

***CHINA – MEASURES AFFECTING THE PROTECTION AND
ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS***

(WT/DS362)

**SECOND SUBMISSION OF
THE UNITED STATES OF AMERICA**

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Short Form	Full Citation
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<i>Canada – Wheat Exports (Panel)</i>	Panel Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/R, adopted 27 September 2004, as modified by the Appellate Body Report, WT/DS276/AB/R
<i>EC – Hormones (AB)</i>	Appellate Body Report, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
<i>India – Patent Protection (US) (AB)</i>	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R, adopted 16 January 1998
<i>Korea – Dairy Safeguard (AB)</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000

I. INTRODUCTION

1. The United States seeks to resolve a dispute between the United States and China with respect to whether certain, specific Chinese measures are consistent with China's obligations under the *Agreement on Trade-Related Aspects of Intellectual Property Rights* ("TRIPS Agreement"). The United States recognizes that China made revisions to its laws to create a modern system of intellectual property right ("IPR") protection in its effort to meet TRIPS Agreement obligations before and after its WTO accession in December 2001. The United States appreciates China's commitment to improving its IPR regime, and continues to look forward to its IPR cooperation with China on many fronts.

2. In its First Submission, the United States demonstrates that China's efforts to implement the TRIPS Agreement fall short in three specific enforcement areas covered in Part III of the TRIPS Agreement. This submission will show how China's arguments in its First Written Submission, Oral Statement at the First Panel Meeting, and Responses to the Panel's Questions fail to rebut the U.S. demonstration that China's measures in these three areas are inconsistent with its obligations under the TRIPS Agreement:

3. The first U.S. claim concerns China's thresholds for criminal prosecution and conviction of trademark counterfeiting and copyright piracy. The TRIPS Agreement states that "Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale." Yet China's laws establish safe harbors from criminal liability for commercial-scale counterfeiting and piracy by prohibiting prosecution or conviction unless a case meets specific quantitative or value thresholds. The United States has shown that China's laws prevent criminal prosecution and conviction of many activities that fall within the scope of the term "commercial scale."

4. The second claim concerns China's border measures for disposal of infringing goods that Chinese authorities have confiscated. China's measures are not consistent with the obligations agreed upon in the TRIPS Agreement. These obligations require Chinese officials to have the authority to order destruction of the confiscated goods, or their disposal outside the channels of commerce in a manner that avoids harm to the right holder. The United States has demonstrated that China's Customs law is inconsistent with the TRIPS Agreement requirements because it creates a three-step hierarchy that requires Customs authorities in certain circumstances either to permit confiscated goods to enter the channels of commerce, or to take other steps that cause, rather than avoid, harm to the affected right holder.

5. The third claim concerns the denial of copyright protection to certain works in China. The TRIPS Agreement requires copyright protection to attach to a work upon its creation, and (with very limited exceptions not applicable here) do not permit such protection to be denied or withdrawn. The absence of rights to this protection and the concomitant lack of enforceability of these rights opens the door to IPR infringement. The United States has demonstrated that China's laws do not provide copyright protection to movies, music, books, journals, and the like, whenever such works are prohibited from publication or distribution in China. The failure to

afford copyright protection to these works allows pirates to exploit these unprotected works in China free of any fears of copyright enforcement.

II. CHINA’S THRESHOLDS FOR CRIMINAL PROCEDURES AND PENALTIES FOR TRADEMARK COUNTERFEITING AND COPYRIGHT PIRACY ARE INCONSISTENT WITH CHINA’S OBLIGATIONS UNDER ARTICLES 61 AND ARTICLE 41.1 OF THE TRIPS AGREEMENT

A. Introduction

6. Under Chinese law, criminal prosecution and conviction for certain acts of IPR infringement are impossible unless specific monetary or volume-based thresholds are met. The thresholds in China’s Criminal Law and the December 2004 and April 2007 Judicial Interpretations (collectively China’s “criminal thresholds”) do not meet the minimum standard in the TRIPS Agreement because they prevent criminal procedures and penalties from being applied in many cases of wilful trademark counterfeiting and copyright piracy on a commercial scale.

7. Specifically, when a case falls below the thresholds that China has established, the application of criminal procedures and penalties for copyright piracy or trademark counterfeiting becomes legally impossible. China has not disputed that acts of “wilful trademark counterfeiting and copyright piracy” occur in many cases without triggering these criminal thresholds, and as the U.S. has demonstrated, China does not provide criminal penalties and procedures for many of these acts that are “on a commercial scale.”

8. China initially attempted to defend itself against this claim by asserting in its First Written Submission that the United States bears an “especially high burden of proof in advancing [the Article 61 claim].”¹ China cited no provision of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”) or of the TRIPS Agreement standing for this proposition, nor could it: the DSU and the TRIPS Agreement do not impose any special burden of proof for this claim. The United States appreciates that China has now retreated from this position.² It appears that the parties now agree that the normal rules with respect to burden of proof are applicable in this case. The United States has met this burden of proof by successfully demonstrating that China’s measures are inconsistent with China’s obligations under the first and second sentences of Article 61 and Article 41.1 of the TRIPS Agreement.

¹ First Written Submission of the People’s Republic of China, para. 49.

² Opening Statement of the People’s Republic of China at the First Panel Meeting, para. 39; Closing Statement of the People’s Republic of China at the First Panel Meeting, para. 7.

B. Article 61, first sentence, of the TRIPS Agreement

1. Introduction

9. In China, many instances of “wilful trademark counterfeiting or copyright piracy” which are “on a commercial scale” as that term is used in Article 61 will not be subject to criminal prosecution or conviction – and thus are not subject to criminal procedures and penalties – unless they meet certain monetary or volume thresholds.³

10. These thresholds permit wilful trademark counterfeiting and copyright piracy on a commercial scale to occur in many cases without triggering the thresholds that are mandatory preconditions to criminal prosecution and conviction. This is evident from the face of the measures: the United States, and a number of third parties, have provided numerous concrete illustrations of how China’s thresholds permit piracy and counterfeiting on a commercial scale to exist.

11. China responds by providing an erroneous interpretation of the meaning of “on a commercial scale” as used in Article 61, and then claims its thresholds meet that test by being appropriate within the structure of China’s domestic law and in its economy. The United States will further demonstrate in this submission that China’s arguments are without merit.

2. Interpretation of Article 61 of the TRIPS Agreement

a. Introduction

12. The first sentence of Article 61 of the TRIPS Agreement provides:

Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale.

13. The obligation in the first sentence of Article 61 is comprised of a number of elements. China “shall provide for” criminal procedures and penalties “to be applied” “at least” in cases of “wilful trademark counterfeiting and copyright piracy” “on a commercial scale.”⁴

14. In its First Written Submission, China observes that the core aspect of this claim in the dispute is the meaning of the term “on a commercial scale.”⁵ The United States agrees, but unlike China, has provided an interpretation for “commercial scale” that accords with the

³ See First Submission of the United States, paras. 31-55.

⁴ First Submission of the United States, paras. 94-107.

⁵ First Written Submission of the People’s Republic of China, para. 60.

customary rules of interpretation of public international law reflected in the *Vienna Convention on the Law of Treaties*. Pursuant to Article 3.2 of the DSU, these rules apply to the Panel’s interpretation of Article 61. The general rule of treaty interpretation contained in Article 31 of the *Vienna Convention* requires an interpretation in good faith in accordance with the ordinary meaning to be given to the terms of the agreement in their context and in the light of the object and purpose of the agreement.

15. The U.S. explanation of the term “commercial scale” is set out in detail in the U.S. first submission.⁶ In particular, two features emerge from the ordinary meaning of the term. *First*, by using the term “commercial *scale*,” the TRIPS Agreement makes clear that WTO Members must criminalize acts of infringement that reach a certain extent or magnitude. *Second*, in using the term “*commercial scale*,” the TRIPS Agreement draws a link to the commercial marketplace – where business-minded IPR infringers take the fruits of their counterfeiting or piracy. Thus, it is clear that the ordinary meaning of “commercial scale” extends to those who engage in commercial activities, including manufacturing, distribution, and retail sales.⁷

16. China, however, proposes an interpretation that is contrary to the ordinary meaning of the term “commercial scale.” As shown below, to reach its faulty conclusion China also misapplies the rules of interpretation reflected in the *Vienna Convention*.

b. China’s Interpretation of “Commercial Scale” is not Consistent with the Customary Rules of Interpretation of Public International Law

17. As a preliminary matter, China’s submissions misread the U.S. view of “commercial scale.” China claims that the U.S. position is that commercial scale only means commercial purpose.⁸ That is demonstrably not the U.S. view; indeed, such an interpretation would read the word “scale” out of the term. That said, an infringer seriously engaged in pursuing financial gain in the marketplace is *necessarily* acting on a “scale” that is “commercial,” and therefore falls within the ordinary meaning of the term. However, the meaning of the term “commercial scale” does not depend on the intent of the infringer. An infringer with a different intent may or may not be acting on a “scale” that is “commercial.” The “scale” of what is “commercial” in each market will necessarily vary by many factors, such as the object of the infringement and the market for the infringed or the infringing items.

18. The Chinese submission also alleges that the United States wrongly interprets the ordinary meaning of the term “commercial scale” by looking at the meaning of the individual

⁶ First Submission of the United States, paras. 108-110.

⁷ *See, e.g.*, Responses of the United States to the Questions of the Panel, paras. 41-42.

⁸ First Written Submission of the People’s Republic of China, paras. 67-68; Oral Statement of the People’s Republic of China at the First Panel Meeting, para. 24.

words “commercial” and “scale” that comprise the term.⁹ However, that is a completely acceptable method for interpreting a term. Indeed, the U.S. approach is similar to that followed by past panels and the Appellate Body.¹⁰

19. China invites the Panel to ignore the ordinary meaning of “commercial scale,” as explicated by the United States, and instead substitute a concept that China has labeled “significant magnitude of activity.” However, as demonstrated below, China’s proposed interpretation does not result from the proper application of the customary rules of interpretation reflected in the *Vienna Convention*.

i. China’s proposed interpretation is at odds with the ordinary meaning of “commercial scale”

20. China proposes to interpret the term “commercial scale” as meaning “a significant magnitude of activity.”¹¹ But, the phrase “significant magnitude of activity” does not appear to be based on the ordinary meaning of the words “commercial” and “scale.” First, China’s interpretation reads “commercial” out of Article 61, by essentially replacing “commercial” with “significant.” Second, as noted above, the word “scale” means a “*certain* extent or magnitude,” not a “*significant* extent or magnitude.”

21. China claims that its proposed meaning derives from “common usage” and from “statements of the TRIPS negotiating parties.”¹² However, despite China’s reference to a few “previous uses” of the term “commercial scale” in unrelated contexts – such as in a 1948 meeting of United Nations Conference on Trade and Employment and a 1985 meeting of the GATT Council – China provides no evidence that the Uruguay Round negotiations distilled any sort of prevailing understanding of “commercial scale” from these unrelated sources.¹³

22. Further, these isolated references themselves are clearly insufficient to constitute any sort of “common usage.” Even if that were not the case, as a matter of substance, those references do not support China’s proposed interpretation.

23. China appears to hinge its argument on the fact that “commercial scale” was used in these documents in the context of “production” or “manufacturing.” China extrapolates from this juxtaposition to inject the concept of “production on a commercial scale” into the meaning of

⁹ First Written Submission of the People’s Republic of China, paras. 69-72.

¹⁰ See, e.g., *Korea – Dairy Safeguard (AB)*, para. 84 (determining meaning of “unforeseen developments” in Article XIX of GATT 1994 by relying on the dictionary definition of “unforeseen”); *Canada – Wheat Exports (Panel)*, paras. 6.84-6.86 (interpreting the term “commercial consideration” in Article XVII:1(b) of the GATT 1994 in part by relying on the dictionary definition of “commercial.”)

¹¹ First Written Submission of the People’s Republic of China, para. 72.

¹² First Written Submission of the People’s Republic of China at the First Panel Meeting, para. 72.

¹³ First Written Submission of the People’s Republic of China, paras. 75-76.

“commercial scale” in Article 61. However, the meeting minutes simply refer to the term “commercial scale” in a context where “production” is occurring.¹⁴ There is no suggestion that “commercial scale” would not apply to other acts – for example, retail sale. Accordingly, these minutes do not support China’s claims as to “common usage.”

24. Of course, Article 61 does not contain these references to “manufacturing” or “production” – it refers instead simply to “counterfeiting” and “piracy.” Indeed, while China criticizes the United States¹⁵ for not providing any other examples showing use of the term “commercial scale,” the only use of “commercial scale” relevant to the task at hand is in Article 61.¹⁶

25. China also hints at the argument that “commercial scale” might have a special meaning provided for under Article 31(4) of the *Vienna Convention*. China cites “commercial paper” as an example of a combined term that has developed a different meaning from the combination of the two words. But the fact that *one* two-word phrase has developed a special meaning does not lead to any particular conclusion about a *different* pair of words. Thus, there is no evidence, either in the Chinese submissions or elsewhere, of a “special meaning” for “commercial scale” under Article 31(4) of the *Vienna Convention*.

ii. The WIPO Committee Document does not Provide Support for China’s Interpretation

26. The principal source that China relies upon in its submissions to make its claims concerning the meaning of “commercial scale” appears to be a discussion in 1988 by a WIPO Committee of Experts on Counterfeiting and Piracy.¹⁷ China claims that “commercial scale” was “explicitly defined by the World Intellectual Property Organization Committee of Experts on Measures Against Counterfeiting and Piracy (“WIPO Committee”) in February 1988 in furtherance of the ongoing TRIPS negotiations.”¹⁸ China then points to a paragraph of the section on manufacturing in a document prepared by the International Bureau of the WIPO for the discussions, which reads:

“‘Commercial scale’ is a notion which will have to be applied taking into account consideration of the circumstances accompanying the manufacture. The quantity of the goods manufactured, the way in which they were, or are intended to be

¹⁴ See Exhibit CHN-44, p. 5; Exhibit CHN-45, p. 15. China’s references to the term “commercial scale” occurring in U.S. statutes do not support its claims. There is no evidence that the drafters of the TRIPS Agreement relied upon these references.

¹⁵ Oral Statement of the People’s Republic of China at the First Panel Meeting, para. 26; Responses of the People’s Republic of China to the Questions of the Panel, para. 61.

¹⁶ See Responses of the People’s Republic of China to the Questions of the Panel, para. 61.

¹⁷ See Exhibit CHN-43 and Exhibit CHN-72.

¹⁸ First Written Submission of the People’s Republic of China, para. 73.

used, and the will to make profit are among the factors that the courts will have to take into consideration.”¹⁹

27. China appears to use this discussion as a basis for its proposed interpretation of “commercial scale” in Article 61. This approach is unavailing on numerous grounds. To begin with, it is unclear what status this document has under the *Vienna Convention*. China has not argued that it should be taken into account in this dispute pursuant to the general rules of treaty interpretation reflected in Article 31 of the *Vienna Convention*. Further, China has not asserted that the WIPO document should be considered as a “supplementary means of interpretation” within the scope of Article 32 of the *Vienna Convention*. Of course, if it is qualified as a supplementary means of interpretation, it could be taken into account only to confirm an interpretation or to avoid an absurd or unreasonable result resulting from the application of the rules reflected in Article 31.

28. In fact, this WIPO proceeding does not constitute an appropriate supplementary means of interpretation for many reasons. First, the WIPO Committee work took place in a proceeding wholly independent of the TRIPS negotiations. Second, as the report on the meeting of the WIPO Committee makes clear, the WIPO Committee of Experts (much less the country members of WIPO) did not adopt the document China has cited; these provisions were drafted by the International Bureau of the WIPO.²⁰ The summary of the Committee’s deliberations reflects no consensus on the document – including the observations on the “concept of commercial scale” – among the delegations represented on the Committee.²¹ Rather, a number of comments and suggestions were made, and it was decided that a new set of draft provisions would be submitted at the next session of the Committee the following year.²²

29. Even assuming that the document could be considered as a “supplementary means of interpretation,” China does not argue, much less demonstrate, that the normal application of the *Vienna Convention* principles to the term “commercial scale” leaves its meaning “ambiguous or obscure” or leads to “manifestly absurd or unreasonable results.” Therefore, if this document could be considered a “supplementary means” of interpretation, it could only be properly used to confirm an interpretation reached by means of the rules in Article 31 of the *Vienna Convention*.

¹⁹ Exhibit CHN-43, para. 17.

²⁰ Exhibit CHN-72.

