup>106</sup> For the draft for public comments, see SPC, Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in Cases Involving the Review of Act Preservation in Intellectual Property Disputes (Draft for comments), SPC (Feb. 26, 2015), <http://www.court.gov.cn/zixun-xiangqing-13517.html> [https://perma.cc/AFH8-K3BT]. For the final promulgated version, see Zuigao Renmin Fayuan Guanyu Shencha Zhishi Chanquan Jiufen Xingwei Baoquan Anjian Shiyong Falv Ruogan Wenti de Jieshi , Fashi [2018] Ershi Yi Hao (最高人民法院关于审理知识产权纠纷行为保全案件适用法律若干问题的解释, 法释 [2018] 21号) [Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in Cases Involving the Review of Act Preservation in Intellectual Property Disputes, Judicial Interpretation No. 21 [2018]], promulgated by Sup. People's Ct., Dec. 12, 2018, effective Jan. 1, 2019), CLI.3.327340(EN) (Lawinfochina) [hereinafter *2018 Judicial Interpretation*].

<sup>107</sup> See 2018 Judicial Interpretation, *supra* note 106, at arts. 2, 6.

<sup>108</sup> See *id.* at arts 2, 13.

*D. 2018 to date*

The US government, however, was not satisfied with the amendments in the 2017 AUCL with regard to trade secrets. The 2018 and 2019 Special 301 Reports identified the 2017 AUCL as “a major missed opportunity to address critical concerns” in the trade secrets protection regime.<sup>109</sup> The 2018 Report criticized China’s failure to establish a standalone trade secrets law as it continues to put important trade secret provisions in the AUCL.<sup>110</sup> Specifically, these two years’ reports criticized some problems in the 2017 AUCL, such as “the overly narrow scope of covered actions and actors, the failure to address obstacles to injunctive relief, and the need to allow for evidentiary burden-shifting in appropriate circumstances.”<sup>111</sup> As mentioned above, the problem of lack of preliminary injunctions had been partly addressed by the 2018 Judicial Interpretation which went into effect on January 1, 2019.<sup>112</sup> The USTR in the 2019 Special 301 Report admitted as much, although it was uncertain whether this judicial interpretation could truly address the problem.<sup>113</sup> From the US government’s perspective, other concerns raised in the reports were not resolved by China in 2017. Moreover, on March 22, 2018, the USTR issued a report describing the acts, policies, and practices that were “unreasonable or discriminatory and burden and/or restrict U.S. commerce.”<sup>114</sup> This report was the outcome of the investigation under the Section 301 process initiated by the USTR in August 2017

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<sup>109</sup> U.S. Trade Representative, 2018 Special 301 Report 40 (Apr. 2018), <https://ustr.gov/sites/default/files/files/Press/Reports/2018%20Special%20301.pdf> [<https://perma.cc/7G8J-98XB>] [hereinafter *2018 Special 301 Report*]; U.S. Trade Representative, 2019 Special 301 Report 41–42 (Apr. 2019), [https://ustr.gov/sites/default/files/2019\\_Special\\_301\\_Report.pdf](https://ustr.gov/sites/default/files/2019_Special_301_Report.pdf) [<https://perma.cc/F2FL-8NUM>] [hereinafter *2019 Special 301 Report*].

<sup>110</sup> See 2018 Special 301 Report, *supra* note 109, at 40.

<sup>111</sup> See 2018 Special 301 Report, *supra* note 109, at 40; 2019 Special 301 Report, *supra* note 109, at 42.

<sup>112</sup> *2018 Judicial Interpretation*, *supra* note 106.

<sup>113</sup> *2019 Special 301 Report*, *supra* note 109, at 42.

<sup>114</sup> *2018 Special 301 Report*, *supra* note 109, at 17; 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 (Mar. 22, 2018), <https://ustr.gov/sites/default/files/Section%20301%20FINAL.PDF> [<https://perma.cc/T3U7-7UVN>] [hereinafter *2018 Investigation Report*].

to examine the IPR situation in China.<sup>115</sup> Trade secrets protection issues were also discussed in this investigation report.<sup>116</sup> This report became the legal basis for US trade sanctions (increased tariffs) against China in July 2018,<sup>117</sup> in response to which China imposed retaliatory tariffs on US exports in August 2018.<sup>118</sup> Intense negotiations between US and China started, following the release of the report.<sup>119</sup> IPR issues including trade secrets were major themes for US–China negotiations during the trade war.<sup>120</sup> For example, the official statement from the US after the US–China three-day trade talks in Beijing on January 2019 mentioned “negotiations with a view to achieving needed structural changes in China with respect to . . . cyber theft of trade secrets for commercial purposes, services, and agriculture.”<sup>121</sup>

In response to US concerns regarding trade secrets protection in China as expressed in the Special 301 process and the trade war negotiations, China amended its 2017 AUCL again in 2019.<sup>122</sup> The 2019 AUCL mainly revised the trade secrets rules in the 2017 AUCL.<sup>123</sup> One revision to the 2019 AUCL expanded the scope of

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<sup>115</sup> See *2018 Special 301 Report*, *supra* note 109, at 17; see also *2018 Investigation Report*, *supra* note 114, at 4.

<sup>116</sup> See *2018 Investigation Report*, *supra* note 114, at 171–76, 179–80.

<sup>117</sup> See Karen Yeung & Sidney Leng, *Can China Meet US Trade War Demands on IP Theft and Forced Technology Transfer?*, SOUTH CHINA MORNING POST (Feb. 25, 2019, 6:00 AM), <https://www.scmp.com/economy/china-economy/article/2187312/us-china-trade-war-can-china-meet-us-demands-ip-theft-and> [<https://perma.cc/A4LJ-WYR6>]; see also Dorcas Wong & Alexander Chipman Koty, *The US-China Trade War: A Timeline*, CHINA BRIEFING (Aug. 25, 2020), <https://www.china-briefing.com/news/the-us-china-trade-war-a-timeline> [<https://perma.cc/JF9W-JJK9>].

<sup>118</sup> See Wong & Koty, *supra* note 117.

<sup>119</sup> See *id.* (demonstrating the on and off trade negotiations between the US and China that occurred between August 22, 2018 and November 9, 2018).

<sup>120</sup> See Yeung & Leng, *supra* note 117; See also Gu Ping (顾萍) & Liu Xingyu (刘騷宇), *China Amended IP Laws & Regulations to Strengthen IPR Protection*, ZHONG LUN (May 13, 2019), <http://www.zhonglun.com/Content/2019/05-13/0937561797.html> [<https://perma.cc/J82U-UYCF>].

<sup>121</sup> U.S. Trade Representative, *Statement on the United States Trade Delegation’s Meetings in Beijing*, USTR Press Release (Jan. 9, 2019), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/january/statement-united-states-trade> [<https://perma.cc/WD8E-BPHR>].

<sup>122</sup> See Ping & Xingyu, *supra* note 120.

<sup>123</sup> See Quanguo Renmin Daibiao Dahui Changwu Weiyuan Hui Zuochu Xiugai Zhonghua Renmin Gongheguo Fanbuzhengdang Jingzheng Fa de Jueding (全国人民代表大会常务委员会做出修改《中华人民共和国反不正当竞争法》的决定) [The Standing Committee of the National People’s Congress made a decision to amend the “People’s Republic of China Anti-Unfair Competition Law”, Guojia Shichang Jiandu Guanli Zongju

Article 9 to include individuals and other entities as potential infringers of trade secrets.<sup>124</sup> This addition makes clear that the trade secrets protections in the 2019 AUCL not only apply to commercial undertakings but also to individual actors and other entities, responding to US concerns that the AUCL restricted its application only to commercial undertakings. Another change in Article 9 was addressing the cyber theft of trade secrets by adding a new type of trade secrets misappropriation—namely, the acquisition of trade secrets through cyber invasion.<sup>125</sup> This change clearly reacted to the concerns of the US about cyber theft of trade secrets as reflected in its trade negotiations with China.<sup>126</sup> One other amendment to the 2019 AUCL again targeted the damage award to trade secrets holders in infringement cases. Article 17 of the 2019 AUCL allows granting right holders punitive damages against trade secret infringement if such misappropriation is carried out with malicious intent.<sup>127</sup> Moreover, the statutory damages was increased from 3 million RMB to 5 million RMB,<sup>128</sup> shortly after its first increase in the 2017 AUCL under the Special 301 process. Lastly importantly, China finally adhered to the US’ consistent demand to allow the burden of proof shifting in some trade secrets infringement. Before the 2019 AUCL, plaintiffs had to prove every element of their claim such that the

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(国家市场监督管理总局) [STATE ADMIN FOR MKT. REGUL.] (Apr. 25, 2019), <http://www.huzhou.gov.cn/hzgov/front/s72/xxgk/zcwj/20191010/i2516950.html> [<https://perma.cc/UR3P-TR2D>] (all the amendments are related to trade secrets); *see also id.*

<sup>124</sup> *See 2019 AUCL, supra* note 1, at art. 9 ¶6 (“An illegal act as set forth in the preceding paragraph committed by a natural person, legal person or unincorporated organization other than a business shall be treated as infringement of the trade secret.”); *see also* Steven Grimes, *China Revises Anti-Unfair Competition Law to Further Enhance Trade Secret Protection*, WINSTON & STRAWN LLP (May 13, 2019), <https://www.winston.com/en/privacy-law-corner/china-revises-anti-unfair-competition-law-to-further-enhance-trade-secret-protection.html> [<https://perma.cc/EY88-YHH8>].

<sup>125</sup> *See 2019 AUCL, supra* note 1, at art. 9 ¶2 (“(1) Acquiring a trade secret from the right holder by theft, bribery, fraud, coercion, *electronic intrusion*, or any other illicit means.” [emphasis added]); *see also* Global Legal Monitor, *China: Trade Secret Provisions Under Anti-Unfair Competition Law Revised*, LIBRARY OF CONGRESS (June 6, 2019), <https://www.loc.gov/law/foreign-news/article/china-trade-secret-provisions-under-anti-unfair-competition-law-revised> [<https://perma.cc/9LM9-BNAD>].

<sup>126</sup> *See supra* text accompanying note 121.

<sup>127</sup> This allows plaintiffs to recover up to five times the loss suffered. *See 2019 AUCL, supra* note 1, at art. 17 ¶3 (“If a business infringes upon a trade secret in bad faith with serious circumstances, the amount of compensation may be determined to be more than one time but not more than five times the amount determined by the aforesaid method.”); *See also* Grimes, *supra* note 124.

<sup>128</sup> *See 2019 AUCL, supra* note 1, at art. 17 ¶4.

information satisfied all requirements of trade secrets and had been misappropriated by the defendants.<sup>129</sup> The legislation then did not recognize any shifting of the burden of proof, which was alleged to have made trade secret infringement claims hard to prove.<sup>130</sup> The 2019 AUCL Article 32 permits evidentiary burden-shifting in several situations. First, Article 32 shifts the burden to the defendant to prove that the litigated information is not a trade secret, if the plaintiff provides *prima facie* evidence that they have taken reasonable measures to protect the trade secret and reasonably shows that the trade secret has been infringed.<sup>131</sup> Moreover, the burden of proof is also shifted to the defendant to prove there is no infringement of trade secrets if plaintiff provides *prima facie* evidence to reasonably indicate the infringement of trade secrets, and provides evidence the particular circumstances Article 32.<sup>132</sup> Examples of such particular circumstances include situations where an alleged infringer has the opportunity to gain access to the trade secrets, while the information used by them is materially similar to the trade secrets, and the trade secrets have been or risk being disclosed or used.<sup>133</sup> All these added stricter rules in the 2019 AUCL were responding to US pressure through the Special 301 process and trade war negotiations. Most suggestions from the US about how to increase the trade secret level were again adopted by China.

Even the 2019 AUCL with other amended IP laws did not bring the US–China trade war to an end<sup>134</sup> and the negotiations between the two countries to reach an agreement continued. After many rounds of negotiations and back-and-forth to tariffs, the two parties signed the Phase One Agreement on January 15, 2020, which

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<sup>129</sup> See 2007 Judicial Interpretation, *supra* note 78, at art. 14; William Fisher, Horace Lam, Ting Xiao & Reking Chen, *China's Long-Awaited Overhaul of Trade Secret Protection Regime*, DLA PIPER (Apr. 26, 2019), <https://www.dlapiper.com/en/china/insights/publications/2019/04/china-s-long-awaited-overhaul> [<https://perma.cc/XL3S-GW7R>]; see also Grimes, *supra* note 124.

<sup>130</sup> See 2018 Special 301 Report, *supra* note 109, at 40; see also Fisher et al., *supra* note 129.

<sup>131</sup> See 2019 AUCL, *supra* note 1, at art. 32 ¶1.

<sup>132</sup> See *id.* at art. 32 ¶2.

<sup>133</sup> See *id.* at art. 32 ¶3 (“(1) Evidence that the alleged tortfeasor has a channel or an opportunity to access the trade secret and that the information it uses is substantially the same as the trade secret. (2) Evidence that the trade secret has been disclosed or used, or is at risk of disclosure or use, by the alleged tortfeasor. (3) Evidence that the trade secret is otherwise infringed upon by the alleged tortfeasor.”).

<sup>134</sup> Although China enhanced its IPR regime by amending several IP related laws, the trade war between the US and China still continued. See Yeung & Leng, *supra* note 117.

partly dealt with strengthening trade secrets protections.<sup>135</sup> Firstly, Section B of the Phase One Agreement provides a broad definition of confidential business information which includes nearly all information as long as it satisfies the statutory requirements.<sup>136</sup> This means China should enhance its protections to include such broad scope of information in trade secrets. In response, the 2020 Judicial Interpretation (Articles 1 and 2) and 2020 Administrative Regulation (Draft) (Article 5) provide examples of the scope of trade secrets covered by the AUCL.<sup>137</sup> These examples represent the broad definition of trade secrets, adopted by the Phase One Agreement. For instance, style of works, business transactions, customer information, amount or source of any income, profits, or other information of commercial value can be regarded as trade secrets in the AUCL according to the 2020 Judicial Interpretation.<sup>138</sup> Secondly, Article 1.3 of the Phase One Agreement requires China to expand its scope of actors liable for trade secrets misappropriation to “include all natural persons, groups of persons, and legal persons”<sup>139</sup>, apart from commercial undertakings or business operators. The 2019 AUCL, as mentioned above, has substantially expanded the scope of actors by adding paragraph 3 to Article 9,<sup>140</sup> and thus satisfies the Article 1.3 requirement in the Phase One Agreement. Article 16 and Article 3 from the 2020 Interpretation and 2020 Administrative Regulation (draft) respectively, further confirm that a natural person, legal person, or unincorporated organization other than business operators

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<sup>135</sup> See Wong & Koty, *supra* note 117.

<sup>136</sup> See *Phase One agreement*, *supra* note 11, at footnote 1 of 1-1 (stating that “confidential business information” includes any “information of commercial value” that could cause “substantial harm to the competitive position of such person from which the information was obtained”).

<sup>137</sup> See *2020 Judicial Interpretation*, *supra* note 1, at art. 1 and 2; see also *2020 Administrative Regulation (Draft)*, *supra* note 1, at art. 5.

<sup>138</sup> See *2020 Judicial Interpretation*, *supra* note 1, at art. 1 (“A people’s court may determine . . . styles . . . processes, methods or their steps, . . . data, computer programs and their related documents, . . . as technical information in paragraph 4, article 9 of the AUCL.”, “A people’s court may determine the information on . . . finance, plans, . . . clients’ information . . . as business information in paragraph 4, article 9 of the AUCL.”); see also *2020 Administrative Regulation (Draft)*, *supra* note 1, at art. 5 (“design, procedures, formulas, . . . , production processes . . . .”, “customer lists, . . . , financial data, . . . purchase prices . . .”).

<sup>139</sup> See *Phase One agreement*, *supra* note 11, at art. 1.3.2.

<sup>140</sup> See *supra* text accompanying note 124.

can be deemed to be an infringer in the AUCL.<sup>141</sup> The current enhanced trade secrets protection regime thus fully satisfies Article 1.3 of the Phase One Agreement. Likewise, the scope of prohibited acts constituting trade secret misappropriation, including “electronic intrusions” (cyber threat), as required by Article 1.4 of the Phase One Agreement, has mostly been covered by the 2019 AUCL.<sup>142</sup> Specifically, Article 1.4.2 (c) in the Phase One Agreement requires China to enumerate any act of “unauthorized disclosure or use that occurs after the acquisition of a trade secret under circumstances giving rise to a duty to protect the trade secret from disclosure or to limit the use of the trade secret.”<sup>143</sup> In contrast to Article 1.4.2 (b) which deals with situations when there is an explicit duty not to disclose, Article 1.4.2 (c) covers situations where there is no explicit duty but an implied duty that has arisen on account of certain circumstances.<sup>144</sup> In response, paragraph one of Article 10 in the 2020 Judicial Interpretation interprets what amounts to “a duty not to disclose information” in the 2019 AUCL, satisfying article 1.4.2(b) of the Phase One Agreement.<sup>145</sup> Meanwhile, paragraph two of Article 10 gives guidance for courts on how to determine whether there is an implied duty not to disclose in certain circumstances, responding to Article 1.4.2(c) of the Phase One Agreement.<sup>146</sup> Accordingly, we may say that the Article 1.4 requirement in the Phase One Agreement has been satisfied by China through the insertion of certain stricter rules into the protection regime.

Fourthly, with regard to the burden-shifting stipulated in Article 1.5 of the Phase One Agreement,<sup>147</sup> the 2019 AUCL similarly

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<sup>141</sup> See *2020 Judicial Interpretation*, *supra* note 1, at art. 16; see also *2020 Administrative Regulation (Draft)*, *supra* note 1, at art. 3.

<sup>142</sup> *Phase One agreement*, *supra* note 11, at art. 1.4; See *supra* text accompanying note 125.

<sup>143</sup> See *Phase One agreement*, *supra* note 11, at art. 1.4.2(c).

<sup>144</sup> See *id.* at art. 1.4.2(b).

<sup>145</sup> See *2020 Judicial Interpretation*, *supra* note 1, at art. 10 ¶ 1 (“The people’s court shall determine the confidentiality obligation assumed by a party in accordance with *legal provisions or those agreed upon in a contract* as a confidentiality obligation set forth in paragraph 1, Article 9 of the Anti-Unfair Competition Law.”).

<sup>146</sup> See *id.*, at art. 10 ¶ 2 (“Where the parties have not agreed on the confidentiality obligation in their contract, but the alleged infringer knows or should have known that the information obtained by it or him belongs to the trade secret of the right holder according to the principle of *good faith and the contract nature, purpose, conclusion process, and trading practices*, among others, the people’s court shall determine that the alleged infringer shall assume the obligation to keep confidential the trade secret obtained by it or him.”).

<sup>147</sup> See *Phase One agreement*, *supra* note 11, at art. 1.5.

deferred to US pressure by including situations when the burden of proof will be shifted to the defendant,<sup>148</sup> satisfying the Phase One Agreement. The 2020 Judicial Interpretation provides further instructions on what factors the court can take into consideration when determining whether the used information is materially the same as the trade secrets, supplementing the burden-shifting provisions in the 2019 AUCL.<sup>149</sup> The promises made by China in article 1.5 of the Phase One Agreement have been satisfied by the 2019 AUCL and the 2020 Judicial Interpretation. Lastly, allowing provisional measures or preliminary injunctions to prevent the use of trade secrets is addressed in article 1.6 of the Phase One Agreement.<sup>150</sup> Fulfilling this commitment, the 2020 Judicial Interpretation grants courts the authority in paragraph 1 of article 15 to take provisional measures to prevent the disclosure or use of trade secrets, while paragraph 2 deals with “urgent situations” by issuing provisional measures.<sup>151</sup> This article meets the requirements in the Phase One Agreement. Other provisions in the 2020 Judicial Interpretation and 2020 Administrative Regulation (Draft) clarify the current protection regime or add details to the original regime to some degree without adding any stricter doctrines or changing the current rules.<sup>152</sup> For example, articles 3 and 4 of the 2020 Judicial Interpretation clarify the requirement of secrecy by defining the meaning of “not known to the public” and provides some examples, without adding new requirements to the regime set up by the AUCL.<sup>153</sup> In sum, under the influence of the Phase One Agreement, namely the US influence, the 2020 Judicial Interpretation and 2020 Administrative Regulation (Draft) added stricter rules to the trade

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<sup>148</sup> See *supra* text accompanying notes 129-133 (emphasizing situations where burden shifting is permitted).

<sup>149</sup> 2020 Judicial Interpretation, *supra* note 1, at art. 13.

<sup>150</sup> Phase One Agreement, *supra* note 11, at art. 1.6.

<sup>151</sup> See 2020 Judicial Interpretation, *supra* note 1, at art. 15 ¶¶ 1–2 (responding to the articles 1.6.1 and 1.6.2 of the Phase One Agreement).

<sup>152</sup> See Zhong Lun Law Firm, *Overview of the PRC New Judicial Interpretation on Civil Enforcement of Trade Secret*, LEXOLOGY (Sept. 21, 2020), <https://www.lexology.com/library/detail.aspx?g=86773741-10df-426c-9b4b-0abe9f5e971b> [<https://perma.cc/PW3K-ZCCY>] (containing a brief summary of the provisions of the 2020 Judicial Interpretation). See Sofia Baruzzi, *Trade Secrets’ Protection in China: What is Changing?*, CHINA BRIEFING (Sept 21, 2020), <https://www.china-briefing.com/news/trade-secrets-protection-in-china-changes-expected/> [<https://perma.cc/U7S7-Q2E8>] (containing a brief summary of the provisions of the 2020 Administrative Regulation (Draft)).

<sup>153</sup> 2020 Judicial Interpretation, *supra* note 1, at arts. 3–4.

secrets protection regime, which have further enhanced the legislative protection level in China.

### *E. Summary*

The above analysis shows that ever since China has established its trade secrets protection regime through the AUCL, most further enhancements of trade secret legislative protection level in China have been significantly influenced by the US through its unilateral Special 301 Process, its bilateral exchanges with China, and its bilateral agreements with China (please see Table 1 for a summary of developments). In other words, the US has pushed China to increase the legislative protection level for trade secrets, and substantially affected, in substance, what stricter rules China has added to the regime nearly every time. Although China itself has added many details and clarifications to the regime by summarizing and synthesizing the lessons learned in practice, most of them do not substantially make the system stricter. It is, thus, argued that most enhancements of the legislative protection level and the s stricter rules added can be majorly attributed to the US influence rather than to the demands of local industry and academia. This development has resulted in problems in the current trade secrets protection regime in China, both in theory and in practice.

### **III. CONSEQUENCES OF SUCH A DEVELOPMENT PATH**

The preceding part shows that every new, stricter rule that advanced the legislative protection level was triggered by and followed the suggestions put forward by the US through the Special 301 Process or bilateral exchanges or bilateral agreements. What is interesting, however, is whether the local industry truly needs this strict regime; if not, what interests, other than that of the local industry, does the current regime mainly account for, and why so. Additionally, what impacts do this development path and the resultant regime have on the local academia? This part of the paper focuses on these questions to explore the consequences of this development path for the local industry and local academia.

A. *Insufficient Consideration of Local Industry Interests and Needs*

One notable consequence of such a development route is that the current protection regime does not sufficiently account for local industry interests, which harms the growth of the local industry. To present this consequence, this sub-part first discusses whether the local industry truly has a practical need for such an enhanced legislative protection regime as demanded by the US. If not, why are local industry interests and needs neglected in this regime? The main reason is that the US industry functions collaboratively to promote and represent their interests in enhancing trade secrets protection in China. As may be recalled, the main frameworks of how to increase the legislative protection level (by adding stricter rules) have been significantly influenced or even set up by the US influence. The subsequent section, however, shows that the perceived US influence is indeed the US industry influence because these main frameworks of the stricter rules added are actually provided and promoted by US industry through the statutory procedure allowed in the Special 301 process. Such extensive representation of the interests of the US industry in China's legal amendments to the trade secrets protection regime leaves little room for China to account for local industry's needs. This furthers the argument that local industry's interests have been harmed significantly by this strict regime when the interests of US industry conflict with those of local industry.