²¹ See Exhibit CHN-72, paras. 56-65, 76-81. The report indicated that there were differences of view on whether “commercial scale” should be one of the elements of counterfeiting and piracy, respectively. *Id.*, at paras. 56, 76. Further, the Chairman concluded the discussion of “commercial scale” with respect to counterfeiting noting that there were differences of view, and that the observations by the delegations that had been made would be taken into account in the new version of the Model Provisions and the accompanying observations. *Id.*, at para. 65.

²² Exhibit CHN-72, para. 177 (“the Director General stated that he would welcome written observations from the delegations prior to the preparation of the *revised text* of the model provisions.”) (Emphasis added).

30. In this context, the WIPO document only serves to confirm the interpretation suggested by the United States. The WIPO Committee document that uses the term “commercial scale” confirms the U.S. view that the scope of commercial scale could not be reduced merely to a value or volume metric.²³ Instead, the document shows that a variety of factors would need to be taken into account to determine whether an act is “on a commercial scale.” This includes the “circumstances” surrounding the manufacture, as well as “the will to make a profit” and the way that the goods “are intended to be used,” in addition to the “quantity of goods.” These factors are not exhaustive, but only “among” the factors that must be considered. China’s system of rigid and high numerical thresholds lies far afield from the open-ended set of considerations that the WIPO International Bureau draft suggested must be taken into account when determining whether an act of counterfeiting or piracy should be subject to criminal penalties.

31. Furthermore, contrary to China’s statements,²⁴ the WIPO Committee’s “definition” of “commercial scale” did not form the basis of the negotiations on Article 61 of the TRIPS Agreement. First, as discussed above, the WIPO Committee did not in fact agree on any “definition,” much less adopt the provisions in the document.

32. Second, even though China is correct that the WIPO Committee’s Model Provisions were brought to the attention of the participants of the TRIPS negotiations, this does not demonstrate that the “TRIPS negotiating parties anticipated, reviewed, and relied upon the WIPO Committee’s Model Provisions,”²⁵ nor does it demonstrate that the TRIPS negotiators adopted that precise concept, quoted above, of “commercial scale.” To the contrary, the particular concept of “on a commercial scale” in Article 61 emerged in the TRIPS negotiations.

33. Initially, when a representative of WIPO present at a meeting of the TRIPS Negotiating Group pointed to work in the WIPO Committee, the delegations were still engaged in a preliminary exchange of ideas and views about the scope of the underlying concepts like counterfeiting.²⁶ For example, the summary reflects that “[s]ome participants said that the concepts of manufacture without authorization and commercial scale in the draft WIPO model legislation could prove useful in narrowing down the *acts of infringement to be termed as counterfeiting*. Other participants believed the Group’s work should cover infringement of

²³ Exhibit CHN-43.

²⁴ First Written Submission of the People’s Republic of China, paras. 110-116.

²⁵ Response of the People’s Republic of China to the Questions of the Panel, para. 83. (Emphasis omitted.)

²⁶ See, e.g., Exhibit CHN-71, at para. 33. (“[t]here was an extensive exchange of views on what should be the scope of the multilateral framework on trade in counterfeit goods . . . [i]n this discussion, participants addressed the following main questions: what intellectual property rights should be covered; what acts of infringement of those rights generated counterfeit goods; what should be the substantive intellectual property law by reference to which counterfeit goods should be defined; and at what points of intervention and against what acts involving those counterfeit goods should states be obliged to provide procedures and remedies in order to combat international trade in counterfeit goods.”)

intellectual property rights more broadly.”²⁷ The focus of this discussion differs sharply from the context in which the term “commercial scale” ultimately was used by the TRIPS negotiators, i.e., to define which acts of trademark counterfeiting and copyright piracy must be subject to criminal procedures and penalties. Indeed, it was later in the negotiations – without any reference to the WIPO Committee work – that activities “on a commercial scale” appeared as a separate component of the criminal provisions.²⁸

34. China also fails in its attempt to use the WIPO discussions as support for its efforts to limit the scope of Article 61 to only “larger-scale” activities such as the manufacture of infringing goods.²⁹ China appears to base its arguments that “commercial scale” should apply exclusively to “industrial-level” production” on the use of the term “manufacturing” in the WIPO Committee Model Provisions and, as noted above, on the various unrelated mentions of “commercial scale” in association with production in international meetings, as well as certain U.S. statutes.³⁰

35. Of course, Article 61 refers to “commercial scale” and not “industrial scale.” Nothing in the ordinary meaning of “commercial” implies that it is limited to the industrial context.³¹ Indeed, had the negotiators of the TRIPS Agreement intended the obligations to apply only to industrial-level production, they presumably would have used the term “industrial scale” and not commercial scale.³²

36. The WIPO Committee document does not support China’s conclusion either. While the WIPO document refers in one place to “manufacture” in the sense of “manufacturing on a commercial scale,” that reference was not included in the final text of Article 61, and the TRIPS

²⁷ Exhibit CHN-71, at para. 35. (Emphasis added).

²⁸ In response to a question from the Panel regarding the EC’s proposal to use the term “on a commercial scale” in the drafting of what became Article 61, the EC notes that “[i]n spite of intense research, the European Communities has not been able to find any trace indicating that the phrase ‘on a commercial scale’ in the EC proposal of 30 May 1989 was sourced from another instrument.” Replies by the European Communities to Questions from the Panel to Third Parties, para. 30.

²⁹ First Written Submission of the People’s Republic of China, para. 74.

³⁰ First Written Submission of the People’s Republic of China, paras. 75-78.

³¹ There is no evidence that the TRIPS negotiators relied on isolated references to “commercial scale” made in contexts entirely unrelated to IPR matters when they arrived at the formulation for Article 61. See paras. 21-22, *supra*. Moreover, China’s reliance on the appearance of the term “commercial scale” in a U.S. statute is misplaced. See First Written Submission of the People’s Republic of China, paras. 77-78. Contrary to China’s assertions, the use of the term “commercial scale” in those statutes does not mean that “commercial scale” should be limited to “industrial-level production.” There is no indication that the negotiators of the TRIPS Agreement relied on the use of “commercial scale” in these statutes.

³² The U.S. also notes that China’s reference to industrial production overlooks the economic realities that large-scale infringement is possible by individuals who possess only a simple desktop computer, much less a factory. See Third Party Submission of Canada, para. 5 (“[p]rofessional infringers can accomplish low-overhead and high-margin mass-production and distribution from their homes using their laptop computers; factory assembly-lines are not needed.”)

negotiators could have done so, if that was their intent. Furthermore, the draft Model Provisions in the document did not only deal with acts of counterfeiting or piracy involving manufacturing. The same document cited by China to support its arguments for limiting “commercial scale” to “manufacturing scale” provides that retail sale can also be an act of counterfeiting or piracy and it refers back to the principles in the manufacturing section to incorporate the concept of “commercial scale” into the retail context.³³ In other words, the reference to “commercial scale” and manufacturing simply reflects the fact that the concept of “commercial scale” was at that point being discussed in the section of the document dealing with manufacturing, but there is no evidence that the WIPO Committee had any intention of limiting the context for understanding the scope of that term to only manufacturing. Indeed, the omission of “manufacture” in the TRIPS Agreement – where it was present in the WIPO document – tends to confirm that other commercial activity, such as retailing and wholesaling, is included in the meaning of “on a commercial scale” in Article 61.

37. Finally, China’s characterization of the WIPO Committee discussions as providing support for its proposed interpretation of the term “commercial scale” as a “broad and flexible standard”³⁴ is misplaced to the extent that China is claiming that this discussion demonstrates a consensus for variable meaning to this term as used in Article 61, or provides a basis for China not to comply with the obligation in that Article. The meaning of this term in Article 61 is clear and its application is uniform across all WTO Members: Article 61 requires all commercial scale piracy and counterfeiting to be subject to criminal penalties and procedures.

38. The United States, supported by a number of third parties,³⁵ believes that a range of quantitative and qualitative factors should be taken into account to ensure that all “commercial scale” activities are subject to this discipline. Mexico’s submission, for example, correctly notes that “many facts and circumstances” would have to be taken into account.³⁶ Unfortunately, China’s rigid and high thresholds do not permit such an assessment, as they preclude taking into account a range of relevant factors for determining what is “on a commercial scale.” As a result, China’s thresholds instead provide a safe harbor for counterfeiting and piracy.

39. In sum, while China alleges that the U.S. explanation of the meaning of “commercial scale” is “logically flawed,” it is China that fails in this effort. China offers no credible rationale for taking the extraordinary step of interpreting “commercial scale” to mean a “significant magnitude of activity.”

³³ Exhibit CHN-43, at para. 36 (“[t]he observations made in connection with the notion of ‘commercial scale’ (paragraph 11) and in connection with licenses (paragraph 12 and 30) apply here too.”)

³⁴ See Response of the People’s Republic of China to the Questions of the Panel, para. 63; Oral Statement of the People’s Republic of China at the First Panel Meeting, para. 40.

³⁵ See, e.g., Third Party Oral Statement of Canada, para. 7; Third Party Oral Statement by the European Communities, para. 14; Third Party Submission of Japan, para. 18.

³⁶ Mexico’s Responses to the Panel’s Questions, para. 6.

iii. China’s Purported Context for Interpreting Article 61 is Unavailing

40. With respect to the context of Article 61, China’s main argument is that Articles 1.1 and 41.5 allow China to define for itself the obligations of Article 61. China also claims that the U.S. interpretation cannot be supported where the “underlying act of infringement is left entirely to national law” and asserts that because Article 61 is not as “specific” as other provisions in the TRIPS Agreement and other WTO Agreements it should be interpreted in a broad, flexible manner. These arguments are without merit as demonstrated below.

41. China takes a novel approach in interpreting the minimum enforcement standards in the TRIPS Agreement. It argues that Article 1.1 and Article 41.5 permit it to “define” the standards of Article 61 based on its own method of implementation and its own enforcement resource constraints.³⁷ The implication of China’s argument is that these provisions permit China to self-adjust its TRIPS enforcement commitments it made to other WTO Members. This argument, however, is contrary to the plain text of both Article 1.1 and Article 41.5.

42. Article 1.1 provides, in pertinent part, that “Members shall be free to determine the appropriate method of implementing the provisions of the Agreement within their own legal system and practice.” China appears to claim that Article 1.1 permits it “considerable discretion” to implement Article 61 in accordance with its “national legal norms” and cites certain Members’ views in the negotiating group for the TRIPS Agreement regarding the scope of the enforcement provisions.³⁸

43. The final sentence of Article 1.1 does reflect the TRIPS Agreement’s respect for different legal traditions, and permits each Member to implement the provisions of the TRIPS Agreement within its own legal framework.³⁹ However, as made clear by the text, Article 1.1 deals with the *method* by which a Member implements TRIPS Agreement obligations, not *whether or to what extent* a Member should implement them in the first place.

44. The United States recognizes that, during the TRIPS Agreement negotiations, many WTO Members expressed diverse views on various draft provisions of the TRIPS Agreement. However, the negotiators coalesced around the specific provisions that are included in the final text of the TRIPS Agreement. One of those provisions states that Members shall “give effect to

³⁷ See, e.g., First Written Submission of the People’s Republic of China, paras. 92-101; Oral Statement of the People’s Republic of China at the First Panel Meeting, para. 35.

³⁸ First Written Submission of the People’s Republic of China, paras. 92-95.

³⁹ *India – Patent Protection (US) (AB)*, para. 59. (Under Article 1.1, “Members are . . . free determine how to meet their *obligations* under the TRIPS Agreement within the context of their own legal system.”) (Emphasis added.)

these provisions.” Accordingly, Article 1.1 does not alter the obligations in Article 61 of the TRIPS Agreement, and China must implement Article 61 in a manner that reflects its terms.⁴⁰

45. Likewise, Article 41.5 deals with the implementation of a Member’s Part III enforcement obligations, not the substance of the obligations themselves. Article 41.5 provides that:

It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.

46. The thrust of the second sentence of Article 41.5 concerns the distribution of enforcement resources between the enforcement of the law in general and the enforcement of intellectual property rights. Article 41.5 does not provide an exception to the obligations of Article 61, nor does it affect the scope of the substantive obligation. China asserts, however, that “a concrete, specific international standard of ‘commercial scale’ necessarily is inconsistent with the provisions of Article 41.5.”⁴¹ China argues that Article 41.5 reserves for China the right to define the enforcement standard of Article 61, as Article 41.5 permits it leeway not to set out “low-scale and therefore high-resource thresholds for the criminalization of intellectual property infringement.”⁴²

47. The United States notes that, while Article 41.5 permits China to retain discretion with respect to the distribution of resources as between the enforcement of intellectual property rights and the enforcement of the law in general, it does not serve as an excuse for China to implement only *some parts* of the obligation of Article 61.⁴³ Indeed, the United States is not arguing that China should alter how China enforces its laws in general; rather, the United States argues that China’s criminal thresholds fall short of the minimum standards in Article 61 of the TRIPS Agreement.

48. This dispute concerns whether certain acts of “commercial scale” piracy and counterfeiting are deemed criminal under China’s criminal enforcement regime. Whether China chooses to actually prosecute relatively smaller cases of wilful trademark counterfeiting or

⁴⁰ Indeed, China’s view appears to be far from the mainstream among WTO Members. *See, e.g.*, Third Party Oral Statement of Australia before the Panel; Third Party Statement of Brazil, para. 21; Third Party Written Submission by the European Communities, para. 12; Oral Statement of Japan, paras. 25-26.

⁴¹ First Written Submission of the People’s Republic of China, para. 98.

⁴² First Written Submission of the People’s Republic of China, para. 100.

⁴³ This view is also shared by a number of Third Parties. *See, e.g.*, Third Party Oral Statement of Australia before the Panel; Third Party Written Submission by the European Communities, para. 12; Oral Statement of Japan, para. 32.

copyright piracy “on a commercial scale” is not at issue in this dispute. Consequently, the level of resources China chooses to dedicate to such prosecution is, from the perspective of the legal claims in this dispute, beside the point. As Mexico succinctly notes in its submission, “[t]he prosecutorial discretion and the allocation of government resources with respect to the actual application of [China’s] laws and regulations are not issues before this Panel.”⁴⁴ The issue in this dispute is simply whether it is legally possible to prosecute or convict all acts of “commercial scale” piracy or counterfeiting in China. A legal regime that denies the availability of criminal procedures and penalties for such activity is not compatible with Article 61.

49. In sum, China may choose to implement Article 61 in Chinese law in any way that is consistent with its terms. However, China may not adopt any definition for Article 61 it chooses. Articles 1.1 and 41.5 do not alter the obligations provided by Article 61.

50. China’s other contextual arguments are similarly unavailing. First, it is not clear what point China attempts to make when it argues that the TRIPS Agreement and Berne Convention “do not set forth a definition of infringement.”⁴⁵ With respect to Article 61, the obligation is to provide criminal penalties and procedures for “trademark counterfeiting or copyright piracy on a commercial scale.” That is the obligation that is at issue in this dispute. China’s arguments are simply beside the point because the United States does not claim in this dispute that, leaving aside the thresholds, there are substantive types or categories of acts constituting “wilful trademark counterfeiting or copyright piracy” (as those terms are used in Article 61 of the TRIPS Agreement) for which China has failed to make criminal procedures and penalties available under Articles 213, 214, 215, 217, and 218.⁴⁶ Rather, the U.S. claim is that through China’s thresholds, China has failed to make criminal procedures and penalties available for all acts of “wilful trademark counterfeiting or copyright piracy” that are “on a commercial scale.”

51. Furthermore, China’s accusation that the U.S. is “impos[ing] a fixed, concrete international standard” of “commercial scale” is also misplaced. Establishing an obligation concerning the minimum enforcement provisions of WTO Members must have in place is precisely what the TRIPS Agreement does. It is those obligations that the negotiators of the TRIPS Agreement agreed to. To interpret Article 61 as something less than an across-the-board standard applying to all WTO Members would be to misinterpret the results of those negotiations, as embodied in the text of Article 61. It is China that has imposed a rigid and high set of thresholds which fail to meet the Article 61 obligation.

52. China’s assertions that Article 61 lacks “specificity” likewise gain China no ground.⁴⁷ China attempts to compare other provisions in the TRIPS Agreement and other WTO Agreements with the language in Article 61, in an attempt to show that Article 61 is not

⁴⁴ Third Party Submission of Mexico, para. 5.

⁴⁵ First Written Submission of the People’s Republic of China, paras. 80-81

⁴⁶ See First Submission of the United States, paras. 101, 106.

⁴⁷ First Written Submission of the People’s Republic of China, paras. 83-87.