1. Does Local Industry Really Need Such Enhanced Protection?

Before we discuss this question in detail, regarding the local industry's needs, let us first consider the main policy goals of trade secrets. By extending trade secrets protection beyond mere contractual protection to prevent misappropriation by parties with the duty of confidence and even third parties, modern trade secrets law mainly intends to serve a policy goal similar to that of patents and copyright—incentivizing invention/creation.<sup>154</sup> Valuable

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<sup>154</sup> See, e.g., Bone, *supra* note 17, at 262–70; Lemley, *supra* note 19, at 329–32; Deepa Varadarajan, *Trade Secret Fair Use*, 83 *FORDHAM L. REV.* 1401, 1418–20 (2014); Peter S. Menell, *Tailoring a Public Policy Exception to Trade Secret Protection*, 105 *CALIF. L. REV.* 1, 15 (2017); PETER SETH. MENELL, MARK A. LEMLEY & ROBERT P. MERGES, *INTELLECTUAL*

information that is subject to trade secrets protection suffers similar public good problems as matters of patent and copyright since such information is nonrivalrous and nonexcludable.<sup>155</sup> The public good nature of information means that, without any legal protection, the valuable information that companies put much investment into creating may be freely used by others, especially their competitors, causing free-rider problems.<sup>156</sup> It is argued that, when faced with free-rider problems, companies may reduce their investment in creating valuable information, which is not socially desirable.<sup>157</sup> To reduce these public goods and free-rider problems, trade secrets law functions to give the developer a limited exclusive right to control the valuable information they put efforts into, and by conferring a right to exclude other users, it gives the developer the possibility of “deriving supracompetitive profits from the information.”<sup>158</sup> In this sense, by giving certain rewards to the developers of the information, trade secrets law is argued to encourage innovation and creation.<sup>159</sup> Moreover, trade secrets law also gives companies an incentive to invest in areas where patent law does not reach, as acknowledged in *Kewanee Oil Co. v. Bicron Corp.*<sup>160</sup> One example of such areas is information that is outside the scope of the patent subject matter, such as “negative know-how” information.<sup>161</sup> Another example is valuable information in fast-moving industries, where the long waiting period to secure patent protection makes patents an impractical choice.<sup>162</sup> The protection offered by trade secrets law in

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PROPERTY IN THE NEW TECHNOLOGICAL AGE 76–77 (2019) (arguing that modern trade secret law aims at incentivizing invention and creation).

<sup>155</sup> See Varadarajan, *supra* note 154, at 1413; Lemley, *supra* note 19, at 329–30; Bone, *supra* note 17, at 262 (all explaining that because information is nonrivalrous and nonexcludable, it is subject to trade secrets protection as patents and copyrights).

<sup>156</sup> See, e.g., Bone, *supra* note 17, at 262–63, 264 (explaining that market may do a poor job to incentivize companies to make investment in creation because of the free-rider problem).

<sup>157</sup> See *id.*

<sup>158</sup> Lemley, *supra* note 19, at 330.

<sup>159</sup> *Id.*

<sup>160</sup> *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 484–85 (1974) (“Trade secret law will encourage invention in areas where patent law does not reach, and will prompt the independent innovator to proceed with the discovery and exploitation of his invention. Competition is fostered and the public is not deprived of the use of valuable, if not quite patentable, invention.”). See also Varadarajan, *supra* note 154, at 1418–19 (reviewing this case).

<sup>161</sup> Lemley, *supra* note 19, at 331 (stating that the Supreme Court identified the incentive-to-invent justification as a key purpose of trade secret law).

<sup>162</sup> *Id.*

areas where patent protections are absent or impractical gives companies an additional incentive to innovate or invest in those areas.

However, giving companies an exclusive right over information, whether limited or absolute, always comes with social costs. One significant cost is its negative influence on the public use of information because exclusive rights naturally limit the dissemination of information to the public, which results in higher costs in innovation based on prior information (namely, cumulative innovation).<sup>163</sup> To curb the accompanying social costs, both patents and copyright adopt certain mechanisms to foster the public use of such information or works. All patents and copyrights are limited in scope and duration, allowing second-comers to freely use any materials beyond such duration and scope.<sup>164</sup> Additionally, patents application requires public disclosure of claims and the written descriptions, which allows others to innovate around the disclosed information.<sup>165</sup> Though copyright law does not have similar disclosure requirements, it imposes another equally strong ex post limitation—fair use doctrine, allowing free use of prior works if deemed fair.<sup>166</sup> All these mechanisms function to reduce social costs caused by exclusive rights, by promoting cumulative innovation. Nevertheless, there is no effective mechanism available in trade secrets law to reduce the social costs. Trade secrets can last indefinitely as long as they are kept secret, and such secrecy requirements conceal information from the public, which limits or even prevents cumulative innovation. On the other hand, as Professor Lemley argues, trade secrets law actually incentivizes disclosure because trade secrets protection can facilitate holders to share trade secrets with others in precontractual negotiations.<sup>167</sup> Without protections, the information holders may require the counterparty to sign a confidentiality agreement first before disclosing, while the

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<sup>163</sup> See Varadarajan, *supra* note 154, at 1413; Bone, *supra* note 17, at 263 (both arguing that exclusive rights should be limited to avoid social costs).

<sup>164</sup> See Varadarajan, *supra* note 154, at 1413 (arguing that patents and copyrights are limited in scope and duration to allow others to freely use protected works once intellectual property rights have expired).

<sup>165</sup> See *id.* at 1409–10 (reviewing the claim and written documents the inventor needs to submit to PTO).

<sup>166</sup> See *id.* at 1427–30; see generally Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483 (2007) (acknowledging that fair use doctrine is important in copyright law and arguing for a clear standard).

<sup>167</sup> Lemley, *supra* note 19, at 336–37.

counterparty may feel reluctant to sign such an agreement without knowing and evaluating the information (the so-called Arrow's Information Paradox).<sup>168</sup> This paradox may lead to failure of negotiations and information not being effectively disclosed to the other party. Thus, according to Professor Lemley, trade secrets, through promoting disclosure in negotiations, facilitate the commercialization of the information.<sup>169</sup> However, such disclosure only between licensing parties is not the type of public disclosure that allows the public to use the information in cumulative innovations.<sup>170</sup> It cannot reduce the social costs imposed by the exclusive rights restricting cumulative innovation. With regard to current limits in trade secrets, although reverse engineering and independent development defenses limit trade secrets protection, both increase the costs for firms in obtaining and innovating around the information and encourage firms to make wasteful investments,<sup>171</sup> which do not facilitate cumulative innovation but somehow impede it. Additionally, the reverse engineering defense is increasingly being contracted out by firms, the validity of which has been accepted by courts, making this defense less effective.<sup>172</sup> These two limits fail to curb the harm trade secrets cause to cumulative innovation. Given this scenario, due to trade secret law's lack of effective mechanisms for the limitation, it is naturally more prone than patents and copyright to negatively affect cumulative innovation, which is not beneficial to the development of the industry. In other words, the current strict trade secrets law without adequate limiting mechanisms may have already impeded cumulative innovation within the industry, causing significant social costs.

The situation is even worse when we take the practices in the US industry into consideration. While the overly restrictive trade secrets law without effective limiting doctrines may itself greatly impede industrial innovations, in the employment context, the confounding effect of the non-compete clauses further restricts

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<sup>168</sup> *Id.* at 336.

<sup>169</sup> *Id.* at 337.

<sup>170</sup> See Robert G. Bone, *The (Still) Shaky Foundations of Trade Secret Law*, 92 TEX. L. REV. 1803, 1818 (2014) (explaining that trade secret licensing limit the goal for the public to use the disclosed information).

<sup>171</sup> Bone, *supra* note 17 at 269.

<sup>172</sup> See Deepa Varadarajan, *The Trade Secret-Contract Interface*, 103 IOWA L. REV. 1543, 1568–70 (2018) (explaining that courts have become increasingly accepting of reverse engineering restrictions and encourage firms to contract out of the defense).

cumulative innovations. Specifically, a strict trade secrets law and the non-compete clauses both function to limit employee mobility, which is acknowledged as potentially the reason for Silicon Valley's success.<sup>173</sup> The non-compete clauses can even facilitate the enforcement of trade secrets since many courts consider protecting trade secrets as the primary justification for recognizing non-compete covenants.<sup>174</sup> With strict trade secrets protection and non-compete clauses in hand, employers especially large companies can easily use litigation threats to deter employees from even lawfully moving to another company or sharing information, which restricts even lawful competition and frustrates cumulative innovation.<sup>175</sup> A former employee may be prevented from "working on the precise line of research they know best" forever, or at least for a certain period, which may be the best time for innovations.<sup>176</sup> US practitioners have already realized the negative effect of strict trade secrets rules and non-compete clauses on the growth of the industry and have called for a less restrictive regime in these areas of the law.<sup>177</sup> US scholars have also been increasingly focusing on adding limiting doctrines to the trade secrets regime to alleviate the current strict regime's harmful effect on US industry's development.<sup>178</sup>

Even as the development of US industry suffers from such strict trade secrets law and the wide use of non-compete agreements, triggering practitioners and scholars to argue for a less restrict regime, China under US pressure is anyway adopting similar strict trade

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<sup>173</sup> See Charles Tait Graves & James A. DiBoise, *Do Strict Trade Secret and Non-Competition Laws Obstruct Innovation*, 1 ENTREPRENEURIAL BUS. L.J. 323, 325–26 (2006) (stating that California has barred the use of non-competition agreements in 1872. This is said to increase the employee mobility for employees to more easily move from company to company and apply the knowledge they developed along the way).

<sup>174</sup> Varadarajan, *supra* note 172, at 1572.

<sup>175</sup> See Graves & DiBoise, *supra* note 173, at 337–38 (arguing that big companies might use trade secret litigations to deter employees to move to a new company or share information).

<sup>176</sup> Joseph P. Fishman & Deepa Varadarajan, *Similar Secrets*, 167 U. PA. L. REV. 1051, 1056 (2019).

<sup>177</sup> See, e.g., Graves & DiBoise, *supra* note 173, at 323–25 (arguing abandoning rigid restrictions on the trade secret rules and non-complete clauses).

<sup>178</sup> See, e.g., Camilla Alexandra Hrdy & Mark A. Lemley, *Abandoning Trade Secrets*, 73 STAN. L. REV. (forthcoming 2020), <https://ssrn.com/abstract=3534322> [<https://perma.cc/5DS7-YVDZ>] (arguing trade secrets can be abandoned); Varadarajan, *supra* note 154 (arguing adding fair use doctrine into trade secrets law); Menell, *supra* note 154 (arguing adding a public policy exception); Fishman & Varadarajan, *supra* note 176 (arguing allowing use of trade secrets in the process to produce different ends).

secrets protections as the US and generally recognizes the validity of non-compete clauses. Although empirical studies in China examining the trade secrets protection level are very limited, one such study in 2019 examined the legislative protection level in the legislation from 1993 to 2013 by using 6 factors (Trade secrets requirements, international conventions attended, a period of protection, limiting doctrines such as reverse engineering, enforcement tools such as injunctions and burden of proof, non-compete agreements).<sup>179</sup> The study concluded that China's legislative protection level in 2013 has achieved international standards.<sup>180</sup> Our prior analysis reveals that, after 2013, the trade secrets legislative protection level has been consistently increased in 2017, 2019, and 2020 under US pressure. We can infer that the current legislative protection level in China has been above the international standards and it is perhaps even quite similar to the US legislative protection level, as the amendments after 2013 have all substantially followed the US' suggestions. Moreover, some even argue that some of the current trade secrets rules in China actually exceed the US protection level. For example, Professor Cui Guobin, a well-known IP scholar in China, argues that the US law does not generally allow shifting of the burden of proof in trade secrets cases, but nevertheless the US still required China to insert burden-shifting clauses into its regime anyway, which enhanced China's protection level in the legislation even above that of the US.<sup>181</sup> This argument is correct on the face of it, but the situation is actually much more complicated. The argument from the US for burden-shifting in China is that Chinese Civil Procedure Law does not have as effective a discovery system as the US, making evidence for trade secrets cases hard to obtain.<sup>182</sup> Thus, it is arguable that the so-called "stricter" rules on burden-shifting in China are to supplement the country's weak

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<sup>179</sup> Wang Lina (王莉娜) & Zhang Guoping (张国平), *Zhongguo Shangye Mimi Baohu Shuiping de Dingliang Yanjiu* (中国商业秘密保护水平的定量研究) [*The Empirical Study on the Production Level of Trade Secrets in China*], *KEYAN GUANLI* (科研管理) [SCI. RSCH. MGMT.], no.9, vol. 40, 2019, at 66.

<sup>180</sup> *Id.* at 71.

<sup>181</sup> Cui Guobin (崔国斌), *Shangye Mimi Qinquan Susong de Juzheng Zeren Fenpei* (商业秘密侵权诉讼的举证责任分配) [*Allocating Burden of Proof in Trade Secrets Infringement Cases*], *JIAODA FAXUE* (交大法学) [SJTU L. REV.], No. 4, 2020, at 11.

<sup>182</sup> Thanks for Professor Victoria Cundiff for pointing out this practical consideration. Prof. Victoria Cundiff is a partner at Paul Hastings with extensive experiences in trade secrets litigation.

discovery system. Besides, although there is no statutory burden-shifting clause in the US, some US courts nevertheless allow shifting of the burden of persuasion on to the defendant when the plaintiff proves that the defendant had access to the secrets and has produced “a suspiciously similar product or process in a short time.”<sup>183</sup> Nevertheless, two local court judges in China argue that the new burden shifting clauses alleviate the burden of trade secrets holders, to an unjustifiable extent.<sup>184</sup> They claimed that, before the new provision, the Chinese courts have already reduced holders’ burden in proving trade secrets claims, especially in proving the secrecy requirement.<sup>185</sup> In this sense, they argue for interpreting the burden shifting rules in a limited way to maintain a better balance between interests.<sup>186</sup>

However, it is still fair to say that China now has adopted a regime that is at least as strict as the one in the US. This is evidenced by an element-by-element comparison between the US trade secrets protection system and the Chinese system using the “Trade Secrets Protection Index,” created by the Organization for Economic Cooperation and Development (OECD)<sup>187</sup> (please see Table 2 below for a detailed comparison between the Chinese system and the US one using the index). Through the element-by-element comparison, we see that the Chinese trade secrets law, through its amendments in 2019 and new judicial interpretations, has been substantially similar to the US law, except for the discovery system. Nevertheless, it can be argued that the burden-shifting clauses, which are not generally

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<sup>183</sup> International Chamber of Commerce (ICC), *Protecting trade secrets – recent EU and US reforms*, ICC 1, 22 (2019), <https://iccwbo.org/content/uploads/sites/3/2019/04/final-icc-report-protecting-trade-secrets.pdf> [<https://perma.cc/RG3D-MEXV>]; see JAMES POOLEY, TRADE SECRETS § 12.04 [2] (Law Journal Press ed. 2019) (listing example cases at the footnote 54).

<sup>184</sup> See Yu Zhiqiang (喻志强) & Ge Guangying (戈光应), *Shangye Mimi Qinquan Susong Juzheng Xinguize de Shiyong* (商业秘密侵权诉讼举证新规则的适用) [*The Application of the New Evidence Rule of Trade Secrets Misappropriation Litigations*], RENMIN SIFA (人民司法) [THE PEOPLE’S JUDICATURE], No. 19, 2020, at 14 (arguing that the new burden shifting rule may result in injustice by excessively reducing trade secret holder’s burden of proof).

<sup>185</sup> *Id.*

<sup>186</sup> See *id.*

<sup>187</sup> See generally Mark F. Schultz & Douglas C. Lippoldt, *Approaches to Protection of Undisclosed Information (Trade Secrets): BACKGROUND PAPER*, No. 162, OECD TRADE POLICY PAPERS (Jan. 30, 2014), <https://www.oecd-ilibrary.org/docserver/5jz9z43w0jnw-en.pdf?expires=1635604817&id=id&accname=guest&checksum=74940FB27766B4C9EC E9698C5A89686A> [<https://perma.cc/C52D-CD58>].

available in the US law, have remedied the weakness of the Chinese discovery system. Therefore, the index can show that the Chinese trade secrets system has become a rather strict one, nearly as strict as US system. Apart from similar strict trade secrets rules, non-compete clauses are expressly allowed in Chinese employment law.<sup>188</sup> Although the employment law sets several limits for the use of non-compete clauses,<sup>189</sup> the combination of a strict trade secrets law and non-compete clauses arguably impede employee mobility to a great extent. Thus, we could say that China, with its trade secret protections supplemented by non-compete agreements, currently adopts a regime that is at least as strict as the US's. However, the Chinese local industry is still quite underdeveloped compared to the US industry, especially in technologies where trade secrets and non-compete clauses are active.<sup>190</sup> For example, although it is acknowledged that the Chinese industry is increasingly developing their indigenous technology under the strong governmental support to R&D, “[h]igh-tech and innovative products and services are rarely associated with China.”<sup>191</sup> One report in 2019 shows that Chinese firms still rely on key inputs (technology) from foreign firms,<sup>192</sup> even though they are producing more technology than ever before.<sup>193</sup> Accordingly, the local industry in China, especially in the technology

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<sup>188</sup> Sandy Zhang, *China: Application of Non-Competes To Protect Business Secrets*, DENTONS (2017), <https://www.dentons.com/en/insights/newsletters/2017/march/14/global-employment-lawyer/global-employment-lawyer-2017/application-of-non-compete-in-business-secret-protection> [<https://perma.cc/MSM7-REHY>].

<sup>189</sup> See *id.* (specifying that “geographic scope, duration and type of employment or line of business prohibited” as limits on the terms of non-compete obligations).

<sup>190</sup> See Jennifer Brant & Sebastian Lohse, *Trade Secrets: Tools for Innovation and Collaboration*, INTERNATIONAL CHAMBER OF COMMERCE 1, 9–10 (2014), <https://iccwbo.org/content/uploads/sites/3/2017/02/ICC-Research-Trade-Secrets-english.pdf> [<https://perma.cc/G68B-3JCY>] (discussing how trade secrets function to protect technology and why companies are more willing to use trade secrets to protect their technology in many situations).

<sup>191</sup> Naubahar Sharif, *China as the World's Technology Leader in the 21st Century: Dream or Reality?*, HKUST IEMS (Feb. 2016), <https://iems.ust.hk/publications/thought-leadership-briefs/china-as-the-worlds-technology-leader-in-the-21st-century-dream-or-reality> [<https://perma.cc/5YN7-NQ8W>].

<sup>192</sup> See *A New Great Game--China, The U.S., And Technology*, S&P GLOB. RATINGS, May 14, 2019, at 12–13, [https://www.spglobal.com/\\_division\\_assets/images/special-editorial/a-new-great-game-china-the-u.s.-and-technology/2019\\_05\\_csag\\_uschina.pdf](https://www.spglobal.com/_division_assets/images/special-editorial/a-new-great-game-china-the-u.s.-and-technology/2019_05_csag_uschina.pdf) [<https://perma.cc/9JSM-YUHT>] (finding that foreign suppliers are deeply embedded in China's technology supply chain, and Asian and US firms are especially important in providing the intellectual-property-rich technology inputs into China's supply chain).

<sup>193</sup> *Id.* at 9–11.

area, is underdeveloped compared to the US industry, as they still rely significantly on foreign technology rather than their own. This demonstrates that the local industry in China has a greater need for developing and catching up with the industry in developed countries. In other words, the value of cumulative innovations is much more for the Chinese local industry for it to develop more indigenous technology or products. As our previous analysis shows, the current strict trade secrets law with non-compete clauses have already, to a certain extent, impeded US industry's development through blocking cumulative innovations. The large companies can use the strict protection regime to effectively squeeze start-ups or other small competitors out of the market and maintain their monopoly in the market, which is not beneficial for overall industrial development.<sup>194</sup> Adopting a similar strict regime for the local industry in China, which has a greater need for cumulative innovations, may have an even more harmful effect on local industry's development compared to the situation in the US. Therefore, it is an open question whether the local industry in China, as a whole, really demands such a legislative protection level, since industrial development benefits much more from cumulative innovation.

So far, using the basic theories of trade secrets and the over-protection problems already existing in the US industry, we have provided circumstantial evidence for the argument that Chinese local industry indeed does not require such enhanced and strict protection. In addition to this circumstantial evidence, some empirical studies provide certain direct evidence. One study by the Beijing High Court searched all judgments related to trade secrets infringement cases made by Chinese courts from 2013–2017 and found there are only 338 trade secret cases that courts delivered a judgment on.<sup>195</sup> Compared with an average of 10,000 IP cases that courts pronounced a judgment on each year from 2013 to 2017, trade secrets cases only accounted for a very limited percentage.<sup>196</sup> Although this statistic cannot represent all trade secret disputes in China because there may

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<sup>194</sup> See Graves & DiBoise, *supra* note 173, at 338–39 (discussing the lengthy time and high costs in rebutting trade secret claims).

<sup>195</sup> Beijing High People's Court (北京市高级人民法院), *She Shangye Mimi Anjian Sifa Shenpan Diaoyan Baogao* (涉商业秘密案件司法审判调研报告) [Empirical Report on the Judicial Trial of Trade Secret Cases], *Zhongguo Shenpan* (中国审判) [CHINA TRIAL] (Dec. 9, 2020), <https://mp.weixin.qq.com/s/WINW2OXOomJLG-AQoBAXGw> [<https://perma.cc/YT2H-LNZ9>].

<sup>196</sup> *Id.*

be many cases settled privately before or after the initiation of litigation, considering that there are also many settlements in other IP cases not represented by the data, such a low percentage can at least provide some evidence that trade secrets infringement is not happening that frequently compared to other types of IP infringement in China. One may argue that the low number of cases reflected in the statistics represents the effectiveness of the current trade secrets law in deterring potential infringers and that this low percentage of trade secrets cases cannot prove there is little need locally for such laws. However, other current IP laws (copyright, patent, trademarks) in China are also quite strict, and the Chinese government has adopted increasingly harsher measures to enforce these laws.<sup>197</sup> In China, these IP laws are more mature and function more effectively than trade secrets law. If the argument is that strict rules result in fewer cases in court due to their deterrent effect, then we may also see fewer IP cases as well. Thus, the argument that the limited number of trade secrets litigations in court is due to the effectiveness of the current law is inaccurate. This small number may be attributable, rather, to the negligible need for such laws in reality. Given the low need for such protection, it is doubtful whether such an enhanced and strict protection regime is urgent or necessary for contemporary local industry. Granting strict protections exceeding the needs of the industry, as a whole, may only help large companies with control over certain advanced information gain more monopolistic power and squeeze the start-up competitors out of the market, harming the growth of the Chinese industry.

## 2. Main Reason: US Industry's Representation of Interests

Why does the regime neglect the interests of local industry, and what other problems may result from this neglect? The overrepresentation of the US industry's interests is the main reason for such neglect, and problems may be caused by the conflicting interests of the US and local industries. As already explained, the Special 301

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<sup>197</sup> Copyright, Trademarks, and Patents have much longer developing period than trade secrets. These three areas have consistently become targets of the US ever since its first Special 301 report in 1989. Moreover, problems of effective enforcement of these laws have also been consistently addressed by the US long before. With such a long period of developments on both legislation and enforcement, these laws in China not only complies with international standards (or even US standards) but also absorbs ample local experience. These laws are arguably functioning more effectively than trade secrets.

reports published by the USTR every year have served as a strong mechanism to affect the development of the IPR regime in China, including the trade secrets protection regime. The Special 301 process, however, is significantly affected by the US industry and greatly represents the US industry's interests and needs. Firstly, it is argued that the Special 301 process and its related provisions are "the direct result of heavy industry lobbying efforts,"<sup>198</sup> serving as an important forum for US industry to represent their interests and express their opinions. Secondly, upon reading the Special 301 reports carefully, one may be surprised by how detailed the reports are in describing situations in other countries and how exactly the US industry has suffered losses in each foreign country. Although such detailed and precise reports are published by the USTR each year, they rely significantly on the inputs from the US industry.<sup>199</sup> US industry indeed is legally allowed to actively participate in the Special 301 process to supply information, submit comments and recommendations to the USTR, and testify before Congress.<sup>200</sup> For example, the interested parties can submit information to the USTR for it to take into account when identifying priority countries in the reports.<sup>201</sup> Many foreign countries perceive that inputs from "U.S. industry tend to exaggerate the situation, or even distort the truth, to create something out of nothing."<sup>202</sup> Regardless of such criticism, history shows that US industries, through the efforts of leading industry representatives such as the International Intellectual Property Alliance (IIPA) and Pharmaceutical Manufacturers Association (PMA), often successfully represent their interests and have their opinions accepted by the USTR in the Special 301 process.<sup>203</sup> Regarding the trade secrets protections in China, the US industry, whose prominent representatives include the National Foreign Trade Council (NFTC), the Intellectual Property Owners Association (IPOA), and the U.S. Chamber's Global Intellectual Property Center (GIPC), also exerts a consistent and inexorable influence on the Special 301 process to have their suggestions

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<sup>198</sup> Liu, *supra* note 27, at 92–93, 98.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 98.