“specific” or “precise.”⁴⁸ However, the negotiators of the TRIPS Agreement settled on the language of Article 61, which provides the substance of the obligation that China must meet. No amount of comparison to other provisions can assist China in escaping the requirement that it must provide for criminal penalties and procedures for all “commercial-scale” trademark counterfeiting and copyright piracy.

iv. The Object and Purpose of the TRIPS Agreement Supports the U.S. Position

53. China claims that the proposed U.S. definition for “commercial scale” is inconsistent with the object and purpose of the TRIPS Agreement.⁴⁹ China observes that the “concern for different legal systems and for the broader public policy objectives of Members is a lynchpin of the TRIPS Agreement” and argues that Article 61 of the TRIPS Agreement should not be read to “harmonize legal systems” across Members.⁵⁰

54. However, the object and purpose of the Agreement do not support China’s arguments. As the preamble of the TRIPS Agreement makes clear, WTO Members took account of the need to promote effective and adequate protection of intellectual property rights, in part, recognizing the need to deal with the “international trade in counterfeit goods,” and “to reduce distortions and impediments to international trade.” They also recognized the need for new rules and disciplines concerning, *inter alia*, “the provision of effective and appropriate means for the enforcement of trade-related intellectual property rights, taking into account differences in national legal systems.”

55. Giving meaning to Part III of the TRIPS Agreement, including Article 61, is not “harmonizing” legal systems. China is free to provide an enforcement regime consistent with, for example, systems in effect in countries of the “civil law” traditions. No harmonization is required to meet the obligations in the TRIPS Agreement. A fair reading of the Preamble simply does not support China’s position.

56. Moreover, Part III of the TRIPS Agreement outlines a set of rules and disciplines Members must have in place to allow them to enforce trade-related intellectual property rights efficiently and thoroughly. Article 41, which opens Part III, underscores that Members must “ensure enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement.”

⁴⁸ First Written Submission of the People’s Republic of China, para. 86.

⁴⁹ The U.S. would again note that China’s claim appears to be based on a misreading of the U.S. position of “commercial scale.” See para. 17, *supra*.

⁵⁰ First Written Submission of the People’s Republic of China, para. 103.

57. Accordingly, far from supporting China’s view that “commercial scale” can be defined by individual countries and divorced from the realities of commerce and trade, the object and purpose of the TRIPS Agreement supports the U.S. interpretation of this term.

v. China’s Resort to the Subsequent Actions of Members is Without Merit

58. Under Article 31(3) of the *Vienna Convention*, “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” may be taken into account with the context. However, China’s efforts to classify certain subsequent events as “subsequent practice” fails, and further demonstrates China’s flawed interpretation.⁵¹

59. China’s attempt to draw in bilateral free trade agreements entered into by the United States as “subsequent practice” is unavailing. The United States, like many WTO Members, has pursued free trade agreements that included negotiated provisions on intellectual property rights. However, the provisions of U.S. free trade agreements are not relevant to this Panel’s interpretation of the covered agreement, i.e., the TRIPS Agreement. Similarly, apart from China’s misreading of the U.S. position, China also attempts to claim that practices by certain third parties to the dispute are some type of “subsequent practice” within the meaning of the *Vienna Convention*. These claims are persuasively refuted by those third parties.⁵²

60. Indeed, the provisions cited by China do not provide any evidence of “subsequent practice in the application of the treaty” (i.e., the WTO Agreement) establishing any agreement by WTO Members regarding the interpretation of Article 61.

vi. China’s Reliance on the Negotiating History of the TRIPS Agreement is Unavailing

61. China claims that the negotiating record of the TRIPS Agreement provides confirmation for its view of the “commercial scale” standard (“counterfeiting and piracy of a significant scale”).⁵³ Specifically, China argues that the WIPO Committee work provides support for its view that commercial scale “involves a scale of such magnitude as to be suitable for manufacturing.”⁵⁴ However, for the reasons stated in paragraphs 26-29 above, China’s reliance on the WIPO Committee work is incorrect, and in any event, supports the U.S. position.

⁵¹ First Written Submission of the People’s Republic of China, paras. 104-108.

⁵² See Third Party Submission of Canada, para. 11; Canada’s Responses to the Panel’s and China’s Questions to the Third Parties from the First Substantive Meeting, pp. 3-4, 6-7; Third Party Written Submission by the European Communities, para. 14.

⁵³ First Written Submission of the People’s Republic of China, para. 109.

⁵⁴ First Written Submission of the People’s Republic of China, para. 112.

62. Based on its misreading of the U.S. view of “commercial scale,” China also accuses the United States of attempting to impose a standard of “commercial” instead of “commercial scale.”⁵⁵ China points to an early negotiating document of the United States as support.⁵⁶ However, China fails to mention that the “commercial scale” standard was actually contained in a later U.S. proposal in 1990 for the contours of a draft TRIPS Agreement.⁵⁷ Indeed, this provides further reinforcement that “commercial scale” – with its attendant ordinary meaning as described by the United States in this case – was the ultimate consensus solution arrived at by the negotiators of the TRIPS Agreement.

vii. China’s Arguments Regarding Deference to its Criminal Law Should be Disregarded

63. China’s submissions in this dispute also repeatedly argue that in this Panel’s scrutiny of China’s implementation of the TRIPS Agreement standards on criminal procedures and penalties, China should be granted “deference,” because the claim concerns aspects of a Member’s criminal law.⁵⁸ For example, in its First Written Submission, China takes the Panel on a *tour d’horizon* of purported international criminal law principles, including international treaties, the enforcement of criminal judgments in foreign countries, and international jurisprudence.⁵⁹ China further argues that there should be “great deference by international organizations to national authorities in criminal law matters”⁶⁰ and counsels that the Panel should “tread lightly” on its domestic criminal law regime, as the TRIPS Agreement cannot be read to “require a Member to distort its legal system.”⁶¹

64. China’s arguments amount to an invitation to the Panel to abandon the treaty interpretation principles that WTO Members have agreed shall govern this Panel’s work. The fact that Article 61 touches on criminal law does not change the provisions of DSU Article 3.2 or the customary rules of treaty interpretation reflected in the *Vienna Convention*, and none of those rules support China’s arguments.

65. The United States recognizes that at the start of negotiations in the Uruguay Round, many participants had varying levels of ambition for the criminal enforcement provisions. However, by the end of the Uruguay Round, WTO Members coalesced around the text of Article 61. The first sentence of Article 61 implements the consensus solution arrived at by the negotiators of the

⁵⁵ First Written Submission of the People’s Republic of China, para. 116.

⁵⁶ See Exhibit CHN-73.

⁵⁷ See Exhibit CHN-63, p. 22 (“Contracting parties shall provide for criminal procedures and penalties to be applied in cases of willful infringements of trademarks and copyright *on a commercial scale.*”) (Emphasis added).

⁵⁸ See, e.g., First Written Submission of the People’s Republic of China, para. 51; Oral Statement of the People’s Republic of China, para. 38.

⁵⁹ See, e.g., First Written Submission of the People’s Republic of China, paras. 52-59.

⁶⁰ First Written Submission of the People’s Republic of China, para. 50.

⁶¹ Oral Statement of the People’s Republic of China at the First Panel Meeting, paras. 36, 38.

TRIPS Agreement – namely, that Members are required to provide for criminal procedures and penalties against wilful commercial-scale piracy and counterfeiting. This provision creates a minimum standard that all WTO Members must implement in their domestic IPR regime.⁶²

66. The claims in this dispute concern whether China, by setting rigid, quantitative thresholds for criminal prosecution which insulate many instances of “commercial scale” piracy and counterfeiting from being subject to criminal penalties and procedures, meets its obligations as a WTO Member under the TRIPS Agreement. Therefore, China’s arguments regarding the special nature of criminal law have no bearing on the core question that is before this Panel: whether China has fulfilled its obligations under Article 61.

67. Like all WTO Members, when China agreed to become a Member of the WTO, it also agreed to ensure that its criminal laws against piracy and counterfeiting meet the standards in the TRIPS Agreement. Article 3.2 of the DSU states that the dispute settlement system serves to “clarify the existing provisions of WTO Agreements in accordance with customary rules of interpretation of public international law – and that is precisely what this Panel is requested to do in this case.”⁶³

68. Finally, in its Oral Statements at the First Panel Meeting, China urges the Panel to take into account “*in dubio mitius*.”⁶⁴ The Appellate Body has said that *in dubio mitius* is a “supplementary means of interpretation that has been expressed in the following terms: [t]he principle of *in dubio mitius* applies in interpreting treaties, in deference to the sovereignty of states. *If the meaning of a term is ambiguous*, that meaning is to be preferred which is less onerous to the party assuming an obligation”⁶⁵ As indicated by the Latin phrase “*in dubio*,” the precondition for application of this concept is doubt or ambiguity. In this case, however, the meaning of “commercial scale” is reached through the general rules of interpretation reflected in Article 31 of the *Vienna Convention*, and there is no “doubt.”⁶⁶ Accordingly, there is no need to rely on the concept *in dubio mitius*.

⁶² See, e.g., Third Party Submission of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, para. 17 (“[b]y concluding the TRIPS Agreement, or acceding to the WTO Agreement, Members assume an obligation under Article 61 of the TRIPS Agreement to adjust their scope and level of criminal enforcement accordingly . . . [Article 61] is an agreed ‘bottom-line’.”)

⁶³ The European Communities notes that similar “to the well-established principle of international treaty law that ‘[a] party may not invoke the provisions of its internal law as a justification for its failure to perform a treaty,’ one cannot expect that the treaty obligations themselves are – absent any express provision to the contrary – conditioned upon internal factors.” See Third Party Written Submission by the European Communities, para. 13.

⁶⁴ See Oral Statement of the People’s Republic of China at the First Panel Meeting, para. 33; Closing Statement of the People’s Republic of China, paras. 4-6.

⁶⁵ The Appellate Body has noted that the interpretive principle of *in dubio mitius*, widely recognized in international law as a ‘supplementary means of interpretation’ has been expressed in the following terms: “[t]he principle of *in dubio mitius* applies in interpreting treaties, in deference to the sovereignty of states. *If the meaning of a term is ambiguous*, that meaning is to be preferred which is less onerous to the party assuming an obligation” *EC – Hormones (AB)*, para. 165 n. 154. (Emphasis added).

⁶⁶ See First Submission of the United States, paras. 108-110.

3. **Contrary to Article 61, China’s Measures Fail to Provide Criminal Procedures and Penalties for Wilful Trademark Counterfeiting and Copyright Piracy on a Commercial Scale**

a. **Introduction**

69. China’s criminal thresholds create a safe harbor, preventing criminal procedures and penalties from being available for all instances of commercial scale counterfeiting and piracy.⁶⁷ The United States has demonstrated that there are two fundamental problems with China’s rigid and high thresholds:

70. *First*, China’s thresholds are set at such a level, and calculated in such a way, that they do not permit prosecution or conviction of sales and other commercial activity involving values or volumes that are below the thresholds but are still “on a commercial scale.” By their nature, the criminal thresholds may capture commercial IPR-infringing activity happening above the thresholds, but they will never capture such activity *below* the thresholds.

71. *Second*, through China’s reliance on value and volume thresholds tied to finished goods, China’s criminal thresholds ignore other indicia of commercial-scale operations.⁶⁸ Indeed, the breadth of the term “on a commercial scale” presumes that a wide range of considerations should be probative of “commercial scale,” but China’s rigid criminal thresholds preclude their use.

72. In its First Written Submission, China states clearly that it “imposes criminal penalties for infringement activity that exceeds the thresholds set forth in its laws.”⁶⁹ However, China must criminalize *all* wilful counterfeiting and piracy on a commercial scale to meet its obligations under Article 61, first sentence. In that connection, China appears to concede that its thresholds cannot capture all commercial-scale activity. Instead of denying this core safe harbor problem, China attempts to disagree with the *degree* but not the *reality* of the inconsistency.

73. Moreover, based on its flawed interpretation of Article 61, China attempts to justify its TRIPS-inconsistent regime by asserting that its criminal thresholds are “appropriate in light of the structure of China’s criminal law” and are “reasonable within the context of commerce in China.” These arguments are without merit and they are discussed in turn below.

⁶⁷ First Submission of the United States, section IV.C.

⁶⁸ See First Submission of the United States, section IV.C.2.

⁶⁹ First Written Submission of the People’s Republic of China, para. 117. (Emphasis added).

b. China’s Criminal Thresholds are Structured as to Exclude Many Classes of Commercial Scale Counterfeiting and Piracy

74. The first fundamental problem with China’s thresholds is that they are set at such a level, and calculated in such a way, that they do not permit prosecution or conviction of infringing activity involving values or volumes below the thresholds but that are still “on a commercial scale.”⁷⁰ Specifying certain levels of “illegal business volume,” “illegal gains,” or numbers of “copies” that must be met before criminal prosecution or conviction is possible, and then, in addition, dictating restrictive calculations of those thresholds, eliminates whole classes of commercial scale counterfeiting and piracy from risk of criminal prosecution and conviction.

75. In its First Written Submission, China agrees with the U.S. description of the legal basis and binding nature of the Judicial Interpretations at issue.⁷¹ China states that its criminal thresholds “articulate the minimum level of activity necessary for a proscribed act to be considered a criminal one.”⁷²

76. At no point, however, does China claim that criminal prosecution or conviction under Articles 213, 214, 215, 217, and 218 is possible for any trademark counterfeiting or copyright piracy below the thresholds themselves.⁷³ Indeed, China does not rebut the core issue raised by the U.S. with respect to the Article 61 claim: that if a case fails to meet at least one of the thresholds, that fact will preclude criminal prosecution and conviction. The thresholds therefore will – contrary to Article 61 – not apply to any “commercial scale” trademark counterfeiting or copyright piracy activity that does not reach these thresholds.⁷⁴ China takes a different tack: it attempts to whittle away at the size of the safe harbor.

77. *First*, China seizes on certain U.S. explanations regarding the nature of the thresholds and attempts to show that “commercial scale” activity can be captured in some circumstances. For example, China argues that the U.S. mis-characterizes the alternative nature of the thresholds in its examples of how the thresholds miss “commercial scale.”⁷⁵ However, the U.S. has fully acknowledged that the thresholds are in the alternative⁷⁶ – and again the Chinese submission misses the point. The U.S. argues that application of any or all of the alternative thresholds still

⁷⁰ See First Submission of the United States, paras. 116-142.

⁷¹ Responses of the People’s Republic of China to the Questions of the Panel, para. 40.

⁷² First Written Submission of the People’s Republic of China, para. 19.

⁷³ China has explained that it has “enacted five criminal measures against trademark counterfeiting and copyright piracy” in these specific provisions of the Criminal Law. See First Written Submission of the People’s Republic of China, para. 20.

⁷⁴ The United States has provided examples showing how the structure of the thresholds that are set for trademark counterfeiting (Articles 213, 214, and 215) and copyright piracy (Articles 217 and 218) exclude many acts of “commercial scale” activity. See, e.g., First Submission of the United States, paras. 127-129 (amount of sales), paras. 118-122 (illegal business volume), paras. 123-125 (illegal gains); and paras. 139-140 (copies).

⁷⁵ First Submission of the People’s Republic of China, paras. 33-34.

⁷⁶ First Submission of the United States, section III.B

leaves many acts of commercial-scale piracy and counterfeiting immune from criminal prosecution or conviction.⁷⁷ Indeed, a person caught with 499 pirated copies worth no more than RMB 49,000 (or \$6,900) in “illegal business volume” or where “illegal gains are no more than RMB 29,000 (\$4,100) cannot be prosecuted in China for copyright piracy.

78. Furthermore, as the U.S. notes, the calculation methodology required for the “illegal business volume” threshold is not a calculation of the value of the legitimate non-infringing goods with which the counterfeit goods compete. Instead, Chinese prosecutors and judges are directed by default to base this calculation on the prices of the counterfeit goods, which have undercut legitimate merchandise. This valuation methodology exacerbates the safe harbor problem by creating a larger safe harbor than would exist if China used a valuation methodology based on the prices of legitimate goods.⁷⁸ China concedes that in calculating certain thresholds the price of the legitimate good is used by courts only as a last option.⁷⁹

79. *Second*, China takes issue with the U.S. characterization of the operation of the thresholds, deeming U.S. examples regarding how counterfeiters and pirates can insulate themselves from prosecution by maintaining a stock of products just under the thresholds as mere “evidentiary procedures.”⁸⁰ China also appears to argue that the provisions concerning the calculation of the thresholds under the measures at issue should not be subject to scrutiny under Article 61, as they allegedly are not relevant to the substantive legal obligation.⁸¹ These distinctions do not withstand scrutiny. Whatever the label ascribed to China’s measures, the way in which they are calculated, including evidentiary requirements, reinforces the commercial scale safe harbor because the thresholds limit the legal bases on which a criminal conviction can be achieved.⁸²

80. Indeed, China’s thresholds provide a substantial safe harbor *capable* of sheltering commercial operations, thus inviting counterfeiters and pirates to structure their commercial

⁷⁷ First Submission of the United States, paras. 39-54.