<sup>201</sup> 19 U.S.C. § 2242 (b)(2)(B) (1988).

<sup>202</sup> Liu, *supra* note 27, at 92.

<sup>203</sup> *See id.* at 102–10 (finding that the comparison between the comments and allegations provided by the leading US industries representatives and the corresponding Special 301 reports shows that US industries' opinions were frequently adopted by the USTR).

accepted by the USTR, and in turn to affect the development of trade secrets protection in China.

Let us look back again to the development phase from 2012 to 2017, during which the trade secrets protection in China became an increasingly important focus of the USTR in its Special 301 reports.<sup>204</sup> The USTR received many public comments from the US industry before each of the Special 301 reports was issued.<sup>205</sup> Specifically, many previously alleged deficiencies of the trade secrets protection in China were emphasized by these public comments, most of which were adopted by the USTR in the Special 301 reports. Firstly, the business operator requirement in the 1993 AUCL was frequently identified as a problem limiting trade secrets protection in China at that time by US industry represented by the NFTC, the IPOA, and the GIPC, all of whom expressed their worry that the 1993 AUCL only applied to businesses instead of individuals, especially current or former employees.<sup>206</sup> Secondly, US industry

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<sup>204</sup> The trade secret protection problems in China started to be mentioned again in the 2012 Special 301 report and were detailed described in the 2013 Special 301 report. After 2013, trade secret protections have consistently become an important issue addressed in the Special 301 process. *See supra* Part II.C.

<sup>205</sup> Public comments submitted by the US industry with regards to the Special 301 process can be found in the Federal Register, (<https://www.regulations.gov/>), with docket number USTR-2011-0021 for 2012 Special 301 Review, USTR-2012-0022 for 2013 Special 301 Review, USTR-2013-0040 for 2014 Special 301 Review, USTR-2014-0025 for 2015 Special 301 Review, USTR-2015-0022 for 2016 Special 301 Review.

<sup>206</sup> National Foreign Trade Council, Comment on the Office of United States Trade Representative (USTR) Notice: 2013 Special 301 Review 8 (Feb. 8, 2013), <https://www.regulations.gov/document?D=USTR-2012-0022-0018> [<https://perma.cc/5V4E-6YSG>] [hereinafter *2013 NFTC Comment*]; Intellectual Property Owners Association, Comment on the Office of United States Trade Representative (USTR) Notice: Special Review of Countries that Do Not Provide Adequate Protection of Intellectual Property Rights 11 (Feb. 7, 2014), <https://www.regulations.gov/document?D=USTR-2013-0040-0023> [<https://perma.cc/K83L-QQDD>] [hereinafter *2014 IPOA Comment*]; Intellectual Property Owners Association, Comment on the Office of United States Trade Representative (USTR) Notice: Special Review of Countries that Do Not Provide Adequate Protection of Intellectual Property Rights 9 (Feb. 8, 2016), <https://www.regulations.gov/document?D=USTR-2015-0022-0045> [<https://perma.cc/WMU5-4USR>] [hereinafter *2016 IPOA Comment*]; U.S. Chamber of Commerce, Comment on the Office of United States Trade Representative (USTR) Notice: Special Review of Countries that Do Not Provide Adequate Protection of Intellectual Property Rights 49 (Feb. 6, 2014), <https://www.regulations.gov/document?D=USTR-2013-0040-0006> [<https://perma.cc/P5WQ-MLAW>] [hereinafter *2014 GIPC Comment*]; U.S. Chamber of Commerce's Global Intellectual Property Center, Comment on the Office of United States Trade Representative (USTR) Notice: 2016 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974: Request for Public Comment and Announcement of Public Hearing 76 (Feb. 8, 2016),

representatives such as the IPOA pointed out that the 1993 AUCL imposed an additional ex-ante requirement for trade secrets—“practical applicability”—limiting the protection scope of trade secrets in China.<sup>207</sup> Thirdly, the lack of adequate measures to prevent leakage of trade secrets during governmental proceedings was also a concern among US trade secrets holders. They maintained that while Chinese regulations sometimes required companies to submit information protected by trade secrets for supervision purposes before they could get access to the Chinese market, there was no provision existing at that time that prevents further disclosure by Chinese government officials.<sup>208</sup> Thus, they demanded that new measures imposing a confidentiality duty on governmental officials should be drafted and enforced.<sup>209</sup> Furthermore, the US industry was quite dissatisfied with the low damage awards in the 1993 AUCL for trade secrets infringement. They perceived that “civil damages remain insufficient in many cases to compensate companies for infringement.”<sup>210</sup> Moreover, the lack of preliminary injunctions for trade secrets cases in China was also one of the US industry’s main concerns. They alleged that Chinese courts either lacked the authority to issue preliminary injunctions under the AUCL<sup>211</sup> or that Chinese courts rarely issued such injunctions though they had the authority to do so under the Civil Procedure Law.<sup>212</sup> As may be recalled from the previous historical analysis, all of these five problems identified by the US industry in their submitted public comments were the ones addressed in the Special 301 reports from 2013 to 2017 and by the USTR and in the 24<sup>th</sup> & 25<sup>th</sup> JCCT.<sup>213</sup> In other words, all the concerns of US industry over the trade secrets

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<https://www.regulations.gov/document?D=USTR-2015-0022-0026>

[<https://perma.cc/3MER-H7XX>] [hereinafter *2016 GIPC Comment*].

<sup>207</sup> *2014 IPOA Comment*, *supra* note 205, at 11.

<sup>208</sup> *Id.*; *2014 GIPC Comment*, *supra* note 205, at 50–51; *2016 GIPC Comment*, *supra* note 205, at 77.

<sup>209</sup> U.S.-China Business Council, Comment on the Office of United States Trade Representative (USTR) Notice: 2013 Special 301 Review; Public Hearing: Identification of Countries Under Section 182 of the Trade Act 14 (Feb. 8, 2013), <https://www.regulations.gov/document?D=USTR-2012-0022-0006> [<https://perma.cc/C7N7-GUDY>] [hereinafter *2013 USCBC Comment*].

<sup>210</sup> *Id.* at 16.

<sup>211</sup> *2013 NFTC Comment*, *supra* note 205, at 8.

<sup>212</sup> *2014 GIPC Comment*, *supra* note 205, at 50; *2016 IPOA Comment*, *supra* note 205, at 9; *2016 GIPC Comment*, *supra* note 205, at 77.

<sup>213</sup> *See supra* text accompanying note 89-98.

issues in China during that period were fully addressed in the US unilateral mechanism and the bilateral dialogues with China, “forcing” China to amend laws to deal with US industry’s concerns. As we now know, under pressure from the US, China amended its 1993 AUCL in 2017 and issued a new Judicial Interpretation in response to most of these criticisms.<sup>214</sup> Through such process, the US industry successfully resolved most of their concerns and thus arguably substantially represented their interests in China’s corresponding legal reforms to enhance the trade secrets legislative protection level during that period.

Nevertheless, the enhanced legislative protection level and stricter rules in the 2017 AUCL did not fully satisfy the US industry. They were not pleased with the limited moves made in the 2017 AUCL to enhance trade secrets protection in China, and some viewed it as a failed attempt to deliver the promise of increasing protection.<sup>215</sup> They expressed continued concerns in their public comments submitted for the 2017–2019 Special 301 Review.<sup>216</sup> One dissatisfaction was the consistent uncertainty regarding whether the 2017 AUCL could apply to individuals—namely, the “business operator” requirement.<sup>217</sup> Specifically, though the GIPC in its comment submitted for the 2018 Special Review admitted that the direct implication of the 2017 AUCL going after infringers related to trade secrets theft committed by current or former employees,<sup>218</sup> the IPOA did not consider this as fully solving the uncertainty caused by

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<sup>214</sup> Leaving only the business operator requirement not fully clarified, which, however, was finally dealt with in the 2019 AUCL. *See supra* Part II.D.

<sup>215</sup> U.S. Chamber of Commerce., Comment on the Office of United States Trade Representative (USTR) Notice: 2018 Special 301 Review (Feb. 11, 2018), <https://www.regulations.gov/document?D=USTR-2017-0024-0013> [<https://perma.cc/846Z-4BG3>] [hereinafter *2018 GIPC Comment*].

<sup>216</sup> Public comments submitted by the US industry with regards to the Special 301 process can be found in the Federal Register, (<https://www.regulations.gov/>), with docket number USTR-2016-0026 for 2017 Special 301 Review, USTR-2017-0024 for 2018 Special 301 Review, USTR-2018-0037 for 2019 Special 301 Review, USTR-2019-0023 for 2020 Special 301 Review.

<sup>217</sup> Intellectual Property Owners Association, Comment on the Office of United States Trade Representative (USTR) Notice: 2018 Special 301 Review 11 (Feb. 11, 2018), <https://www.regulations.gov/document?D=USTR-2017-0024-0014> [<https://perma.cc/P8G4-DPVX>] [hereinafter *2018 IPOA Comment*]; Intell. Prop. Owners Ass’n, Comment on the Office of United States Trade Representative (USTR) Notice: Public Hearings: 2019 Special 301 Review 11 (Feb. 8, 2019), <https://www.regulations.gov/document?D=USTR-2018-0037-0033> [<https://perma.cc/SZ9Z-SXDZ>] [hereinafter *2019 IPOA Comment*].

<sup>218</sup> *2018 GIPC Comment, supra* note 214, at 65.

the “business operator” requirement and continuously urged China to amend this requirement.<sup>219</sup> Besides, the limited damages awarded to compensate right holders was another continued concern for US industry, leading the National Association of Manufacturers (NAM) to repeatedly demand that China boost damage awards to deter trade secrets theft.<sup>220</sup> Moreover, uncertainty about whether cyber-attacks could amount to misappropriation, and the high evidentiary burden on plaintiffs due to the absence of a burden-shifting mechanism were considered by the US industry and were deemed (by the IPOA and GIPC) urgent deficiencies that the 2017 AUCL had failed to resolve.<sup>221</sup> Again, all these continued concerns of the US industry were represented in the 2018 and 2019 Special 301 Reports,<sup>222</sup> urging China to enhance the legislative protection level by plugging these loopholes. All these complaints of US industry were addressed in the 2019 AUCL by China,<sup>223</sup> which means that once again US industry’s interests were substantially represented in China’s legal amendments to further enhance trade secrets protection.

Recall that in previous sections we formulated an argument that on each occasion the main framework for the enhancement of trade secrets protection (the substance of all stricter rules) in China was substantially affected by the US. From the analysis here, it is appropriate to say that China’s enhancement of trade secrets protection was indeed influenced by US industry. It followed a pattern where the US industry identified problems and recommended amendments through their public comments to the USTR for it to

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<sup>219</sup> 2018 IPOA Comment, *supra* note 216, at 11; 2019 IPOA Comment, *supra* note 216, at 11.

<sup>220</sup> National Association of Manufacturers, Comment on the Office of United States Trade Representative (USTR) Notice: Public Hearings: 2019 Special 301 Review 22 (Feb. 8, 2019), <https://www.regulations.gov/document?D=USTR-2018-0037-0041> [<https://perma.cc/BX4D-DPRQ>] [hereinafter 2019 NAM Comment]; Nat’l Ass’n of Mfrs., Comment on the Office of United States Trade Representative (USTR) Notice: 2018 Special 301 Review 19 (Feb. 11, 2018), <https://www.regulations.gov/document?D=USTR-2017-0024-0034> [<https://perma.cc/AV32-H5MS>].

<sup>221</sup> See, e.g., 2019 IPOA Comment, *supra* note 217, at 10–11; see also 2018 GIPC Comment, *supra* note 215, at 64–65; see also U.S. Chamber of Commerce, Comment on the Office of United States Trade Representative (USTR) Request for Public Comment: 2019 Special 301 Submission 98–99 (Feb. 7, 2019), <https://www.regulations.gov/document?D=USTR-2018-0037-0039> [<https://perma.cc/MJ96-AQPJ>] [hereinafter 2019 GIPC Comment]; see also 2019 NAM Comment, *supra* note 220, at 22.

<sup>222</sup> See *supra* text accompanying notes 109–116.

<sup>223</sup> See *supra* text accompanying notes 122–150.

include in the Special 301 reports first, and the USTR then used its Special 301 process and other bilateral tools to urge China to accept these suggested amendments. Since all related legal amendments mainly targeted and accounted for US industry's concerns and interests, the current protection regime arguably leaves very little room for local industry to express their views, and thus to a certain extent does not substantially take into account the interests of local industry.