⁷⁸ China’s own exhibits confirm how the safe harbor problem is exacerbated. *See, e.g., People’s Procuratorate of Haidan District, Beijing v. Zhu Pengda and Zhu Kekai*, Criminal Judgment adopted by People’s Court of Haidan District, Beijing on July 19, 2006, (2006) Hai Fa Xing Chu Zi No. 1841 (Exhibit CHN-6) (court relied on defendant’s sales vouchers for counterfeit selenium drums to calculate the average price of infringing product); *People’s Procuratorate of Tianhe District, Guangzhou v. Yu Jie*, Criminal Judgment adopted by People’s Court of Tianhe District, Guangzhou on October 24, 2006, (2006) Tian Fa Zhi Xing Chu Zi, No. 5 (Exhibit CHN-7) (court calculated the total value of counterfeit mice and keyboards at their actual unit prices sold, instead of the higher “assessed” prices provided by the Tianhe District’s Price Assessment Center).

⁷⁹ *See* Response of the People’s Republic of China to the Questions of the Panel, para. 1; First Submission of the People’s Republic of China, para. 28.

⁸⁰ *See, e.g.,* First Submission of the People’s Republic of China, paras. 24, 140-141.

⁸¹ First Written Submission of the People’s Republic of China, paras. 140-141.

⁸² China’s citations to U.S. laws regarding prosecution of intellectual property infringement are irrelevant to the matter at hand. *See* First Submission of the People’s Republic of China, para. 142. For example, China’s reference to the “first-sale” doctrine under U.S. law is better characterized as a limitation on the exercise of a right holder’s exclusive rights, not as an “evidentiary” procedure.

operations in such a way as to take maximum advantage from them. Therefore, what China calls “evidentiary” standards are, in fact, very relevant to whether China meets the Article 61 obligation: they cause “criminal procedures” and “criminal penalties” not to be “applied” in some cases of wilful trademark counterfeiting and copyright piracy.

81. China’s other arguments about the operation of the thresholds likewise do not overcome the U.S. case. For example, China claims that the thresholds can be calculated over a prolonged period of time and states that some of the U.S. examples of the operation of the thresholds “lose meaning.” However, the second paragraph of Article 12 of the December 2004 JI makes clear that the values of “illegal business volume,” “illegal gains” and “amount of sales” can only be cumulated if engaging in such acts has not resulted in the imposition of an administrative penalty or criminal punishment.⁸³ Accordingly, if an administrative penalty in a prior seizure action or case is imposed (and China admits that the imposition of administrative penalties is often its preferred remedy),⁸⁴ this will wipe the slate clean and those prior seizures cannot be counted towards the thresholds, leaving prosecutors to start their calculations over again.

82. In response to the U.S. argument that the “illegal business volume” threshold can miss many acts of commercial-scale piracy and counterfeiting,⁸⁵ China claims that its authorities can count infringing products “at other warehouses” and “in transportation.” Of course, this misses the point. Even assuming, *arguendo*, that authorities would take the time to investigate other facets of a criminal enterprise, the “illegal business operation” threshold is structured so as to exclude many cases of “commercial scale” piracy and counterfeiting – regardless of whether goods at other warehouses can be counted.⁸⁶ Indeed, even if the thresholds apply to infringing acts committed at different times, or instead of being based on goods found at one site at one time, they will still create a safe harbor whereby pirates and counterfeiters can conduct their commercial-scale operations, immune from criminal prosecution.

83. In all of these situations, China appears to be arguing about the degree, not the reality of the inconsistency with Article 61. While China seizes on selective examples in the U.S. analysis to argue about the amount of counterfeiting or piracy that is shielded from criminal prosecution or conviction, the fact remains that China has not rebutted the existence of a safe harbor: that is, China’s rigid criminal thresholds exclude many classes of counterfeiting and piracy on a commercial scale from criminal prosecution or conviction.

⁸³ See First Written Submission of the People’s Republic of China, paras. 30-31.

⁸⁴ First Written Submission of the People’s Republic of China, paras. 39-43; see also Exhibits CHN-132, CHN-133, and CHN-134 (administrative penalty imposed against retail store for distributing pre-release *Shrek 2* DVDs).

⁸⁵ See, e.g., First Submission of the United States, para. 140. (“if hundreds of small commercial operations were located in a seven story building in Beijing, and each of those operations stocked or reproduced pirated products – but each one was also careful not to store more than 499 pirated products or more than RMB 49,999 of pirated products at any time (while also ensuring that no records were kept), then China’s Criminal Law would exclude the entire building of commercial establishments from criminal prosecution or conviction.”)

⁸⁶ See First Submission of the United States, section IV.C.

c. China’s One-Size-Fits-All Regime of Criminal Thresholds Also Fails to Take Account of Other Indicia that Show Commercial Scale Counterfeiting and Piracy

84. As the United States notes in its First Submission, the second set of problems with respect to China’s high and arbitrary thresholds stems from the fact that Chinese authorities must rely on a very limited set of one-size-fits-all numerical tests to find commercial scale piracy and counterfeiting that can be subject to criminal prosecution or conviction.⁸⁷ A range of considerations should be probative of “commercial scale,” but China’s rigid criminal thresholds preclude their use.

85. In this connection, the thresholds fail to reach some classes of commercial-scale piracy and counterfeiting not only because of their magnitude, but also because of what they do – and do not – measure. The thresholds do not measure reliable indicia of a commercial-scale piracy or counterfeiting operation, such as “worn molds” for pressing pirated products or counterfeit marks or other materials and implements of such an operation. Indeed, the thresholds reduce the multi-dimensional universe of commercial activity to a flat value or volume metric. As the United States demonstrated in our First Submission, this metric is ill-adapted to the diversity of commercial activity in China and provides many ways for commercial-scale counterfeiting and piracy to escape prosecution.⁸⁸

86. China does not claim that its thresholds can reach beyond the metrics of “illegal business volume,” “illegal gains,” “amount of sales,” or “copies” to capture cases of commercial-scale piracy and counterfeiting that are probative of “commercial scale” but do not neatly fit under these categories. Rather, it argues around this issue, and these arguments do not withstand scrutiny.

87. China claims that criminal measures are available for the crimes of “attempt” and “preparation.”⁸⁹ China asserts that “unfinished products and components are evidence of preparation and attempt,”⁹⁰ and that these offenses capture additional acts of commercial-scale counterfeiting and piracy.

88. However, this does not address the concerns of the United States. Worn molds and similar reliable evidence of commercial-scale piracy or counterfeiting would be evidence of a completed crime; that is, the worn mold supports the conclusion that commercial-scale infringement *already has* occurred. Attempt and preparation are “inchoate” or uncompleted crimes.

⁸⁷ See First Submission of the United States, paras. 143-150.

⁸⁸ See First Submission of the United States, paras. 137, 140, and 156.

⁸⁹ First Written Submission of the People’s Republic of China, para. 36.

⁹⁰ First Written Submission of the People’s Republic of China, para. 36.

89. Unfortunately, despite the probative value of this evidence for proving a particular completed crime, evidence such as worn molds, which are implements used to commit the crime, unfinished products and non-infringing packaging is not cognizable under the metrics of China's thresholds for copyright piracy or trademark counterfeiting, as China's argument here seems to confirm.

90. But even if certain near-finished products can be counted against the thresholds in some cases, China's arguments still miss the point. Its thresholds will still exclude commercial-scale piracy and counterfeiting. For example, 499 unfinished copies of a video game not yet bearing an infringing trademark still qualify as evidence of a "commercial scale" operation, just as much as 499 finished video games bearing such a trademark.

91. The United States also notes that, contrary to China's assertion, the cases included in China's First Written Submission that involved conviction under the crime of "attempt" (Exhibits CHN-12 and CHN-14) only involved convictions based on "unsold" but finished products and did not involve a situation where unfinished products or non-infringing packaging were used by the court for that conviction.⁹¹

92. Additionally, the cases that China claims counted "unfinished" goods do not assist China. The reasoning in the first case, involving washing powder, is quite confused, and the case appears to be an outlier.⁹² The second case, involving game cartridges, is inapposite, as the case did not involve the Article 213 thresholds established by the December 2004 JI.⁹³ Furthermore, only finished and semi-finished products that bore the "Nintendo" registered trademark were counted (thus involving a "completed" crime, rather than counting components which were not in themselves infringing but were to be assembled into a finished good bearing a trademark and a "completed crime") – and the component materials and the implements⁹⁴ used to product the infringing game cartridges were not used to calculate the thresholds. Other cases cited by China demonstrate that Chinese courts do not count other reliable indicia of commercial scale

⁹¹ These two examples involved the application of Article 214 of the Criminal Law, which involves the sale of counterfeit goods. China has admitted that, under the thresholds for Article 214, its authorities will not count "unsold" goods. See Response of the People's Republic of China to the Questions of the Panel, para. 25.

⁹² This case, which the United States understands is a decision from a local, low level court in China, uses the value of finished counterfeit product, together with finished low-cost branded product (intended to substitute for the genuine product in the counterfeit packaging) to calculate illegal business volume. If the value of unfinished goods and packaging in fact is normally included in these calculations, the court would have included the large volume of counterfeit packaging it noted was seized in the raid on the offending premises. However, it did not include these items in its calculation, and the decision offers no clear explanation why the value of the low-cost branded product was included, but the value of the other items was excluded. See Exhibit CHN-15.

⁹³ Exhibit CHN-16, pp. 9-10. Moreover, as the right holder Nintendo states that this case was the only criminal prosecution resulting from raids of commercial operations that they are aware of since 2002 – in the midst of more than 380 administrative raids. See Exhibit US-36, p. 3.

⁹⁴ See Exhibit CHN-15, p. 9. Indeed, paper box packaging and manuals seized on site were not counted. *Id.*

operations, such as packaging materials and tools used in the manufacture of infringing product, for measuring whether the thresholds are met for the crime of manufacturing counterfeit products.⁹⁵

d. China Does Not Rebut the Conclusions Reached in CCA Report on Actual Enforcement Efforts

93. In its First Submission, the United States provides an illustration of how the existence of China’s high and arbitrary criminal thresholds creates a safe harbor for commercial scale piracy and counterfeiting.⁹⁶ The report prepared by the China Copyright Alliance (“CCA”) in the course of their IPR enforcement efforts in China focuses on enforcement raids undertaken by Chinese administrative officials against a variety of retail operations involving recorded music and audiovisual products.⁹⁷

94. The U.S. noted three key features of the CCA Report in its Oral Statement at the First Panel Meeting: *First*, the CCA Report is an empirical study regarding complaints and raids taken against retail outlets dealing with pirated recorded music and audiovisual products; and thus, it provides an example of the scale of commerce in China for certain pirated products. *Second*, the CCA Report demonstrates the safe harbor created by China’s regime because significant quantities of retail sales of infringing product take place in China at levels below China’s thresholds. That means that the vast majority of retail outlets raided in the time period covered by the CCA Report faced no possibility of criminal prosecution or conviction under China’s criminal IPR laws, even though it is undeniable that commercial-scale piracy is involved. *Third*, the two sets of “below-the-thresholds” seizure data in the charts in the U.S. first written Submission⁹⁸ show that more than 80% of all administrative raids in both of these two time periods netted evidence falling below the thresholds in effect at the time.

95. China does not challenge the methodology of the CCA Report. Rather, China first argues that the “statistical trends” from the data are not meaningful.⁹⁹ China also claims that “the U.S. has failed to present the correct conclusions from the data.”¹⁰⁰

⁹⁵ See *People’s Procuratorate of Mianzhu v. Yi Qingsong, Li Fazhao, Li Lin, Xiao Zebin, Yang Changping, Liao Shaofan, Yang Changjun, Wu Shixue, Huang Da’ni, Chen Changqiong, Liu Zhangyan, Yang Qingxu and Yi Zuzhen*, Criminal Judgment adopted by People’s Court of Mianzhu, Sichuan Province on January 13, 2006, (2006) Mian Zhu Xing Chu Zi No.19 (Exhibit CHN-9) (noting seizure of more than 4,000 semi-finished beverages and large amounts of packaging materials and tools for manufacturing counterfeit products, which appear not to have been counted in meeting the illegal business volume threshold under Article 213).

⁹⁶ First Submission of the United States, paras. 151-161.

⁹⁷ See Exhibit US-41.

⁹⁸ First Submission of the United States, pp. 42, 43.

⁹⁹ First Written Submission of the People’s Republic of China, para. 44.

¹⁰⁰ First Written Submission of the People’s Republic of China, para. 47.

96. Contrary to China’s assertions, the United States does not advance any predictive theories from the CCA Report. The CCA Report is a compelling empirical study that pulls together raw data from several hundred enforcement actions in four major Chinese cities. The only observations made are of actual conduct that occurred in the past. Far from being “statistical noise,” as China puts it, the conclusions are plain to see: the vast majority of traditional retail outlets selling recorded music and/or home video products – a classic example of commercial scale activity – faced no possibility of criminal prosecution or conviction under China’s criminal thresholds. China also claims that the CCA Report is not “meaningful,” based on the fact that it uses data from administrative raids carried out at the request of the right holders themselves. However, it is unclear what point China is trying to make; each of these raids was conducted by China’s own administrative authorities after a written complaint, and the data collected in the CCA Report is based on seizure data provided by China’s authorities.¹⁰¹

97. China’s attempts to cast doubt on the conclusions from the empirical study are unpersuasive. Rather than focus on the below-the-thresholds data at the heart of this dispute, China instead focuses on trying to construct a U.S. “hypothesis” based on activity happening above the thresholds – activity which is by definition criminalized and not the subject of this dispute. Moreover, China’s argument that there is no “dramatic shift” in infringing activity between the two time periods – i.e., calendar year 2006, when the December 2004 JI was in effect, and April 5 to November 30, 2007, when the April 2007 JI was in effect – simply misses the point. Despite the lower 500 copy threshold that was in effect during the second time period, piracy and counterfeiting continued to flourish in the safe harbor below the thresholds.

98. China also criticizes other U.S. exhibits, such as articles in newspapers and magazines that illustrate the safe harbor problem.¹⁰² China’s concern that another WTO Member would have recourse to newspapers or other media in this connection is puzzling. When the United States attempted to obtain information from China pursuant to Article 63.3 of the TRIPS Agreement,¹⁰³ China declined to provide information and stated instead: “China’s competent domestic IPR authorities have also made relevant information publicly available through their official websites, *newspapers, magazines* and other proper channels.”¹⁰⁴

¹⁰¹ See Exhibit US-41, paras. 11-12.

¹⁰² First Written Submission of the People’s Republic of China, para. 45. The information that China claims are of “poor quality” are drawn from a variety of well-established and well-regarded sources, including *International Herald Tribune*, the *Wall Street Journal*, *Business Week*, *Time*, *Daily Telegraph* (UK), *Sydney Morning Herald*, *BBC News*, *Seattle Times*, the *Economist*, and the *New York Times*. These publications originate in a variety of regions. Some of these sources include China’s own *Xinhua* and *China Daily*. See also, *Brazil – Tyres (AB)*, para. 207 (relying on Panel’s determination of evidence derived from *New York Times*).

¹⁰³ *Request for Information Pursuant to Article 63.3 of the TRIPS Agreement: Communication from the United States*, IP/C/W/461, circulated 14 November 2005 (Exhibit US-65).

¹⁰⁴ *Response to a Request for Information Pursuant to Article 63.3 of the TRIPS Agreement: Communication from China*, IP/C/W/465, circulated 23 January 2006, para. 2. (Emphasis added) (Exhibit US-66). The United States provided a follow-up request to China’s response. See *Follow-up Request for Information*

e. China’s Has Failed to Justify the Appropriateness of its Criminal IPR Thresholds Under Article 61

i. Introduction

99. China claims it has implemented its obligations under Article 61. Unfortunately, its claim is based on a wholly erroneous interpretation of Article 61.¹⁰⁵ As shown above in section II.B.2.b, China’s proposed interpretation is contrary to the customary rules of treaty interpretation. China asserts that it has “imposed criminal penalties for wilful infringement that involves a *significant magnitude of activity*” (its erroneous interpretation, emphasis added) that is (a) appropriate within the legal structures of China, and (b) appropriate within the commercial context of China.¹⁰⁶ As demonstrated in this submission, these arguments are without merit.

ii. Whether China’s Criminal IPR Thresholds are Appropriate Within the Context of China’s Domestic Law Is Irrelevant

100. China’s first purported justification for its TRIPS-inconsistent criminal enforcement regime is that China’s criminal thresholds are appropriate in light of the structure of China’s Criminal Law.¹⁰⁷ China observes that Chinese law on commercial crimes employ a range of thresholds, including for crimes such as foreign exchange evasion and currency counterfeiting,¹⁰⁸ and argues that it has “set thresholds for criminal measures for intellectual property infringement that are proportional to the thresholds for other commercial crimes under Chinese law.”¹⁰⁹ This argument reflects a misconstruction of the claims in this dispute.