### 3. But why bother?

The question, however, is why bother that the current regime only substantially accounts for US industry's interests rather than local industry's interests? Some may argue that so long as the strict trade secrets law provides equal protection for local industry, it benefits them in the same way. Following this argument, it seems as if which industry's interests the current regime accounts for does not matter so much because the law provides the same protection for local industry to protect their innovations from misappropriation as well. In other words, there seem to be no conflicting interests between US industry and local industry. Let us first assume there are no conflicting interests. As we mentioned above, the strict regime not only already harms the US industry's development but may have a more negative impact on the underdeveloped local industry.<sup>224</sup> Such a strict regime is promoted by large corporations with greater monopolistic power over valuable information, who are the supporters/members behind the US industry representatives in the Special 301 process.<sup>225</sup> The net effect would be that large companies benefit more from the strict regime while deterring even lawful competition and the development of small companies or start-ups. That said, even if we assume there are no conflicting interests, it is questionable whether the whole of the local industry truly benefits

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<sup>224</sup> See *supra* text accompanying notes 154-194.

<sup>225</sup> For example, many members of the International Property Owner Association (IPOA) are quite famous and large companies who have certain market share and competitive power such as 3M Innovative Properties Co., AT&T, American Express Company, Apple Inc., CPA Global North America LLC, Capital One, Cisco Systems, Inc., Google Inc., IBM Corp., LexisNexis IP, MasterCard International Incorporated, Nike, Inc., Oracle Corporation, Samsung Electronics Co., Ltd., Sony Corporation of America, Uber. For a full member list, see <https://ipo.org/index.php/member-organizations/> [<https://perma.cc/3DPR-PHFE>].

from this strict regime, as it favors large companies too much regardless of the need for cumulative innovation for smaller companies. However, the US industry's interests are generally not in line with those of local industry, making the situation worse. The problem lies in the comparative advantage that the US enjoys in intellectual property-related goods or technology. US industry still enjoys a significant competitive edge over the local industry with regard to technology, since Chinese industrial sectors rely heavily on importing key technology from the US.<sup>226</sup> With such an unequal state of affairs, adopting a strict trade secrets system by representing mainly the interests of the US industry which already enjoys a competitive advantage in exporting IP-related products or technology leaves the local industry as importers with “nothing really to gain.”<sup>227</sup> More precisely, the Chinese local industry is relatively underdeveloped compared to the US industry and demands more space to innovate to grow and catch up with developed industries. Development relies on self-research, and more importantly cumulative innovations based on previous information. However, the current strict trade secrets law combined with non-compete clauses impedes cumulative innovations in a major way. A strict and harsh trade secrets law can be utilized by trade secret holders to deter even lawful use of certain information by others who want to innovate around such information.<sup>228</sup> This is because companies often try to include even non-secret information (public information) in their non-disclosure agreements or license agreements, treating this information also as “trade secrets”.<sup>229</sup> With a strict trade secrets law in hand, they can still sue the information users who, for fear of the uncertain litigation outcomes and large litigation costs, may simply quit using such information in the first place even if such use may be legal.<sup>230</sup> Cumulative innovation is thus substantially harmed. In the US–China context, this means that US companies that enjoy a large

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<sup>226</sup> See *supra* text accompanying notes 190-193.

<sup>227</sup> See PETER DRAHOS & JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY 11 (2002) (“The rest of the developed countries and all developing countries were in the position of being importers with nothing really to gain by agreeing to terms of trade for intellectual property that would offer so much protection to the comparative advantage the US enjoyed in intellectual property-related goods”).

<sup>228</sup> See Varadarajan, *supra* note 172 at 1564–66; see also Graves & DiBoise, *supra* note 173 at 337–38.

<sup>229</sup> See Varadarajan, *supra* note 172 at 1565.

<sup>230</sup> See Graves & DiBoise, *supra* note 173, at 337–39.

comparative edge in exporting technology or advanced products can easily use broad non-disclosure or licensing agreements to cover any information they deem valuable and deter Chinese corporations, through strict trade secrets law which favors the right holders more, from innovating around any information. Moreover, in the employer–employee context, strict trade secrets law and non-compete clauses may prevent employees from lawfully moving to other competitors and even using their knowledge to research in the same line.<sup>231</sup> Relying on harsh trade secrets law and non-compete clauses, US companies can effectively prevent their employees from moving to work in Chinese corporations that urgently need experienced employees to develop. As such, adopting such a strict regime representing mainly US industry interests reduces opportunities for local industry to innovate and develop; in other words, it harms the local industry’s interests. It mainly helps the US industry to maintain its competitive edge in advanced technology and products at the expense of local industry’s development needs. This is clearly the goal of the US government in consistently pushing China to adopt a harsher trade secrets regime. Ironically, before the US became the leading exporter of IP-related products, it was the one resisting strong intellectual property protections, knowing what negative effect strict protections would have on local industry’s growth. For example, before US creations started being increasingly used in other countries,<sup>232</sup> the US “was exceptionally parochial in copyright matters, not only denying any protection to the published works of nonresident foreign authors, but actually appearing to encourage piracy.”<sup>233</sup> The US knew clearly that as an importer of IP-related works rather than an exporter,<sup>234</sup> denying strict protection could aid the development of local industry and help it innovate

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<sup>231</sup> See *supra* text accompanying notes 175–76.

<sup>232</sup> Barbara A. Ringer, *The Role of the United States in International Copyright—Past, Present, and Future*, 56 GEO. L. J. 1050, 1058 (1968) (“following the First World War, the increasing use of American works in other countries brought with it a demand that the United States adhere to the Berne Convention. Beginning in 1922, a series of bills for this purpose was introduced in Congress.”).

<sup>233</sup> *Id.* at 1054.

<sup>234</sup> See *id.* at 1055 (nothing that, at the time, the main exporters were Great Britain and France).

further at lower costs and that granting a protection level exceeding local needs could most benefit the exporter countries.<sup>235</sup>

However, by criticizing the strict regime caused by the over-representation of US industry's interests, this article does not claim that strict laws provide no benefits for the local industry which has no need for strict protections, or that China should lift the strict rules established currently. Strict laws can function to fulfill the most important policy goal of trade secrets—incentivizing creation/innovation. In the absence of strict rules, original innovations may be discouraged. Thus, it is true that China should spare no effort to protect trade secrets owned by parties, regardless of their nationality. Moreover, Chinese corporations themselves are in increasing need of adequate trade secrets protection and can benefit, to a certain extent, from strict rules.<sup>236</sup> When considered from this angle, Chinese local industry's interests are in line with US industry's interests. However, the above analysis shows that the local industry as a whole benefits from a more lenient regime that provides greater opportunities for cumulative innovation. Therefore, what this article proposes, instead, is to impose reasonable limiting doctrines on the current strict trade secrets rules in China to account more for the developmental needs of local industry and to make them more consistent with other IP laws which have effective limiting tools to curb any potential harm to cumulative innovation. For example, in light of the current debate among US scholars as mentioned above, a trade secrets abandonment doctrine (by analogy with trademarks abandonment) and a fair use doctrine (analogous to copyright fair use) may be introduced into the current regime to alleviate the negative consequences caused by the strict rules. A strict regime with reasonable limiting mechanisms can adequately protect the trade

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<sup>235</sup> See DRAHOS & BRAITHWAITE, *supra* note 227, at 32-33 (discussing how US publishing was built upon the piracy upon European works and US publishers were opposed to change US policy towards copyright then).

<sup>236</sup> One notable trade secrets case brought by the local corporation is the *Baidu v. Wangxun* in 2017. Baidu is a Chinese multinational technology company that is famous for its search engine. Wangxun is a former senior vice-president and general manager of the autonomous driving unit of Baidu. He resigned from Baidu and opened a start-up in the US also in the area of autonomous driving. Baidu sued Wangxun alleging that he took away relevant data and infringed trade secrets of Baidu. This case can be an example for showing local industry needs for protections. See Jing Shuiyu, *Baidu Suing Former Executive Wang Jing* (Dec. 22, 2017, 5:16 PM), <http://www.chinadaily.com.cn/a/201712/22/WS5a3ccd8ea31008cf16da2f35.html>, [\[https://perma.cc/J8UC-VDF3\]](https://perma.cc/J8UC-VDF3).

secrets of local and foreign companies while leaving sufficient room for local industry to develop.

#### 4. Summary

In sum, the development route of trade secrets protection in China has resulted in insufficient consideration of local industry's interests and needs, which may impede local developmental requirements. By comparison with the negative effect of the strict trade secrets rules in the US on industrial innovation and development, this section has shown that the current strict trade secrets rules in China have an even more harmful effect on the development of China's underdeveloped local industry. Combining this circumstantial evidence with some direct evidence from local empirical studies, this section demonstrates that the current protection regime actually exceeds the Chinese local industry's needs. Such a strict protection regime may only strengthen large corporations' monopoly, which may lead to undesirable consequences for local industry's innovations and growth. The local industry's interests were not substantially accounted for in the current regime. The main reason is that the US industry consistently used their statutory tools to provide detailed input to the USTR, which in turn promotes the adoption of these "suggestions" in China's legal amendments. This naturally makes the protection regime in China account more for the US industry's views and interests, which conflicts with the local interests. US industry's competitive edge is being preserved at the expense of local industry's growth. Notwithstanding these conclusions, this article does not entirely repudiate the current strict rules, but, just like some US scholars currently propose, it hopes to impose reasonable limiting doctrines in the regime to account better for local industry's developmental needs and to make trade secrets protection better serve its policy goals.

Another thing to emphasize is that this article only deals with the law in the books rather than the law in practice. Some may argue that, while China may have enhanced its trade secrets protection in the books, it may not enforce the law fully in practice. According to this view, even if the law in the books is enhanced, its lack of enforcement means that China has not, in fact, increased its protection level. It is beyond the scope of this article to respond to this counter-argument about the enforcement level in China. However, based on

this article, future studies can put more focus on the empirical side of trade secrets law in action in China.

**B. *Insufficient Local Research Backing the Protection***

Another consequence of such a development route is that the local academic research takes or has to take, due to the intense US pressure, the theories backing trade secrets protection and all enhanced protections as a given. On the basic theory level, Chinese scholars seem to rarely ask why trade secrets should be treated as intellectual property or, in other words, why it is appropriate to use IP theories to justify trade secrets—a question heatedly debated among US scholars. US scholars have strived to search for justifications for modern trade secrets protection by examining torts theory, property theory, commercial morality theory, and intellectual property theory.<sup>237</sup> Professor Bone argued that none of these theories can justify trade secrets properly, and he harshly criticized the use of IP theories (i.e., utilitarian justification) to justify trade secrets.<sup>238</sup> Responding to Professor Bone's arguments, Professor Lemley argues that trade secrets serve most policy goals of IP (incentives to innovate and incentives to disclose), so that it is appropriate to treat trade secrets as one type of IP.<sup>239</sup> Professor Bone hit back, pointing out the defects in Professor Lemley's arguments, and reiterated his position, that IP theories cannot justify modern trade secrets protection.<sup>240</sup> Regardless of which answer is the most convincing, these discussions leave us with huge academic resources about the policy goals of trade secrets that this article has already discussed. In particular, these scholarly debates have partially triggered scholars to turn their research focus to imposing limiting doctrines in trade secrets law so as to curb the negative impact of the current strict rules and to direct trade secrets more in the direction of being a type of IP.<sup>241</sup> Professor Lemley himself questioned the justifiability of protecting trade secrets for an indefinite time if they are treated as an IP, in his 2008

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<sup>237</sup> See Lemley, *supra* note 19 at 320-341; Varadarajan, *supra* note 154 at 1414-1420.

<sup>238</sup> See Bone, *supra* note 17 at 251-259.

<sup>239</sup> See Lemley, *supra* note 19 at 329-341.

<sup>240</sup> See Bone, *supra* note 170 at 1812-1819.