101. Article 61 first sentence requires that all wilful commercial scale piracy and counterfeiting must be criminalized. What China chooses to do with its domestic *non-IPR* criminal thresholds has no bearing on this Panel’s assessment of whether China meets its international obligations under the first sentence of *Article 61 of the TRIPS Agreement*. China appears to confuse its ability to determine what constitutes a “commercial crime” in its domestic law with its obligation to comply with the first sentence of Article 61 of the TRIPS Agreement. Indeed, whether or not China’s thresholds are reasonable under China’s domestic regime is not relevant to the TRIPS Article 61 analysis; this dispute concerns whether China’s criminal thresholds meet China’s international obligations to provide criminal penalties and procedures

¹⁰⁴ (...continued)

Pursuant to Article 63.3 of the TRIPS Agreement: Communication from the United States, IP/C/W/461.Add.1, circulated 24 January 2006 (Exhibit US-67).

¹⁰⁵ See First Written Submission of the People’s Republic of China, section III.D.

¹⁰⁶ First Written Submission of the People’s Republic of China, para. 117.

¹⁰⁷ First Written Submission of the People’s Republic of China, paras. 118-132.

¹⁰⁸ First Written Submission of the People’s Republic of China, paras. 123-127.

¹⁰⁹ First Written Submission of the People’s Republic of China, para. 122.

for “commercial scale” piracy and counterfeiting. As we have shown, China’s thresholds miss many such acts.

102. Moreover, China again alleges that if the Panel were to agree with the U.S. view, it would “require China to up-end its criminal law regime,” and all but “eliminate the thresholds.”¹¹⁰ To the contrary, in this dispute, the United States is seeking to ensure that a criminal law regime is in place where Article 61 requires China to have one (and where China, at the moment, does not).

iii. China’s Claim that its Thresholds are Appropriate in Light of Scale of Commerce within China Fails to Pass Muster

103. China also argues that its thresholds are reasonable “in terms of the scale of commerce in China,” comparing its RMB 50,000 (approximately \$6,900) threshold for “illegal business volume” to statistics related to “small-size industrial enterprises” and retail enterprises.¹¹¹ However, these arguments fail to withstand scrutiny for the following reasons.

104. *First*, China’s thresholds are not appropriate to the scale of commerce in China, as they miss many types of “commercial scale” activity. Examples of how China’s thresholds miss commercial-scale activity are provided throughout the U.S. submissions.¹¹² Indeed, from personal care products to high-tech electronics to cutting-edge software, what is “commercial scale” can vary from situation to situation according to a number of factors, including the object of the infringement and the market for the infringed items. Moreover, as markets develop and technology progresses, these changes can alter the realities of the marketplace in meaningful ways, and therefore affect what may constitute “commercial scale.” The Internet and e-commerce provide such an example.¹¹³ China’s thresholds offer one size for all cases; they do not accommodate the realities of the marketplace, particularly China’s marketplace for copyright and trademark-based products from WTO Members.¹¹⁴

105. Again, as noted previously, China does not directly contradict the U.S. position that its thresholds fail to reach all commercial scale counterfeiting and piracy. Rather, China argues that they “best capture the points at which intellectual property infringement . . . warrants criminal enforcement.”¹¹⁵ That statement, however, neither explains nor justifies how the boundaries of criminal liability that China has chosen in fact capture all counterfeiting and piracy that is “on a commercial scale” under Article 61.

¹¹⁰ First Written Submission of the People’s Republic of China, para. 126.

¹¹¹ First Written Submission of the People’s Republic of China, paras. 133-137.

¹¹² *See, e.g.*, First Submission of the United States, paras. 127-129 (amount of sales), paras. 118-122 (illegal business volume), and paras. 123-125 (illegal gains).

¹¹³ *See* First Submission of the United States, para. 149.

¹¹⁴ *See, e.g.*, First Submission of the United States, paras. 122, 148.

¹¹⁵ First Written Submission of the People’s Republic of China, para. 137. (Emphasis added).

106. *Second*, China’s argument regarding the purported reasonableness of its “illegal business operation” threshold again confirms the U.S. argument. In making this argument, China concedes that there is some “commerce” that falls below the thresholds.¹¹⁶ China’s own statistics demonstrate that its thresholds miss “commercial-scale” piracy and counterfeiting. For example, China claims that the RMB 50,000 “illegal business volume” threshold is less than 25% of the average annual revenue of a household or 30% of the annual revenue of households engaged in retail trade.¹¹⁷ It is unclear, however, why China believes this figure is representative of “commercial scale.” The examples imply that such a household could engage in retail sales of pirated or counterfeit goods for approximately four months out of the year and still not commit a crime under China’s “illegal business volume” threshold.

107. Indeed, China’s reliance on aggregate statistics related to an undefined set of “average households” or “small-size” industrial enterprises does not shed any real light on the scope and scale of commerce in China. As the U.S. has noted, the Article 61 concept of “commercial scale” includes those who engage in commercial activities, including retail sales, distribution, and manufacturing.¹¹⁸ The Chinese market, including the market for many copyright and trademark bearing goods, is fragmented and characterized by a profusion of small manufacturers, middlemen, distributors, and small outlets at the retail level.¹¹⁹ China’s thresholds exclude “commercial scale” activity in these aspects of the supply chain if they fall under the volume or value thresholds.

108. *Third*, the inappropriateness of China’s thresholds is borne out by other illustrations. Canada’s citation to China’s estimated per capita gross domestic product in Canada’s Third Party Submission is particularly insightful. The U.S. notes that China’s estimated GDP per capita over 2007 was approximately \$2,500.¹²⁰ The United States fails to see how the \$6,900 “illegal business volume” thresholds would be appropriate to commercial scale in light of being more than *two times* a Chinese citizen’s *yearly* per capita income of \$2,500.

109. *Fourth*, China erroneously interprets “commercial scale,” limiting its scope to only manufacturing and industrial production. Again, China’s interpretation is contrary to the ordinary meaning of the term “commercial scale.”¹²¹ It is clear that “commercial scale” counterfeiting and piracy is not limited to large-scale or industrial-scale enterprises – on the

¹¹⁶ See, e.g., Oral Statement of the People’s Republic of China at the First Panel Meeting, para. 45.

¹¹⁷ First Written Submission of the People’s Republic of China, para. 135.

¹¹⁸ See First Submission of the United States, paras. 108-110.

¹¹⁹ See First Submission of the United States, para. 122. See also *AT Kearney, 2005 Global Retail Development Index: Destination China* (noting that “[a]lthough the Chinese retail market is huge, it is extremely fragmented, with no dominant organized players. The top 10 retailers hold less than 2 percent of the market, and the top 100 retailers have less than 6.4 percent.”) (Exhibit US-29)

¹²⁰ Third Party Submission of Canada, para. 8. (Exhibit CDA-1 also demonstrates that the per capita Gross Domestic Product using the purchasing power parity method is \$5,300.)

¹²¹ See section II.B.2.b *supra*.

contrary, the huge growth of the Internet and digital technological advancements permit commercial-scale piracy and counterfeiting to occur in a small space equipped with a computer. No factory or assembly-line production is necessary for such commercial-scale activity.

110. *Fifth*, China also argues that it does not have an obligation to consider the “commercial impact of the intellectual property infringement when setting its thresholds.”¹²² In China’s view, under Article 61, “criminal enforcement is required if the infringing activity is on a commercial scale, not if the impact of the infringing activity is on a commercial scale.”¹²³

111. China again appears to misunderstand the U.S. position. Article 61 requires WTO Members to provide criminal penalties for all counterfeiting and piracy that takes place “on a commercial scale.” Advances in digital technology and the Internet, among other market conditions, enable piracy and counterfeiting to take place in situations that escape the reach of China’s thresholds, even though the scale of that activity is evidently “commercial” (in the sense discussed in the U.S. first submission). For example, the U.S. has provided the example of “HDVDs” that can hold multiple movies or television shows. While China claims its courts have discretion to treat an HDVD as multiple copies, it provides neither the legal support for that assertion nor any cases that demonstrate that courts depart from counting each physical piece of media as one copy.¹²⁴

112. At the same time, such activity can and does cause major market damage. When digital technology and the Internet can permit hundreds of works to be distributed by an individual for negligible cost without triggering China’s thresholds, such distributions and the concomitant reproductions are practically indistinguishable in their effect from the industrial manufacture of pirated DVDs or software on optical discs.¹²⁵ They both have a large (and commercial) impact and are on a large (and commercial) scale. Indeed, China’s criminal IPR thresholds would allow “commercial scale” activity – such as the sale of less than 499 copies worth less than RMB 50,000 of a specialized, high-value software product – to escape criminal prosecution or conviction.¹²⁶

¹²² First Written Submission of the People’s Republic of China, paras. 138-139.

¹²³ First Written Submission of the People’s Republic of China, para. 139.

¹²⁴ Response of the People’s Republic of China to the Questions of the Panel, para. 30

¹²⁵ China claims that it implements Article 61 through the Criminal Law. Under its Criminal Law, the definition of a crime include acts that “undermine . . . economic order [or] violates property privately owned by citizens [or] or any other act that endangers society.” See First Written Submission of the People’s Republic of China, para. 120. However, if the impact of an infringement causes “serious harm” by substantially diminishing the market for a protected work, yet the activity does not exceed China’s thresholds, it would not be subject to criminal penalties or procedures.

¹²⁶ See, e.g., Kristi Heim, “Inside China’s teeming world of fake goods,” *Seattle Times*, (February 12, 2006), available at http://seattletimes.nwsource.com/html/chinainfocus/2002782434_chinapiracy12.html (describing counterfeit copies of various business-related software being sold in the basement of a building for 60 cents, when prices of some legitimate versions of that software being sold on the second floor for prices reaching \$1000) (Exhibit

(continued...)

4. China’s Other Arguments Regarding the Implementation of Article 61 Are Unavailing

a. China’s Arguments Regarding Private Prosecution Should Be Disregarded

113. China also asks the Panel to take particular note of the fact that Chinese law permits private parties to bring prosecution of certain criminal acts.¹²⁷ China also asserts that its private criminal enforcement scheme precludes it from setting the thresholds too low, for fear of “flooding” its courts with private criminal complaints. China therefore claims it does not have the option to define a crime aggressively and then rely on prosecutorial discretion to target prosecutions.¹²⁸

114. First of all, China’s assertions that lowering its thresholds¹²⁹ would cause an increase in private criminal complaints and “could unleash a large volume of private enforcement actions” is simply unsubstantiated. Indeed, China admits that “it lacks comprehensive data on the incidence of private enforcement actions” and acknowledges that it cannot speak “with absolute certainty” on the matter.¹³⁰ Such conjecture also disregards significant disincentives to bringing trivial cases, such as the time and expense of mounting a private prosecution. This argument is of little relevance to the Panel’s consideration of whether China’s criminal thresholds are consistent with China’s obligations under Article 61 of the TRIPS Agreement.

115. In any event, China’s decision to allow prosecutions by private parties in its domestic law does not excuse it from the obligation to make available criminal procedures and penalties to all wilful trademark counterfeiting and copyright piracy on a commercial scale.

¹²⁶ (...continued)
US-37).

¹²⁷ See First Submission of the People’s Republic of China, para. 38; Oral Statement of the People’s Republic of China at the First Panel Meeting, para. 14.

¹²⁸ First Submission of the People’s Republic of China, para. 38.

¹²⁹ China appears to concede that private prosecutions under Articles 213-215 and 217-218 of the Criminal Law are subject to the same criminal thresholds for conviction as government-initiated actions. See First Submission of the People’s Republic of China, para. 38. See also Response of the People’s Republic of China at the First Panel Meeting, para. 54. Accordingly, by placing the same threshold requirements on private prosecutions, the same safe harbor problems arise as with government-initiated actions.

¹³⁰ Response of the People’s Republic of China to the Questions of the Panel, para. 53. Moreover, in response to a specific question from the Panel on the incidence of private prosecutions after China lowered its thresholds in 2004, China does not provide any such data. *Id.*, at para. 58

b. China’s Administrative Enforcement Regime Has No Bearing on Whether China Meets the Obligations of Article 61

116. China also emphasizes its administrative enforcement regime, arguing that it imposes “significant deterrence” on IPR infringement beneath China’s criminal thresholds.¹³¹ China claims that this regime permits its authorities to “swiftly and effectively” target infringement activity of any scale.”¹³² China states that, because of this regime, “low-scale infringers do not have a safe harbor.”¹³³ The United States, by contrast, has repeatedly raised the concern that China’s over-reliance on an administrative enforcement system fails to deter rampant counterfeiting and piracy. However, neither the failures nor any purported successes of China’s administrative enforcement system are relevant to the legal issues under the present claim, which solely concern China’s obligations under the TRIPS Agreement in the area of criminal procedures and penalties.

117. The United States recalls that Article 61 is located in Part III of the TRIPS Agreement. Part III of the TRIPS Agreement deals with a number of enforcement procedures, such as civil, border, administrative, and criminal measures. Section 2 of the TRIPS Agreement pertains to “Civil and Administrative” procedures and Section 5 of the TRIPS Agreement, where Article 61 can be found, pertains to “Criminal” procedures. Understanding the important role that is played by criminal enforcement of IPR, the negotiators of the TRIPS Agreement set forth a separate section of the TRIPS Agreement to provide for criminal procedures.

118. It is notable that Article 61 is the only provision that focuses on criminal penalties and procedures. Conversely, that also means that only criminal penalties and procedures can fulfill the obligations in Article 61. China’s administrative remedies therefore do not assist China in meeting its obligations under Article 61 of the TRIPS Agreement. Administrative remedies are by their very nature “administrative” and not “criminal.” As such, administrative enforcement is not a substitute for criminal enforcement.

119. In making its administrative enforcement argument, China concedes that it does not provide for criminal procedures and penalties for commercial-scale activity under the criminal thresholds. Instead, China states that its administrative enforcement regime enforces “against infringing activity under the criminal thresholds.”¹³⁴ Moreover, while China claims that “low-scale” infringers do not have a safe harbor by virtue of this administrative enforcement regime, when these counterfeiters and pirates are engaged in “commercial scale” activity, they must be subject to criminal penalties and procedures.

¹³¹ First Written Submission of the People’s Republic of China, paras. 39-43.

¹³² Oral Statement of the People’s Republic of China at the First Panel Meeting, para. 16.

¹³³ Oral Statement of the People’s Republic of China at the First Panel Meeting, para. 18.

¹³⁴ Oral Statement of the People’s Republic of China at the First Panel Meeting, para. 19.

C. China’s Criminal IPR Thresholds Are also Inconsistent with Article 61, Second Sentence and Article 41.1 of the TRIPS Agreement

120. The United States has also demonstrated why China’s criminal IPR thresholds are also inconsistent with the second sentence of Article 61 and Article 41.1.¹³⁵ China acknowledges that if the Panel finds that China’s criminal IPR thresholds are inconsistent with the first sentence of Article 61, it must also find an inconsistency with the second sentence of Article 61 and with Article 41.1.¹³⁶

D. Conclusion

121. The United States has demonstrated that China fails to provide for criminal procedures and penalties to be applied in a great number of instances of commercial-scale trademark counterfeiting and copyright piracy. China’s measures fail to make various acts of commercial scale trademark counterfeiting and copyright piracy subject to criminal procedures and penalties. This conclusion follows from an analysis of the structure and operation of the criminal thresholds themselves. In addition, the CCA Report provides a concrete illustration of the troubling consequences of these thresholds.

122. The United States therefore respectfully requests that this Panel find China’s IPR thresholds are inconsistent with China’s obligations under the first and second sentences of Article 61, and Article 41.1, of the TRIPS Agreement.

III. CHINA’S MEASURES FOR DISPOSING OF CONFISCATED GOODS THAT INFRINGE INTELLECTUAL PROPERTY RIGHTS ARE INCONSISTENT WITH CHINA’S OBLIGATIONS UNDER ARTICLE 59 OF THE TRIPS AGREEMENT

A. Introduction

123. Article 59 of the TRIPS Agreement requires Chinese authorities to have the authority to order destruction of the goods, or their disposal outside the channels of commerce in a manner that avoids harm to the right holder. However, Chinese law does not give Chinese customs officials the scope of authority they need. That is because, in many circumstances, Chinese officials do not have the authority to destroy the goods, except as a last resort, and they must give priority to disposal options that permit such goods to enter the channels of commerce or otherwise cause harm to the right holder.

¹³⁵ First Submission of the United States, paras. 164-169.

¹³⁶ First Submission of the People’s Republic of China, para. 150.

B. Article 59 of the TRIPS Agreement

124. Article 59 provides in pertinent part that the “competent authorities shall have the authority to order the destruction or disposal of infringing goods in accordance with the principles set out in Article 46.”

125. As the U.S. discusses in its First Submission, for the purposes of this dispute, the relevant authority needed under Article 59 is detailed in two sentences in Article 46. Read together, Article 46 and Article 59 require, first, that a Member’s competent authorities for border enforcement “shall have the authority to order that goods that they have found to be infringing be disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder, or, unless this would be contrary to existing constitutional requirements, destroyed.” Second, “[i]n regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in exceptional cases, to permit release of the goods into the channels of commerce.”

126. China’s submissions to date advance a number of arguments concerning Articles 59 and 46 that would minimize China’s obligations under those Articles. However, these arguments are without merit.

127. *First*, China asserts that Article 59 does not require that Members provide a broad grant of authority to agencies, and argues that China’s regime simply “stipulates conditions and sequencing for its exercise by domestic agencies.”¹³⁷ Accordingly, China asserts that it gives its Customs officials sufficient authority to comply with Article 59, even when those officials have no power to destroy confiscated goods under numerous circumstances.¹³⁸ These arguments are unavailing.

128. As the United States sets forth in its First Submission, Article 59 plainly requires full authority to be granted to dispose of or destroy confiscated infringing goods in accordance with the principles of Article 46. The broad scope of Article 59 authority regarding infringing goods confiscated by border authorities is clear from the absence of any restrictions on this authority in Article 46. Accordingly, China Customs should have the *power* to choose among any legitimate options for dealing with these goods – which must include destruction or disposal outside the channels of commerce in accordance with the principles of Article 46 – from the outset when the goods are found to be infringing, and thereafter until the goods are finally dealt with. As Korea has explained, the term “shall have the authority” does not mean “shall *sometimes* have the authority.”¹³⁹

¹³⁷ First Written Submission of the People’s Republic of China, paras. 195-196.

¹³⁸ First Written Submission of the People’s Republic of China, paras. 196, 201-202.

¹³⁹ See Korea’s Response to the Panel Questions, p. 6 (Emphasis added).

129. China also unsuccessfully attempts to use Article 1.1 of the TRIPS Agreement to argue for the acceptability of its rigidly constrained disposal regime.¹⁴⁰ However, as noted in other contexts, Article 1.1 only offers China flexibility in how it implements TRIPS obligations; it does not exempt China from the need to comply fully with these provisions of the TRIPS Agreement.¹⁴¹

130. China’s references to other Members’ copyright and trademark laws are similarly misplaced.¹⁴² First, this dispute concerns China’s measures, not other Members’ laws.¹⁴³ Second, substantively, these laws do not resemble in any respect the problematic disposal hierarchy used by China that denies China Customs the authority to destroy the goods when any of the other options are available.¹⁴⁴

131. *Second*, throughout China’s defense related to this second claim, China also points to statistics showing the breakdown of how confiscated goods found to be infringing end up being dealt with by China Customs.¹⁴⁵ Those figures, however, provide no response to the U.S. claim. Indeed, the United States is not arguing that the TRIPS Agreement obligations *require* China to destroy or dispose of all such goods in accordance with the principles in the first sentence of Article 46. The pertinent issue is what decisions China Customs is permitted by law to make in particular circumstances. China’s measures do not give its Customs officials the authority Article 59 requires – i.e., to be able to take this step (or to be able to dispose of the goods outside the channels of commerce without harm to the right holder) at any time Customs has charge of these infringing goods.

132. *Third*, China also attempts to defend its disposal hierarchy against the claim that it is inconsistent with the Article 46 principle to “avoid any harm caused to the right holder.”¹⁴⁶ China argues that this language only obliges China to “pay due regard to potential harms to the right-holder and to refrain from disposition methods that consistently or significantly harm the right-holder’s interests.”¹⁴⁷

¹⁴⁰ First Written Submission of the People’s Republic of China, para. 202.

¹⁴¹ See paras. 40-44, *supra*.

¹⁴² First Written Submission of the People’s Republic of China, para. 200.

¹⁴³ For that reason, China’s citations in its submission to U.S. customs law are similarly unavailing. See, e.g., First Written Submission of the People’s Republic of China, paras. 198-199, 205.

¹⁴⁴ China’s own Trademark Law provides a sharp contrast to the restrictive regime in its Customs IPR Implementing Measures. Under Article 53 of the Trademark Law, when the Administration of Industry and Commerce “determines that the fact of infringement is established, it shall order the infringer to cease infringing upon the right immediately, and it shall *confiscate and destroy the goods involved . . .*” See Exhibit CHN-21, article 53.

¹⁴⁵ See, e.g., First Written Submission of the People’s Republic of China, paras. 155, 194; Oral Statement of the People’s Republic of China at the First Panel Meeting, para. 62.

¹⁴⁶ See First Written Submission of the People’s Republic of China, paras. 183-186.

¹⁴⁷ First Written Submission of the People’s Republic of China, para. 186.

133. However, this proposed interpretation is contrary to the meaning of the provision and cannot stand. The obligation is not to “pay due regard” to the interests of a right holder and to tolerate intermittent or “non-significant” harm. The standard requires avoiding any harm to the right holder.¹⁴⁸ Indeed, the definition China itself cites for the word “avoid” is “to keep away or refrain from; *prevent from doing or happening*” – and this definition is fundamentally at odds with the interpretation China then advocates.¹⁴⁹ Accordingly, China’s arguments should be rejected.¹⁵⁰

134. China then argues that its measures are otherwise in compliance with Article 59, but argues the final sentence of Article 46 is not a principle within the meaning of Article 59, and as such, is not incorporated into Article 59.¹⁵¹ In the alternative, China does not read the text of the last sentence of Article 46 to bar the release of seized counterfeit goods into the channels of commerce, except in exceptional cases. Instead, China claims the principle only means that the “removal of the trademark is not sufficient” to permit this release. It then asserts that features of Chinese laws, such as right holders’ ability to comment on (but not prevent) an auction, go beyond removal of the trademark, and therefore Chinese measures meet the TRIPS standard.¹⁵²

135. China’s argument that the fourth sentence of Article 46 is not incorporated into Article 59 is at odds with the text of Article 59.¹⁵³ China has not pointed to any limiting language in Article 59 that would selectively incorporate only the obligations in the first sentence of Article 46. Indeed, the word “principle” does not appear in Article 46. If the negotiators of the TRIPS Agreement had intended to carve out specific obligations in Article 46 from being transposed to Article 59, they would have done so.

136. China asserts, in the alternative, that even if the fourth sentence is incorporated as a principle governing China Customs’ actions, it only provides that the “mere removal of a counterfeit mark is not normally sufficient” to bar the release of seized counterfeit goods.¹⁵⁴

¹⁴⁸ The European Communities notes that “[t]he use of the word “any” suggests that even a slight degree of harm is too much.” Third Party Written Submission by the European Communities, para. 20.

¹⁴⁹ Exhibit CHN-101 (emphasis added).

¹⁵⁰ China attempts to bolster this argument by citing Article 1.1 of the TRIPS Agreement. For the reasons explained above, Article 1.1 of the TRIPS Agreement does not provide any support for China’s attempt to ignore the meaning of the obligation. See paras. 40-44, *supra*.

¹⁵¹ First Written Submission of the People’s Republic of China, paras. 218-222; Responses of the People’s Republic of China to the Questions of the Panel, para. 144.

¹⁵² First Written Submission of the People’s Republic of China, paras. 215, 223-225; Oral Statement of the People’s Republic of China at the First Panel Meeting, para. 77.

¹⁵³ The United States would note a number of the Third Parties agree. See, e.g., Australian Responses to Questions of the Panel, para. 32; Third Party Oral Statement of Canada, para. 14; Third Party Written Submission by the European Communities, para. 19; Responses to the Panel’s Questions to the Third Parties in Connection with the First Substantive Meeting by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, para. 4.

¹⁵⁴ First Written Submission of the People’s Republic of China, para. 223; Oral Statement of the People’s Republic of China at the First Panel Meeting, para. 72.

However, China’s proposed interpretation is contrary to the language of Article 46, last sentence. To begin with, China misreads the relationship between the phrases “removal of the trademark unlawfully affixed shall not be sufficient” and “exceptional cases.” The phrase “other than in exceptional cases” means that only in exceptional cases may the competent authorities “permit release of the goods into the channels of commerce.”

137. China further claims that since China Customs does not “merely” remove the counterfeit mark, but rather removes all infringing features from the goods and takes other steps such as allowing right holders to comment on the impending auction, China complies with the principle in the fourth sentence.¹⁵⁵ China supports its assertion by claiming that the purpose behind the principle is simply to ensure that “authorities deprive infringers of economic benefits from the goods” and prevent them from “cheap[ly] reclaiming them.”¹⁵⁶

138. However, the TRIPS Agreement does not provide for Members to identify what they perceive to be “the purpose behind” a provision and then comply with that “purpose.” Moreover, different purposes have been ascribed to this provision, including the purpose of providing an effective deterrent to further infringing activity. As Canada notes, “were simple removal of the infringing feature sufficient, the counterfeiter would take very little chance: he or she would just wait for the next shipment of infringing features and start again.”¹⁵⁷

C. Contrary to Article 59, China’s Customs Authorities Do not Have the Authority to Order the Destruction or Disposal of Infringing Goods in Accordance with the Principles Set out in Article 46

1. Introduction

139. As the United States has explained in its First Submission, Article 30 of the Customs IPR Implementing Measures, which implements Article 27 of the State Council Customs IPR Regulation, sets out a compulsory sequence of steps that Chinese Customs must follow in deciding how to treat goods seized at the border that it has determined infringe intellectual property rights.

¹⁵⁵ Oral Statement of the People’s Republic of China at the First Meeting of the Panel, para. 72.

¹⁵⁶ Oral Statement of the People’s Republic of China at the First Meeting of the Panel, paras. 74-76.

¹⁵⁷ Third Party Submission of Canada, para. 21. Indeed, in the commentary cited by Canada, the author states that “Article 46 addresses specifically the question of certain counterfeit goods to which an infringing mark is affixed, e.g., garments and travel accessories, sometimes in a country different from that of manufacture of the goods. If simple removal of the trademark is allowed, the (probably professional) infringer takes very little chance: he just waits for the next shipment of infringing logos, etc., and starts again. The general rule is clearly established: this is not permitted other than in exceptional cases.” See Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis* (Sweet & Maxwell, 2003), p. 300 (Exhibit CDA-2)

140. Under these measures, the Customs authorities are only permitted to destroy the infringing goods as a last resort, and in many circumstances, they do not have the power to dispose of goods outside the channels of commerce in a manner that avoids any harm to the rightholder. Customs’ rules require officials to attempt to dispose of the goods in accordance with a strict hierarchy – first, by either transferring them to public welfare organizations or selling them to the right holder; if this is not feasible, they must take the second step and auction off the seized goods following removal of infringing features, if this is possible. And, if Customs can take any of these actions, Customs does not ever acquire the power to destroy the goods. These measures are inconsistent with China’s obligations under Article 59 of the TRIPS Agreement.

2. The Mandatory Customs Hierarchy

141. The Customs IPR Implementing Measures were issued by China’s General Administration of Customs and bind customs officials across China.¹⁵⁸ They set out a detailed, step-by-step process governing exactly how Customs must proceed in handling the disposal of confiscated goods. The United States provides a flow chart showing the mandatory hierarchy provided by China’s measures in Exhibit US-68, attached.

142. In its First Written Submission, China takes issue with how the United States characterizes its compulsory hierarchy, claiming that, despite the language of its measures on their face, its Customs authorities have the “discretion” not to follow the prescribed steps in the hierarchy.¹⁵⁹

143. However, China later concedes that once Chinese authorities have made a determination that particular circumstances are present, they do not have the “discretion” to take action inconsistent with that determination.¹⁶⁰ This is the essential point of the U.S. claim: in circumstances where Customs makes a certain determination under its measures, it is compelled to follow the option set forth in the hierarchy. And in those circumstances, China Customs lacks the authority that the TRIPS Agreement requires to opt for destruction or disposal in accordance with Article 46 principles.

144. In its first submission, China initially depicted its hierarchy as merely “preferential” and not “compulsory,”¹⁶¹ while conceding that its regime “sets forth certain conditions and

¹⁵⁸ See Exhibit US-6. See also Responses by the People’s Republic of China to the Questions of the Panel, para. 93.

¹⁵⁹ First Written Submission of the People’s Republic of China, paras. 175, 182.

¹⁶⁰ Responses of the People’s Republic of China to the Questions of the Panel, para 131.

¹⁶¹ First Written Submission of the People’s Republic of China, para. 156; see also Oral Statement of the People’s Republic of China at the First Panel Meeting, para. 60.

sequencing” for China Customs to follow.¹⁶² China also has attempted to defend its regime by asserting that its rigid disposal regime somehow does not strictly constrain Customs officials’ scope of action, because other generally applicable Chinese laws regarding such matters as safety also govern Customs authorities’ decision making.¹⁶³

145. In response to panel questions, however, China specifically concedes that Chinese Customs officials must make particular findings under its disposal regime, and once they have made them, they have no discretion as to how they must act.¹⁶⁴ Indeed, neither semantics nor the existence of general regulatory norms that also apply to Chinese officials’ behavior can mask the mandatory nature of the Customs disposal hierarchy in China. Under the Customs IPR Implementing Measures, if Customs finds a certain set of facts, it is compelled to take a certain step – such as donation to a public welfare organization or sale by public auction.¹⁶⁵

146. In the following paragraphs, the United States discusses each of the steps in the hierarchy mandated by the Customs Implementing Measures, and demonstrates how China’s measures operate to deny China Customs the authority to destroy or dispose of goods in a TRIPS-consistent fashion.

3. The Initial Step: Donation to Public Welfare Organizations or Sale to the Right Holder

147. In the initial step of China’s disposal hierarchy, Customs must decide whether the infringing goods can be used for “the public good.” If the answer is affirmative, Customs must either give the goods to a “public welfare organization,” or Customs may instead allow the right holder to purchase the goods – in other words, the opportunity afforded to the right holder is to buy the very goods that infringe on the right holder’s intellectual property rights. As discussed below, neither alternative in the first step of China’s mandatory hierarchy meets the principles of Article 46.

a. Donation to Public Welfare Organizations

148. As the United States has explained, China Customs’ donation of infringing goods to “public welfare organizations” under the Customs IPR Regulations and Customs IPR Implementing Measures does not provide Customs with the authority to dispose of the confiscated goods “outside of the channels of commerce in such a manner as to avoid any harm caused to the right holder.”¹⁶⁶ Donation to a public welfare organization can damage the right holder’s reputation, since by definition, lower quality counterfeit or pirated products are being

¹⁶² First Written Submission of the People’s Republic of China, para. 159.

¹⁶³ Responses of the People’s Republic of China to the Questions of the Panel, para. 128.

¹⁶⁴ Responses of the People’s Republic of China to the Questions of the Panel, paras. 130-131.

¹⁶⁵ See Exhibits US-6, US-68.

¹⁶⁶ First Written Submission of the United States, paras. 185-187.

distributed for use by potential consumers of the genuine article.¹⁶⁷ In addition, the United States continues to consider that China’s mandatory donation option set forth under its measures can result in the goods returning to the channels of commerce.

149. China makes two arguments in response. First, China claims that its Customs authorities only donate goods suitable for public welfare purposes, which prevents unsafe or luxury goods from reaching users in China.¹⁶⁸ Second, China states that it has a legal obligation to supervise the use of the donated goods, which ensures that they will not return to commerce.¹⁶⁹ These arguments, however, do not address the basis for the U.S. argument that China’s hierarchy, does not accord with the Article 46 principles.

150. *First*, while China confirms that Customs officials will reject donation to public welfare organizations as an option if the goods are unsuitable for donation,¹⁷⁰ China has given no indication that these standards would prevent usable but likely lower-quality counterfeit or pirated products from being donated, and these illegitimate products could easily harm the right holder’s reputation. Indeed, the Memorandum of Cooperation that China negotiated with the Red Cross of China to arrange the terms for donations to that organization specifically provides that China Customs “shall not be responsible for the quality of the goods handed over,” an indication of Customs’ awareness that these seized goods may not perform to the highest standard.¹⁷¹ Accordingly, the donation option in China’s measures is inconsistent with the Article 46 principle requiring Chinese authorities to be able to act in a manner that avoids harm to the right holder.