<sup>241</sup> See Hrdy and Lemley, *supra* note 178.

article,<sup>242</sup> and thus argued for adding trade secrets abandonment doctrine to the regime, in his recent work.<sup>243</sup>

Looking back at the scholarly works in China, few have made the effort to discuss the justifications underlying trade secrets protection. After trade secrets officially began to be considered as one type of IP since the General Provisions of the Civil Law in 2017 under US pressure,<sup>244</sup> many Chinese scholars seem to take it as for granted that trade secrets are an IP, without discussing why we treat them in this way.<sup>245</sup> Professor Kong Xiangjun, a well-known trade secrets scholar in China, holds the position that there is no need in China to discuss the theories backing trade secrets, as is done in the US because recognizing trade secrets does not negate any prior theories in China.<sup>246</sup> Thus, he argues that we only need to place trade secrets in a position of being current theories and legislations (namely, giving this aspect a position in IP theories and laws), which suffices within the context of Chinese law.<sup>247</sup> Professor Kong is right on the point that treating trade secrets as an IP in China will not cause conflict between theories like in the US, so that putting it in the position of IP is acceptable, even if such classification is indeed significantly influenced by the US. However, what is important is not the mere classification, but the question as to whether trade secrets can appropriately serve the policy goals of IP. In other words, we can simply classify trade secrets as IP in China either because in the Chinese context there is no conflict, or because US scholars have already done much of these basic theories studies so that we can gratefully accept the theories without the need to put wasteful effort

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<sup>242</sup> See Lemley, *supra* note 19 at 353.

<sup>243</sup> See Hrdy & Lemley, *supra* note 178 at 75-83.

<sup>244</sup> GENERAL PROVISIONS OF THE CIVIL LAW OF THE PEOPLE'S 123,123REPUBLIC OF CHINA (中华人民共和国民法总则), CLI.1.291593, art. 123 (2017); CIVIL CODE 123,123, OF THE PEOPLE'S REPUBLIC OF CHINA (中华人民共和国民法典), CLI.1.342411, art. 123 (2021). The US pressure can be seen in the 2017 Special 301 Report. See 2017 Special 301 Report, *supra* note 42, at 30.

<sup>245</sup> Only very limited scholar works in China comprehensively discuss why trade secrets are treated as an IP and the theories underpinning trade secrets protection. See, e.g., Liu Chuntian (刘春田) & Zheng Xuanyu (郑璇玉), *Shangye Mimi de Fali Fenxi (商业秘密的法理分析)* [Theoretical Analysis of Trade Secrets], FAXUE JIA (法学家) [THE JURIST], no. 3, 2004, at 106-113; Lin Xiuqin (林秀芹), *Shangye Mimi Zhishi Chanquan Hua de Lilun Jichu (商业秘密知识产权化的理论基础)* [Theoretical Underpinnings of Treating Trade Secrets as an IP], GANSU SHEHUI KEXUE (甘肃社会科学) [GANSU SOC. SCI.], no. 2, 2020 (discussing the theories underlying protecting trade secrets as an IP).

<sup>246</sup> See KONG, *supra* note 19, at 357.

<sup>247</sup> *Id.*

into researching them again. However, discussing the underlying theories of such a classification serves another significant goal, in helping us to rethink whether the current trade secrets protection really serves the policy goals of IP properly—promoting innovation within the industry. These discussions can facilitate theoretical questioning about the current strict trade secrets rules in China and also enlighten Chinese scholars to think about introducing limitation doctrines into the regime to help trade secrets protection better serve its policy goals, as the current US scholars have done in their work. The lack of such focus on underlying theories may be part of the reason why many Chinese scholars again take the specific legal amendments “suggested” by the US as a given. They tend to focus more on arguing for the necessity of enhancing these protections as “suggested” by the US rather than taking a step back to think about what negative consequences a stricter regime may have on the local industry’s development.<sup>248</sup> Perhaps they even lacked the chance to do so because even with it, their recommendations against any strict rules might have been hard for the Chinese government to accept at a point when US pressure was quite intense. That said, because of the US influence on the legislation of trade secrets protection in China, many Chinese scholars seem to take or have taken it for granted that trade secrets should be treated as IP, consequently neglecting the importance of the theoretical discussions underlying such classification. Such insufficient research focuses on underpinning theories may result in inadequate scholarly reflection on China’s current strict protection regime, which may harm innovation within the local industry. Using basic theories to figure out whether and how China should impose limiting doctrines in the current strict regime to alleviate the accompanying social costs of this regime has become a

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<sup>248</sup> For example, many scholars argue in favor of shifting burden of proof to the defendants in trade secrets infringement cases by simply stating that such burden shifting can benefit right holders, just as the US suggested in its Special 301 Reports, without questioning the potential negative results of such burden shifting. See, e.g., ZilimiyaZilimila· Ainiwaer (孜里米拉·艾尼瓦尔), *Shilun Fan BuZhengdang Jingzheng Fa Xiuzheng'an de Shangye Mimi Tiaokuan* (试论反不正当竞争法修正案的商业秘密条款) [*Discussions on the Trade Secrets Provisions in the Amendments for Anti-Unfair Competition Law*], KEJI YU FALÜ (科技与法律) [SCI. TECH. L.], no. 2, 2020, at 74. Cf. Cui, *supra* note 181 (arguing that although shifting burden of proof in current trade secrets protection regime may alleviate the burden on plaintiffs, it, however, unreasonably increases the burden on some weak defendants which may impose too high social costs). Professor Cui is one of the very view scholars in China questions about shifting burden of proof in current regime.

barren land in Chinese academic research that few scholars touch upon.<sup>249</sup>

#### IV. SUGGESTIONS FOR CHINA

After exploring how the US has significantly affected the development of China's trade secrets rules and protection level, which has resulted in the current regime's insufficient consideration of local industry's needs and insufficient academic focus on basic theories, this section tries to provide some suggestions for China to alleviate these negative consequences in the future at different levels. Although these suggestions may not be very comprehensive or ripe, this section, by putting forward this preliminary advice, hopes to point out some directions that China can move towards.

At the legislation level, the protection level should not be increased anymore at this point. In other words, we should not add any more or stricter rules into the current regime before we truly know whether an even stricter regime benefits the whole industry or not. Such an answer requires more evidence based on serious research and sufficient empirical evidence. This relates to the suggestions at the academic research level. First, it is time that Chinese scholars start to turn their focus from simply justifying each strict protection rule in the regime to considering the potential negative effect of a strict regime as a whole on local industrial development. It is a necessity that scholars research deeply into the underlying public goals and theories of trade secrets and rethink the current strict regime based on these basic theories. One more specific suggestion, thus, is that scholars may consider whether limiting doctrines—and, if so, what kinds—should be introduced into the current regime to help trade secrets protection better fulfill the policy goals as an IP. For example, scholars may consider whether adding limiting doctrines to the current strict regime will help trade secrets protection to foster innovation within the industry. They may also study whether and how the currently discussed or implemented limiting doctrines in the US such as fair use, abandonment, or public policy exception can be transplanted into China's trade secrets protection regime. Secondly, scholars and practitioners can

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<sup>249</sup> Upon researching the CNKI database (the largest and most frequently used database in China for collections of scholarly works in China), I did not find any comprehensive studies on imposing limitations on trade secret protections in China.

collaborate to conduct more empirical studies on the effect of the current regime on industrial growth.<sup>250</sup> For instance, empirical evidence concerning the compounding effect of strict trade secrets rules and non-competing clauses on the Chinese industry is required. Also, empirical evidence about whether current limiting doctrines (reverse engineering and independent development) can successfully function to curb the social costs of trade secrets protection in China is urgently needed.<sup>251</sup> Such empirical evidence can complement pure academic research evidence and can better guide any future amendments to the protection regime.

Some may question that if China does not legislate any stricter rules in the future, how can the Chinese government cope with potential future US pressure. As this article has already argued, at least at the legislative protection level, China's trade secrets regime has adopted similar rules as the US. It is predicted that the US may not push China to adopt any stricter rules at the legislation level. Instead, the US may focus more on the effectiveness of enforcement of the current regime. For example, apart from monitoring the Phase One Agreement implementation situations, the USTR in the 2020 Special 301 Report mainly focuses on enforcement concerns such as the effectiveness of the 2018 Judicial Interpretation on preliminary injunctions for IP disputes in real cases instead of "recommending" other stricter rules.<sup>252</sup> Therefore, it is foreseeable that the main concern for the US in the future would be improving enforcement rather than further enhancing the legislative protection level. With regard to the enforcement level, it is suggested that the Chinese government strives to increase the enforcement level of the law in the book concerning trade secrets protection. Strengthening IPR enforcement can equip the Chinese government with more confidence and a solid foundation in future negotiations with the US government. Specific topics that China may focus on in raising

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<sup>250</sup> For some examples of empirical works conducted by the US scholars, see David S. Almeling, Darin W. Snyder & Michael Sapoznikow, *A Statistical Analysis of Trade Secret Litigation in Federal Courts*, 45 GONZ. L. REV. 291 (2009); see also David S. Almeling, Darin W. Snyder, Michael Sapoznikow & Whitney E. McCollum, *A Statistical Analysis of Trade Secret Litigation in State Courts*, 46 GONZ. L. REV. 57 (2010).

<sup>251</sup> Some US scholarly works have provided an economic analysis for the effect of reverse engineering. See, e.g., Pamela Samuelson & Suzanne Scotchmer, *The Law and Economics of Reverse Engineering*, 111 YALE L.J. 1575 (2002) (noting that law and economic analysis of reverse engineering in different industry sectors).

<sup>252</sup> See 2020 Special 301 Report, *supra* note 10, at 41–42.

enforcement levels in the future are promoting the judicial consistency in trade secrets issues by means such as issuing guiding judgments, improving the expertise of judges in dealing with trade secrets cases, and increasing the transparency of governmental and judicial proceedings in trade secrets cases.

However, one point related to the legislation that may still be questioned by the US is whether China should adopt a standalone trade secrets law in the near future. While China has shown much respect for US “suggestions” to enhance trade secrets protection by adding strict rules, it still does not have a standalone trade secrets law. As we can see from history, China adheres to its original way of protecting trade secrets mainly through the AUCL and related judicial interpretations.<sup>253</sup> The lack of a Chinese standalone trade secrets law still remains a target of US criticism<sup>254</sup> because attacking this “defect” remains a strong weapon for the US to achieve certain future objectives. In this sense, whether or not China should promulgate a standalone trade secrets law is still an important matter for China in dealing with its trade relations with the US. Although such a discussion is beyond the scope of this article, it does put forth the proposition that we should be cautious about promulgating a new law. Certain conditions should be met before China adopts a new standalone trade secrets law. First, again, future research should test the effects of the current strict regime on local industrial innovation. Second, studies should investigate the necessity of imposing more limiting doctrines and, if deemed necessary, detail how to transplant and impose them. Third, academic research evidence and empirical evidence are both needed to support that local industry’s needs have developed to such a level as truly demands a standalone trade secrets

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<sup>253</sup> See Zheng Youde (郑友德) & Qian Xiangyang (钱向阳), *Lun Woguo Shangye Mimi Baohu Zhuanmen Fa de Zhiding* (论我国商业秘密保护专门法的制定) [Discussions About Promulgating a Specialized Stand-Alone Trade Secret Protection Law], DIANZI ZHISHI CHANQUAN (电子知识产权) [Elec. Intell. Prop.], no. 10, 2018, at 56–58 (discussing that current trade secret protection provisions can be found in different laws in China); See also Ma Zhongfa (马忠法) & Li Zhongchen (李仲琛), *Zailun Woguo Shangye Mimi Baohu de Lifa Moshi* (再论我国商业秘密保护立法的模式) [Discussion About the Legislation Method of Protecting Trade Secrets in China], DIANZI ZHISHI CHANQUAN (电子知识产权) [Elec. Intell. Prop.], no. 12, 2019, at 8–9 (discussing the current legislation method of protecting trade secrets in China and how it comes into being); see also Zhou, *supra* note 48, at 133–34 (comparing the methods of protecting trade secrets in the US and China, while the latter adopts the method of protecting through different laws).

<sup>254</sup> See 2018 Special 301 Report, *supra* note 109 at 40; see also 2017 Special 301 Report, *supra* note 42, at 30.

law. Before these conditions are met, it is advised that China maintains *status quo*, allowing the academic research and local industry to develop for a certain amount of time, first.

Although the US criticism of the lack of a standalone law may return sooner or later, this article predicts that China may have already secured respite<sup>255</sup> after the Phase One Agreement, which does not require a standalone trade secrets law in China. This is also evidenced by the 2020 Special 301 Report which does not demand China adopting a new law anymore but rather focuses mainly on the implementation of the agreement and enforcement situations of the current regime in China.<sup>256</sup> It is foreseeable that at least during the implementation period of the agreement, China has a breathing period to delay its agenda for a standalone law. China should use the breathing period to let academic research and local industry develop first and wait until all the abovementioned conditions are satisfied, before finally legislating a standalone law.