151. *Second*, China appears to argue that its general legal obligation “to implement necessary supervision” under the measures at issue ensures that confiscated infringing goods will not enter the channels of commerce once donated.¹⁷² However, Article 17 of the Law on Donations for Public Welfare specifically authorizes public welfare organizations to sell donated goods on the market if certain circumstances are present.¹⁷³ China cites to the Memorandum of Cooperation with the Red Cross of China as evidence that goods in fact will not reenter the market. This Memorandum does contain a provision obligating the Red Cross to “take effective measures to prevent goods from being used for other purposes or entering into the channels of commerce.”¹⁷⁴ However, China’s argument still fails on two grounds.

¹⁶⁷ See, e.g., a right holder’s comments about the adverse effect on its brand’s reputation if confiscated counterfeit padlock products were not destroyed. Exhibit CHN-94, at p. 2.

¹⁶⁸ First Written Submission of the People’s Republic of China, para. 161.

¹⁶⁹ First Written Submission of the People’s Republic of China, para. 164.

¹⁷⁰ First Written Submission of the People’s Republic of China, paras. 161-162, 173.

¹⁷¹ See Exhibit CHN-92, para. 6.

¹⁷² First Written Submission of the People’s Republic of China, para. 164

¹⁷³ Exhibit US-59; Exhibit CHN-154. As requested by the Panel, the United States and China are continuing discussions on a common set of agreed-upon translations for the provisions of the Law on Donations for Public Welfare.

¹⁷⁴ See Exhibit CHN-92, para. 7.

152. First, the Law on Donations for Public Welfare makes clear that donee organizations are not required to enter into these kinds of agreements,¹⁷⁵ and when no agreement is in place, Chinese authorities have offered no legal argument that they can override the provisions of Article 17. Accordingly, for that reason alone, China is not meeting its obligations under Articles 59 and 46.

153. Second, based on the plain language of the Law on Donations, it appears that the preventive measures the Red Cross must take under the Memorandum of Cooperation likewise do not in fact demonstrate that, under Chinese law, the goods cannot return to the channels of commerce.

154. China attempts to dismiss the relevance of Article 17 of the Law on Donations for Public Welfare to the Red Cross Memorandum of Cooperation, by pointing to Article 18 of this Law. Article 18 provides that if a recipient of the donated goods signs a donation agreement, the donee shall “use the donated property according to the purposes of use prescribed in the agreement.”¹⁷⁶ However, selling the goods under Article 17 and ensuring the resulting funds continue to be put to the “use” prescribed in the donation agreement appears, on its face, to be an action consistent with the mandates of Article 18.¹⁷⁷ Likewise, it appears that a general contractual commitment to “take effective measures to prevent goods from entering into the channels of commerce” would not override the specific rights provided under a national law.

155. In its responses to the Panel’s Questions, China offers another unavailing argument against the operation of Article 17 of the Law on Donations for Public Welfare. It claims that Article 30 of the Customs IPR Implementing Measures renders the resale option under Article 17 of the donations law “null,” because Article 30 requires the donated goods to be used “directly” for charitable purposes.¹⁷⁸ This textual notation, however, is unavailing. Article 30 of the Customs IPR Implementing Measures governs Customs’ donations to a public welfare organization. However, Article 17 governs the donees’ disposal of such goods after the donation has occurred, when the specific circumstances presented in Article 17 arise. Moreover, under China’s legal hierarchy, Article 30 of the Customs IPR Implementing Measures, as a departmental rule, would not supersede the Law on Donations for Public Welfare in the Chinese legal system.¹⁷⁹ The fact that Article 17 provides the right to sell donated goods on the market if certain circumstances are present means that when Chinese Customs officials are required to use the donation option in their disposal hierarchy, they do not have the requisite authority to act in accordance with the principles of Article 46 concerning the disposal of goods found to be

¹⁷⁵ Law on Donations for Public Welfare, articles 12, 18.

¹⁷⁶ Law on Donations for Public Welfare, article 18 (Exhibit CHN-154).

¹⁷⁷ The discussion in Article 17 of the Law on Donations for Public Welfare concerning the “use” to be made of donations by the two types of public welfare organizations in China lends further support to this reading.

¹⁷⁸ Responses of the People’s Republic of China to the Questions of the Panel, paras. 117-118.

¹⁷⁹ See First Submission of the United States, paras. 20-22.

infringing “outside the channels of commerce in such a manner as to avoid any harm to the right holder.”

b. Sale to the Right Holder

156. The second option at the initial step in China’s disposal hierarchy allows Customs to sell the infringing goods to the right holder. In China’s First Written Submission, as well as its answers to the panel’s questions, China notes that there are a number of situations where donation is not appropriate.¹⁸⁰ In these circumstances then, China’s measures require Chinese authorities to offer the infringing goods for sale to the right holder. However, this mandated action does not permit disposal “in such a manner as to avoid any harm caused to the right holder,” as Article 46 requires.

157. Indeed, this situation creates a dilemma for right holders. They can pay for the infringing goods to ensure that they are destroyed or removed from the channels of commerce, knowing that financial harm will result in the form of a payment for goods that infringe intellectual property rights that they own. Alternatively, they can refuse to purchase the goods and face the prospect that the goods could be released into the channels of commerce by public auction.¹⁸¹

158. Astonishingly, China argues that the required efforts to sell infringing product to the right holder advance right holder’s interests.¹⁸² China asserts that such transactions may be beneficial, because the right holder might pay a favorably low price for “overruns illicitly produced by a licensed manufacturer.”¹⁸³ This argument is without merit. It requires the untenable assumption that right holders are eager to buy extra product they have not ordered and whose production is outside the terms of their contract. To the contrary, a right holder that must purchase goods violating his or her intellectual property right in order to prevent the potential release of such goods into the channels of commerce is harmed – at minimum – in the amount of the payment that must be made for the goods.

¹⁸⁰ See, e.g., First Written Submission of the People’s Republic of China, para. 173; Responses of the People’s Republic of China to the Questions of the Panel, para. 118.

¹⁸¹ Indeed, the right holder in the “Horizontal Iron Padlock” case appears to have been concerned about avoiding precisely this problem. In its offer to purchase the counterfeit padlocks, the right holder notes the potential damage to its reputation if the goods were resold, emphasizing that “this batch of confiscated products . . . *by no means can . . . enter the market.*” Exhibit CHN-94, p. 2 (Emphasis added).

¹⁸² First Written Submission of the People’s Republic of China, para. 191; Oral Statement of the People’s Republic of China, para. 55.

¹⁸³ First Written Submission of the People’s Republic of China, para. 168.

159. China’s attempts to bolster its arguments in this regard by reference to other countries’ copyright and trademark laws likewise fail.¹⁸⁴ This dispute concerns China’s measures, not those of other Members.¹⁸⁵

4. The Second Step: Public Auction

160. Where the transfer to a public welfare organization is unavailable, and the right holder does not elect to purchase the infringing goods, the Customs authorities must turn to the next compulsory step under the Customs Implementing Measures. This step involves the public auction of the confiscated goods.

161. China’s public auction process for these goods likewise does not comport with the Article 46 principles incorporated into Article 59. Putting seized goods up for public auction by the Customs authorities releases them into the channels of commerce and does not dispose of them in a manner that avoids any harm to the right holder. Because China’s mandatory procedures strip Customs of the authority to prevent auction when this option becomes operative in the Customs hierarchy,¹⁸⁶ the procedures are inconsistent with the first sentence of Article 46. A mandated auction under the Customs Implementing Measures, of course, also precludes Customs from having the authority to destroy these products.

162. Further, with respect to counterfeit trademark goods, China’s public auction procedure is also inconsistent with the last sentence of Article 46, which provides that “[i]n regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in exceptional cases, to permit release of the goods into the channels of commerce.” Simply put, China does not confine its release of these goods into the channels of commerce to exceptional cases.

163. In its First Written Submission, China appears to argue that its public auction procedure is consistent with Article 59 of the TRIPS Agreement on the basis that WTO Members are not

¹⁸⁴ First Written Submission of the People’s Republic of China, para. 191.

¹⁸⁵ See First Written Submission of the People’s Republic of China, para. 191, fn. 202. The laws cited are not similar substantively to China’s measures at issue. None of them appears to relate to Customs disposal procedures, and none provides that if a right holder refuses to purchase goods infringing its intellectual property rights, the competent authorities may respond by selling these goods at public auction. Ironically, the Chinese statutory analogue to these laws appears to be China’s own Trademark Law, which states, (“[w]hen the [AIC] determines that the fact of infringement is established, it shall order the infringer to cease infringing upon the right immediately, and it shall confiscate *and destroy the goods involved* . . .”) (Emphasis added). See Exhibit CHN-21, article 53.

¹⁸⁶ In addition to the specific conditions in the auction procedures provision (i.e., removal of the mark), China notes, for example, that goods must not pose safety problems. See First Written Submission of the People’s Republic of China, para. 170.

“required to limit their customs agencies to the disposal outside the channels of commerce.”¹⁸⁷ As noted above,¹⁸⁸ this argument misses the point. The United States’ claim concerns the scope of authority under Article 59.¹⁸⁹ The specific issue at hand is whether China’s hierarchy provides China Customs with the requisite authority required by the TRIPS Agreement – i.e., the ability to freely choose to meet the principles of Article 46. Because China’s mandatory public auction procedure does not permit China Customs to act in accordance with the Article 46 principles, it is inconsistent with China’s obligations under the TRIPS Agreement.

164. China also attempts to justify its auctions by arguing that they avoid harm to the right holder. However, as shown below, China’s public auction procedure does not in fact achieve this goal.

165. *First*, China claims that “infringers whose goods are auctioned are left in exactly the same position as if the goods had been destroyed.”¹⁹⁰ However, even if this were an accurate statement, it is not relevant to this dispute. The Article 46 principle at issue concerns avoiding any harm to the right holder, not assessing the status of the infringer. A public auction can cause great harm to the right holder, since the infringer whose goods have been confiscated can simply purchase the seized goods at the auction, re-affix the infringing features, and proceed to distribute the goods.

166. *Second*, China asserts that right holders’ formal right to comment before the auction allows China’s measure to meet the principle of avoiding harm to the right holder.¹⁹¹ However, a right holder’s ability to “comment” on China’s measures is not a right to *prevent* the goods from being auctioned, and is not a means to ensure that the authorities act in a manner that avoids any harm to a right holder.¹⁹²

167. *Third*, China asserts that in certain cases involving “safety concerns,” auction will not result even if the infringing features can be easily removed.¹⁹³ However, this assertion does not

¹⁸⁷ First Written Submission of the People’s Republic of China, para. 209 (Emphasis omitted).

¹⁸⁸ See paras. 127-131, *supra*.

¹⁸⁹ China’s citations to the selected Copyright Laws of other WTO Members for support has no relevance to this dispute. See First Written Submission of the People’s Republic of China, para. 210. Under the customary rules of interpretation reflected in the *Vienna Convention*, these laws do not represent “subsequent practice” that evidences any agreement on the part of WTO Members as to the meaning of Article 59 of the TRIPS Agreement.

¹⁹⁰ First Written Submission of the People’s Republic of China, para. 214.

¹⁹¹ First Written Submission of the People’s Republic of China, para. 214.

¹⁹² See Third Party Submission of Canada, para. 20 (“the Chinese customs authority must auction the goods if the infringing feature can be easily removed. While the right holder’s views are solicited, the Chinese Customs authority may proceed with the auction even if the right holder voices a strenuous objection.”)

¹⁹³ First Written Submission of the People’s Republic of China, para. 170; Response of the People’s Republic of China, para. 133. We note that certain exhibits that China alleges support this point provide no indication of Customs’ reasoning regarding why they were not auctioned. See, e.g., Exhibit CHN-94; Exhibit CHN-
(continued...)

change the mandatory hierarchy that Customs officials must follow. Even if some “safety” concerns will prevent a public auction, in the many cases where the infringing features can be eliminated and the goods do not pose safety concerns, the Customs Implementing Measures mandate public auction – and thus, entry into the channels of commerce. As such, China’s mandatory auction procedure does not meet the Article 46 principles.

168. The fourth sentence of Article 46 contains an additional principle that should be, but is not, taken into account in China’s auction procedures. This sentence states: “[i]n regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in exceptional cases, to permit release of the goods into the channels of commerce.” As explained above in paragraphs 134-135, this fourth sentence is unequivocally a “principle” for the purposes of Article 59.

169. China claims that it complies with the fourth sentence of Article 46 because it removes all the infringing features from the seized goods, sets a reserve price at auction, and accepts comments from the right holder.¹⁹⁴ China’s focus on these actions is misplaced: the problem is that China’s measures compel public auction if the infringing features of the products can be eliminated, assuming no safety defects. Nothing about China’s customs measures suggests that the auctioning of these goods after removal of the infringing mark is permitted only in “exceptional cases.”

170. Accordingly, with respect to counterfeit trademark goods in particular, this public auction step in China’s disposal hierarchy is also inconsistent with the principle in the fourth sentence of Article 46, which provides that goods can be introduced into the channels of commerce after removal of the unlawfully affixed trademarks only “in exceptional cases.”

5. The Final Step: Destruction

171. In the final step of the mandatory hierarchy, if no earlier options prove feasible, then and only then, China Customs gains the power to destroy the infringing goods. In other words, this step will not be reached if any of the options higher in priority are available – either under mandatory step one: donation with possible resale rights or sale to the right holder; or, if step one is not available, under mandatory step two: the public auction. In these situations, Chinese customs authorities are not, as a matter of Chinese law, authorized to destroy the infringing good

¹⁹³ (...continued)

173. In the cases where Customs’ reasoning is provided, what is most striking is how the reasoning confirms the basic point being made by the United States – that China Customs acts in accordance with the mandatory Customs disposal hierarchy at issue here. See, for example, the “Electronic Irons” case (Exhibit CHN-98) and the “Automobile Fittings” case (Exhibit CHN-99), where the notice states that the “legal basis for destruction” includes that the goods “cannot be used for public welfare and the right holders have no intention to purchase the goods,” and that because “the safety of the goods cannot be guaranteed,” it is not appropriate to auction them.

¹⁹⁴ First Written Submission of the People’s Republic of China, para. 224; *see also* Oral Statement of the People’s Republic of China, para. 72.

(or otherwise dispose of the good in a way that is both outside of the channels of commerce and handled in a manner that avoids any harm to the right holder).

172. China does not deny that China Customs only possesses the authority to destroy the goods when the other options in its disposal hierarchy (i.e., donation, sale to the right holder, public auction) are not available.¹⁹⁵ China, however, argues that it has “substantial discretion” to determine that an infringing good is not suitable for other disposal options in its hierarchy and therefore it in fact has the authority to order destruction.¹⁹⁶ But this is contradicted by the text of China’s Customs IPR Implementing Measures and by China’s responses to the Panel’s questions, which state that when certain facts are present, Customs officials have no discretion, i.e., they must dispose of the goods only in the manner stipulated.¹⁹⁷ In each of those circumstances, Chinese customs authorities lack the authority, as a matter of Chinese law, to order the destruction of infringing goods.

173. Indeed, the few cases China cites where China Customs destroyed infringing goods do not contradict the mandatory nature of the Customs disposal hierarchy. For example, in the “Electronic Irons” case,¹⁹⁸ China Customs only determined that the goods should be destroyed *after* it made factual determinations, pursuant to the Customs IPR Regulations, that such goods could not be sold to the right holder or donated to a public welfare organization and that auction was not available for safety reasons.

D. Conclusion

174. For the reasons set forth above, the United States respectfully requests that the Panel find that the compulsory sequences of steps set out in the Chinese measures at issue mean that Chinese customs authorities lack the authority to order destruction or disposal of infringing goods in accordance with the principles set out in Article 46 of the TRIPS Agreement, and to find that the measures at issue are therefore inconsistent with China’s obligations under Article 59 of the TRIPS Agreement.

¹⁹⁵ First Written Submission of the People’s Republic of China, para. 204.

¹⁹⁶ First Written Submission of the People’s Republic of China, para. 173.

¹⁹⁷ See Responses of the People’s Republic of China to the Questions of the Panel, para. 131 (noting that once the criteria are determined by Customs to be satisfied, Customs *no longer has discretion*).

¹⁹⁸ Exhibit CHN-98.

IV. CHINA’S DENIAL OF COPYRIGHT PROTECTION AND ENFORCEMENT TO CERTAIN WORKS IS INCONSISTENT WITH THE TRIPS AGREEMENT

A. Introduction

175. China’s Copyright Law denies protection to certain copyright works. Article 4 of China’s Copyright Law provides as follows:

Works the publication or distribution¹⁹⁹ of which is prohibited by law shall not be protected by this Law. Copyright owners, in exercising their copyright, shall not violate the Constitution or laws or prejudice the public interests.