## CONCLUSION

China's trade secrets protection law is not a product of its own industry's growth, but rather the outcome of US–China trade negotiations. This article is a first attempt at comprehensively examining how the US affected the development of China's trade secrets regime, mainly through its strong Special 301 process. Highlighting the development route, it is argued that each time legal amendments added strict rules to enhance the legislative protection level, they followed US “recommendations.” Evidence demonstrates that the current strict trade secrets regime in China exceeds the local

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<sup>255</sup> In Chapter 1 (Intellectual Property) of the Phase One Agreement, Article 1.35 only requires China to promulgate an Action Plan within 30 working days after the date of entry into force of the Phase One Agreement to provide measures that China will take to implement its obligations under Chapter 1. No specific dates are mentioned in the Phase One Agreement. CNIPA issued its 2020-2021 Implementation of the Opinions on Strengthening the Protection of Intellectual Property Promotion Plan on April 20, 2020 and prescribed 133 measures to be taken in the future. Many measures do not stipulate a date but merely use the phrase “continue to advance”. Therefore, there is still a long way to go before China implements all these measures, which may give China a long breathing period. For details of the CNIPA action plan, see the link inside the article: Mark Cohen, *Is It In There – CNIPA's “Phase 1” IP Action Plan?*, CHINA IPR (Apr. 22, 2020), <https://chinaipr.com/2020/04/22/is-it-in-there-cnipas-phase-1-ip-action-plan> [https://perma.cc/5NQE-UEBY].

<sup>256</sup> See 2020 Special 301 Report, *supra* note 10, at 38–39.

industry's needs and may impede local industrial innovation. Such interests are being neglected because of the substantial representation of the US industry's interests in China's legal amendments. Since the US industry's interests conflict considerably with the local industry's interests, the current strict regime in China may only benefit the US industry in preserving their competitive edge at the expense of unduly impeding the local industry's growth. Furthermore, this development path has also influenced many local scholars to take trade secrets protection for granted and put the research focus mainly on further enhancing protection without taking a step back to examine basic theories and limiting doctrines. In light of the development path and the accompanying negative consequences, this article has tried to provide some directions that China may move towards, in legislation and academic research and at the government levels. Any future changes in China's trade secrets protection legislation can be more spontaneous and should account more for local industry's interests, and future academic research can provide deeper theoretical discussion and more feasible recommendations.

## ANNEX

*Table 1: Summary of Developments*

<b>Changes to Protections</b>	<b>Year</b>	<b>Authority</b>	<b>US influence</b>
<u>Mere contractual protections</u>	Before 1993	Contract Law	No
<u>Basic Protection System Established</u> <ul style="list-style-type: none"> <li>• Information Scope:</li> <li>• Technology or Business information;</li> <li>• Requirements: <ul style="list-style-type: none"> <li>• secrecy, commercial value, practical applicability, reasonable measures to keep secret.</li> </ul> </li> <li>• Scope of protection:</li> <li>• Misappropriation.</li> <li>• Business Operator requirement;</li> <li>• Remedies:</li> <li>• Civil;</li> <li>• Administrative.</li> </ul>	1993	1993 AUCL	<ul style="list-style-type: none"> <li>• 1991 Special 301 report;</li> <li>• 1992 China–US Memorandum of Understanding.</li> </ul>
<u>Details added</u> <ul style="list-style-type: none"> <li>• administrative remedies</li> </ul>	1995	1995 Administrative Regulation	No
<u>Details added</u>	2007	2007 Judicial Interpretation	No

<ul style="list-style-type: none"> <li>e.g., the definition and examples of each requirement;</li> </ul> <u>Limitations/Exclusions</u> <ul style="list-style-type: none"> <li>reverse engineering and independent development.</li> </ul>			
<u>Stricter Rules</u> <ul style="list-style-type: none"> <li>Practical applicability deleted;</li> <li>Statutory damage cap increased;</li> <li>Confidentiality duty on government officials imposed;</li> <li>Employee misappropriation emphasized;</li> <li>Preliminary Injunction allowed.</li> </ul>	2017	2017 AUCL; 2018 Judicial Interpretation	<ul style="list-style-type: none"> <li>2012-2017 Special 301 Reports;</li> <li>24<sup>th</sup> &amp; 25<sup>th</sup> JCCT.</li> </ul>
<u>Stricter Rules</u> <ul style="list-style-type: none"> <li>“Business Operator “ concerned cleared;</li> <li>Cyber theft addressed;</li> <li>Burden shifting added;</li> <li>Statutory damage cap increased;</li> <li>Punitive damage allowed;</li> <li>Information scope expanded;</li> <li>Preliminary Injunction allowed.</li> </ul>	2019 & 2020	2019 AUCL; 2020 Judicial Interpretation & Administrative Regulation	<ul style="list-style-type: none"> <li>2018-2019 Special 301 Reports;</li> <li>Phase One Agreement.</li> </ul>

Table 2: Comparison between China and the US Trade Secrets Law<sup>257</sup>

Category	Index	Sub-Index	United States <sup>258</sup>	China <sup>259</sup>
Source of Law, Definition and Scope	Statutory or Other Protection	Civil	Civil protection pursuant to statute.	Civil protection pursuant to the statute (AUCL) and judicial interpretations.
		Definition	No.	No.
		All confidential business information Common Definition: Confidential business information, <b>subject to:</b> deriving value from secrecy; reasonable and making reasonable efforts to maintain secrecy	Yes.	Yes.

<sup>257</sup> This chart is made according to the Trade Secrets Protection Index created by the OECD. See MARK F. SCHULTZ & DOUGLAS C. LIPPOLDT, APPROACHES TO PROTECTION OF UNDISCLOSED INFORMATION (TRADE SECRETS), OECD TRADE POLICY PAPERS No. 162 193-199 (2014), <http://dx.doi.org/10.1787/5jz9z43w0jnw-en> [<https://perma.cc/XU4Z-QVWJ>]. However, since this chapter does not focus on criminal remedies but limits its scope to mere civil remedies, the index for criminal related elements has been deleted.

<sup>258</sup> The features/elements of the US law are based on the findings by OECD. See *id.* at 193-199.

<sup>259</sup> The features /elements of the Chinese law are summarized by the author from the PRC AUCL, the 2020 Judicial Interpretation, and the PRC Criminal Code. See generally, 2019 AUCL, *supra* note 1; see also generally, 2020 Judicial Interpretation, *supra* note 1.

		Common definition <b>plus condition that</b> it be imparted to recipient in confidence	No.	No.
	<b>Additional Elements of Definition</b>	Use must be shown	No.	No.
		Inventory of trade secrets required	No.	No.
		Must be reduced to writing	No.	No.
		Must be identified as a trade secret to recipient	No.	No.
		Written notice to recipient required	No.	No.
	<b>Scope</b>	Confidential Business Information	Yes.	Yes.
		Technical Information	Yes.	Yes.
<b>Covered Acts</b>	<b>Acts Covered as Civil Infringement</b>	Breach of Duty?	Yes.	Yes.
		Wrongful Acquisition/Misappropriation	Yes.	Yes.
	<b>Third Parties:</b> 1. <b>Liable for Acquisition?</b> 2. <b>Liable Even if Innocent</b>	Civil	1. Yes. 2. No. Only liable if third party has knowledge or reason to know.	1. Yes. 2. No. Only liable if third party has knowledge or reason to know.

	(Without Knowledge)?			
<b>Defining Duties and Misappropriation</b>	<b>Defining Duty of Confidentiality</b>	Commercial Relationship	Duty can be based on express contract or implied.	Duty can be based on express contract or implied (Article 10 of the 2020 Judicial Interpretation).
		Current Employment Relationship	Duty can be based on express contract or implied.	Duty can be based on express contract or implied (Article 10 of the 2020 Judicial Interpretation).
		Past Employment Relationship	Duty can be based on express agreement or implied.  In some US states, the doctrine of	Duty can be based on express contract or implied (Article 10 of the 2020 Judicial Interpretation).  The doctrine of inevitable

			inevitable disclosure exists.	disclosure does not exist in the statute or judicial interpretation but some courts, in reality, use this doctrine. <sup>260</sup>
	<b>Restrictions on Duty of confidentiality</b>	Commercial Relationship	None beyond ordinary competition law concerns. Ends with public disclosure of confidential information	None beyond public information.
		Employment Relationship	Ends with public disclosure of confidential information	None beyond general skills and knowledge; None beyond public information.

<sup>260</sup> See Nie Xing (聂鑫), *Shangye Mimi Bukepilu Yuanze De Zhidu Fazhan Yu Yizhi Shexiang* (商业秘密不可避免披露原则的制度发展与移植设想) [*The Development and Transplantation Plans for the Inevitable Disclosure Doctrine in Trade Secrets Law*], ZHISHI CHANQUAN (知识产权), INTELL. PROP. No. 9 (2016) at 71.

	<b>Defining Wrongful Acquisition - Misappropriation</b>	Civil	Obtaining secrets by tort, crime, espionage, or other act that circumvents reasonable security measures.	Obtaining secrets by theft, bribery, fraud, duress, electronic intrusion, or any other improper means.
<b>Restrictions on Liability</b>	<b>Additional Elements of Proof in Infringement Claim</b>	Civil	None.	None.
	<b>Contractual Restrictions on Competition - Validity</b>	Commercial Relationship	Per se prohibited in some states.  If not, must be related to the protection of trade secrets, limited in duration and	Uncertain.

			geographic scope.	
		Post-Employment	Per se prohibited in some states. If not, must be related to the protection of trade secrets, limited in duration and geographic scope.	<p>Significant limitations.</p> <p>Must be related to the protection of trade secrets and other confidential information about IP rights, limited in duration (no more than two years) and geographic scope; monthly compensations should be paid; limited to only senior management, senior technical personnel and other personnel with confidentiality duty.</p>

	<b>Defenses</b>	Civil	Independent creation. Reverse engineering.	Independent development. Reverse engineering.
<b>Remedies</b>	<b>Civil Remedies</b>	Preliminary injunction	Yes. Temporary restraining orders and other ex parte action available.	Yes. Ex parte action available if in urgent situations or if notifying the other party may affect the injunctions. <sup>261</sup>
		Permanent injunction	Yes (For so long as remains secret).	Yes. (For so long as remains secret as the default rule).
		Injunction to eliminate wrongful head start	Uncertain.	Yes. (If the period of the default rule is unreasonable).
		Delivery up and/or	Yes.	Yes.

<sup>261</sup> See 2018 Judicial Interpretation, *supra* note 106 at arts. 2 and 5; 2020 Judicial Interpretation, *supra* note 1, at art. 15.

		destruction of infringing materials		
		Compensatory Damages – Availability and Type	Direct. Consequential. Lost Profits.	Direct. Consequential. Lost Profits.
		Defendant's Profits	Yes.	Yes.
		Punitive damages available?	Yes.	Yes.
		Statutory or Pre-established damages	No.	Yes.
<b>Enforcement, investigation and discovery &amp; related regulations</b>	<b>Enforcement, investigation and discovery</b>	Emergency Search to preserve and obtain proof	Yes. Ex parte available.	Yes. Conducted by the officials. Ex parte available
		Pre-trial discovery	Most extensive in world. Documentary, interrogatories, depositions.	No such an extensive discovery system in place. However, other mechanisms (e.g., burden shifting clauses, order for production of a document) are in place to facilitate the discovery.

		Protection of confidentiality of trade secrets in litigation	In camera hearings available. Protection of documents available. Protection from other party available.	Reasonable confidentiality measures available. Protection of documents, evidence available. Protection from the other party available.
	<b>Technology Transfer</b>		None.	In the process of removing requirements, as promised in the US-China Phase One Agreement.
	<b>Legal Complements</b>	Fraser Score	On the Fraser Institute Index of Economic Freedom's component index for Legal System and Security of Property Rights	On the Fraser Institute Index of Economic Freedom's component index for Legal System and Security of Property Rights

			(2018), the US receives a score of 7.33 out of 10, which ranks it 20nd in the world. <sup>262</sup>	(2018), China receives a score of 4.93 out of 10, which ranks it 86th in the world. <sup>263</sup>
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<sup>262</sup> JAMES GWARTNEY, et al., ECONOMIC FREEDOM OF THE WORLD: 2020 ANNUAL REPORT, FRASER INSTITUTE 15 (2020), <https://www.fraserinstitute.org/sites/default/files/economic-freedom-of-the-world-2020.pdf> [<https://perma.cc/2GWJ-EP2W>].

<sup>263</sup> *See id.* at 11.