176. On its face, the first sentence of Article 4 provides a straightforward denial of protection: “Works the publication or distribution of which is prohibited by law shall not be protected by *this law*.” (Emphasis added). As the United States has demonstrated in its First Submission,²⁰⁰ Article 4.1 of the Copyright Law is inconsistent with China’s obligations under the TRIPS Agreement, in at least two ways.

177. *First*, contrary to China’s obligations under Article 9.1 of the TRIPS Agreement (and the provisions of the Berne Convention referenced in Article 9.1), the first sentence of Article 4 of the Copyright Law denies copyright in China to works that are required to be afforded copyright protection.²⁰¹

178. *Second*, China fails to ensure that enforcement procedures as specified in Part III of the TRIPS Agreement are available for copyrighted works; these works must be protected upon creation in order to permit effective action against infringement, including expeditious remedies to prevent, punish, and deter infringement. Among other problems, China’s denial of copyright means that it fails to provide for criminal procedures and penalties to be applied in certain cases of willful copyright piracy on a commercial scale. China is therefore not in compliance with its obligations under Article 41.1 and Article 61, first and second sentence, of the TRIPS Agreement.

¹⁹⁹ The United States recognizes that China has claimed that the translation of “distribution” in Article 4 of its Copyright Law that it notified to the WTO (Exhibit US-8) is incorrect, and instead should be “disseminated.” As requested by the Panel, the United States and China are continuing discussions on a common set of agreed-upon translations.

²⁰⁰ First Submission of the United States, section IV.

²⁰¹ The U.S. also argues that depending on the construction given to Article 4, its first sentence may be inconsistent with China’s obligations under Article 14 of the TRIPS Agreement. In addition, China has correctly pointed out that the U.S. first submission did not develop a claim under Article 3.1 of the TRIPS Agreement. Though such a claim was referred to in the U.S. panel request, the United States is not pursuing claims under Article 3.1 before this panel.

179. In its submissions to date, China has two basic themes with respect to the theoretical operation of Article 4.1 of the Copyright Law. *First*, China asserts that under Article 2 of the Copyright Law, Chinese law “protects copyright from the time a work is created” as “copyright vests upon creation.” *Second*, China argues that the content review process “operates independently of Article 4.1 and the only result of a finding of prohibited content in that process is a denial of authority to publish.”²⁰² Neither of China’s arguments responds to the fundamental inconsistency of Article 4.1 with the TRIPS Agreement.

180. It appears that the thrust of the first theme is the claim by China that it grants “immediate protection” to all works. But, China concedes that Article 4.1 denies protection to certain works.²⁰³ Thus, China already admits that *some* subject matter does not receive protection at all since it is denied such protection as a matter of law. While courts and/or competent authorities may *confirm* what is illegal after the fact, such confirmation is not a prerequisite for concluding as a legal matter that content is not protected by copyright. This denial of protection as a result of Article 4.1 is inconsistent with China’s obligations under the TRIPS Agreement to protect works regardless of the nature of their content.

181. Further, China’s submissions have not resolved a number of concerns about the operation of Article 4 – the text of which provides a clear and straightforward denial of copyright protection, whether immediate or post-creation. And as demonstrated below, China’s arguments do not overcome that Article 4.1 is inconsistent with China’s obligations under the TRIPS Agreement.

182. It appears that the thrust of the second theme is the claim by China that content review “operates independently” of Article 4.1, such that “a finding of prohibited content” only leads to “a denial of authority to publish” but not “a denial of copyright.” However, in claiming this, China has left out the express consequence in Article 4.1 of “a finding of prohibited content,” namely, that the work whose publication or dissemination is prohibited “shall not be protected by this Law,” i.e., under the Copyright Law.

183. The remainder of this section is structured along the lines of the U.S. first submission, and addresses these themes where they arise.

²⁰² First Written Submission of the People’s Republic of China, para. 246.

²⁰³ Response of the People’s Republic of China to the Questions of the Panel, para. 154; First Written Submission of the People’s Republic of China, para. 243; *see also* Exhibit CHN-118.

B. The Denial of Copyright Protection by the First Sentence of Article 4 is Inconsistent with Article 9.1 of the TRIPS Agreement

1. The Denial of Copyright Protection Provided by the First Sentence of Article 4 is Inconsistent with Articles 2 and 5(1) of the Berne Convention

184. In its submissions, China admits that it denies copyright protection to certain works whose contents Chinese authorities determine are prohibited by law.²⁰⁴ Moreover, the National Copyright Administration of China (NCAC) has confirmed that, at least for the purpose of administrative proceedings, Article 4 denies copyright protection to “works whose contents are illegal.”²⁰⁵ Therefore, contrary to China’s obligations under Article 9.1 of the TRIPS Agreement (and the provisions of the Berne Convention referenced in Article 9.1), the first sentence of Article 4 of the Copyright Law on its face denies copyright protection to works that are required to be afforded protection.

185. Therefore, China has confirmed that it is acting inconsistently with its obligations under Article 9.1 of the TRIPS Agreement, which provides that all WTO Members shall comply with Articles 1 through 21 of the Berne Convention.²⁰⁶

186. *First*, Article 4 of the Copyright Law excludes from copyright protection an entire category of works – “works the publication or distribution of which is prohibited by law” – but that exclusion from protection is not permitted by the Berne Convention. Berne Convention Article 2(1) makes clear that the works protected by the Convention include “*every* production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression” (emphasis added), and Article 2(6) further makes clear that these works must enjoy copyright protection everywhere that the Berne Convention applies.²⁰⁷ China’s Article 4.1 blanket exclusion for certain works, e.g., works the publication or distribution of which is prohibited, therefore, is inconsistent with the Berne Convention as incorporated into the TRIPS Agreement.

187. China’s first argument involves the assertion that under Article 2 of the Copyright Law, Chinese law “protects copyright from the time a work is created” as “copyright vests upon

²⁰⁴ E.g., First Written Submission of the People’s Republic of China, para. 243; Responses of the People’s Republic of China to the Questions of the Panel, paras. 154-155.

²⁰⁵ First Written Submission of the People’s Republic of China, para. 243; *see also* Exh. CHN-118 (Article 4.1 refers to “works whose contents are illegal”).

²⁰⁶ WTO Members do not, however, have rights or obligations under the TRIPS Agreement in respect of the rights conferred under Article 6*bis* of the Berne Convention or of the rights derived therefrom.

²⁰⁷ As noted in the U.S. First Submission, other provisions in Articles 2 and 2*bis* of the Berne Convention provide specific qualifications to these provisions, such as the possibility of requiring fixation (Article 2(2)), the possibility of excluding from coverage official texts, political speeches and speeches in legal proceedings (Articles 2(4) and 2*bis*(1)), and the exception for news of the day (Article 2(8)). But, China’s exclusion is contained nowhere in the Berne Convention.

creation.”²⁰⁸ But, as noted, the text of Article 4.1 is straightforward: “works the publication or distribution of which is prohibited shall *not* be protected *by this law*.” (Emphasis added). Accordingly, even if one provision of China’s Copyright Law appears to grant protection of the Copyright Law to foreigners’ works, another provision denies protection of the Copyright Law to those works for which publication or distribution is prohibited by law. Thus, Article 2 of the Copyright Law cannot, by the terms of Article 4, apply to such works.

188. Moreover, the fact that an author of a work may not be on official notice of the operation of Article 4 until the denial of protection is stated by an authoritative content review agency or court does not appear to alter the way in which the law operates. Thus, China already admits that some subject matter does not receive protection at all since it is denied such protection as a matter of law, i.e., while courts and/or competent authorities may confirm what is illegal *after the fact*, such confirmation is not a prerequisite for concluding as a legal matter that content is not protected by copyright.

189. Further, the Berne Convention (or the TRIPS Agreement) does not permit copyright to be extended initially, but then rescinded for the reasons stated in Article 4. The Article 4.1 exclusion, therefore, is inconsistent with the Berne Convention (and thus the TRIPS Agreement).²⁰⁹

190. *Second*, because Article 4 denies copyright protection to certain works, the exclusive rights enumerated in Article 10 of China’s Copyright Law, and all the protections of the Copyright Law, are also denied to such works. As a result, Article 4 of the Copyright Law does not comply with the requirements of Article 5(1) of the Berne Convention, which specifies certain guaranteed minimum copyright protection for works, including a minimum set of exclusive rights.

191. China effectively concedes this point when it attempts to distinguish “copyright” and “copyright protection.”²¹⁰ China argues that even when Article 4.1 applies it only denies “copyright protection” and that “the Article 2 copyright is preserved” because “any use is effectively unauthorized.”²¹¹

192. However, this distinction does not reflect a distinction found in the text of the Berne Convention. Indeed, the relevant provisions of the Berne Convention provide that China has

²⁰⁸ First Written Submission of the People’s Republic of China, paras. 236-240.

²⁰⁹ Article 17 of the Berne Convention does not allow such an exclusion either, since it only provides for the right “to permit, to control, or to prohibit ... the circulation, presentation, or exhibition” of certain works, and not to deny copyright protection to such works.

²¹⁰ Response of the People’s Republic of China to the Questions of the Panel, para. 156. Moreover, China’s attempted explanation of the meaning of Article 4.1 with respect to “copyright protection” utilizes terminology (“particularized rights of private copyright enforcement” and “the right of private censorship that constitutes ‘copyright protection’”) that appears to be invented out of whole cloth.

²¹¹ Response of the People’s Republic of China to the Questions of the Panel, paras. 156-157.

obligations with respect to “protection” of copyright,²¹² thus, the existence of what China calls “Article 2 copyright” – whatever that could mean in the absence of protection under China’s Copyright Law – is not relevant to the analysis of whether Berne Convention-mandated “protection” is afforded. Indeed, were the Panel to adopt China’s distinction, that would logically permit a WTO Member to provide copyright subsistence, but then deny the Berne-guaranteed set of exclusive rights – clearly not the outcome contemplated by the Berne Convention. Distinguishing between “copyright” and “copyright protection” is of no moment, therefore, under the Berne Convention, because the end result is that authors are not provided the broad set of exclusive rights that are inherent in their protected works – and that WTO Members must guarantee.

193. *Third*, China also appears to ask the Panel to ignore the TRIPS-inconsistency of Article 4.1 because, China asserts, as a practical matter “it has no marketplace effect.”²¹³ However, the United States would expect that Chinese and foreign right holders whose works are denied copyright protection against pirates in the Chinese marketplace might disagree with that assertion. Amongst other things, Article 4.1 creates significant commercial uncertainty since right holders cannot know whether or not their works will be denied copyright protection. Worse yet, where it is clear that a work has been denied copyright protection, by denying copyright protection to works that should have it, Article 4 allows copyright pirates to profit at the expense of the legitimate rightholder, without fear of being subjected to enforcement procedures and remedies against copyright infringement. These copyright pirates will ensure that any demand for prohibited works is met by illegitimate copies.

194. Furthermore, China’s assertion of little effect in the *Chinese marketplace* notwithstanding, many right holders have reported that pirates produce pirated goods that are then exported to other countries.²¹⁴ If right holders cannot enforce their copyright against pirated products manufactured in China, then this deprives them of a critical mechanism for preventing the export of such products, whether they are pirated books, CDs, DVDs, or software. The enforcement burden falls instead on countries that are the recipients of infringing exports, including other WTO Members. Thus, the denial of copyright protection in China has a significant real-world impact.

²¹² See, e.g., Berne Convention Article 1 (“[t]he countries to which this Convention applies constitute a Union for the *protection* of the rights of authors in their literary and artistic works”); Article 2(6) (“the works mentioned in this Article *shall enjoy protection* in all countries of the Union.”).

²¹³ Responses of the People’s Republic of China to the Questions of the Panel, para. 154.

²¹⁴ See, e.g., “China’s Pirates,” *Business Week*, (June 5, 2000), p. 4, available at http://www.businessweek.com/2000/00_23/b3684007.htm (discussing export of pirated and counterfeit products from China) (Exhibit US-27); Kristi Heim, “Inside China’s teeming world of fake goods,” *Seattle Times*, (February 12, 2006), p. 2, available at http://seattletimes.nwsourc.com/html/chinainfocus/2002782434_chinapiracy12.html (discussing issues related to export of counterfeit and pirated goods) (Exhibit US-37).

195. China also states that the United States, “through its obscenity laws, similarly extinguishes the rights of authors.”²¹⁵ Such an argument is immaterial to this dispute concerning China’s measures. In any event, China is mistaken. The U.S. Copyright Act does not extinguish copyright in any category or subject matter of otherwise copyrightable works (i.e., works that meet “the original work of authorship fixed in a tangible medium of expression” standard contained in 17 U.S.C. § 102).²¹⁶

2. The First Sentence of Article 4 Makes Copyright Protection in China Subject to a Formality that is Inconsistent with Article 5(2) of the Berne Convention

196. In its First Submission, the United States argues that China has made protection and enforcement under the Copyright Law dependent on the formality of successful completion of content review.²¹⁷ Because content review is a formal, legally required procedure in China, and because the exercise and enjoyment of copyright rights are, for many works, dependent upon submission to and successful completion of content review, the content review process makes the exercise and enjoyment of copyright “subject to a formality” within the meaning of Article 5(2). By making protection under the Copyright Law dependent on successful completion of content review, China’s law thus is inconsistent with China’s obligations under Article 5(2) of the Berne Convention. China’s law therefore is also inconsistent with China’s obligations under Article 9.1 of the TRIPS Agreement.

197. In its First Written Submission, China contends that its content review process operates independently from the Copyright Law and the two processes are distinct. China claims that under Article 2, copyright “vests upon creation and is independent of publication”²¹⁸ and argues that its NCAC protects works “regardless of a work’s status under content review.”²¹⁹

198. China’s written submission and its answers to the Panel’s questions do not address the U.S. concerns that the impact of content review on copyright protection constitutes a “formality” under Article 5(2). Indeed, China admits that China does not permit publication until content has been approved.²²⁰ Moreover, as explained below, China’s focus on the actions of its NCAC leaves unresolved the concerns that, as a matter of law, the first sentence of Article 4 denies copyright protection to works whose content is still being reviewed – that is, where relevant

²¹⁵ First Submission of the People’s Republic of China, para. 280, fn. 297.

²¹⁶ See, e.g., *Mitchell Brothers Film Group v. Cinema Adult Theater*, 604 F.2d 852 (5th Cir. 1979) (finding that the alleged obscene nature of a motion picture did not deprive work of copyright protection under U.S. copyright law) (Exhibit US-69); *Jartech, Inc. v. Clancy*, 666 F.2d 403 (9th Cir. 1982) (relying on *Mitchell Brothers* decision to rejecting defendant’s assertion of an obscenity defense to a claim of copyright infringement) (Exhibit US-70).

²¹⁷ See First Written Submission of the United States, paras. 220-225.

²¹⁸ First Written Submission of the People’s Republic of China, para. 235.

²¹⁹ First Written Submission of the People’s Republic of China, para. 254.

²²⁰ See Oral Statement of the People’s Republic of China at the First Panel Meeting, para. 81.

Chinese authorities are still verifying whether the contents fall within one of the prohibited categories.

199. *First*, while China goes to great lengths to assert that copyright protection and content review are, under Chinese law, separate and that the effect of a content review process does not deny copyright, China acknowledges that it “maintains pre-publication review with respect to the publication and distribution of certain kinds of works” including “films and audiovisual products.”²²¹ However, China admits that in certain cases, China does not permit publication until content has been approved.²²² Further, while China claims that reviewing authorities “do not apply the copyright law,” in its responses to the Panel’s questions, China states that if a content review authority were to find a work to contain prohibited content, it would likely compel a determination by the NCAC or Chinese courts that the work contains prohibited content, and thus is not protected by China’s Copyright Law by virtue of the operation of Article 4.²²³

200. Indeed, the content review regulations cited by the United States all contain very similar substantive lists of prohibited content.²²⁴ China confirms that under these regulations the “reviewing authorities apply a standard that may identify certain kinds of prohibited content,” and observes that “these types of contents are clearly unconstitutional.”²²⁵ Thus, by China’s own admission, works that have been found to contain such prohibited content would clearly come under the ambit of Article 4.1, as they are “unconstitutional.” Therefore, by analogy, where pre-publication review is required and publication is prohibited until the completion of a successful review, Article 4 denies copyright to such works. This means that copyright protection in China is subject to the results of that review – i.e., to a formality.

201. *Second*, China’s arguments regarding the alleged separation between the content review authorities and NCAC do not accord with the fact that Article 4 of the Copyright Law refers to other laws and regulations in China that prohibit the publication or distribution of works. In that connection, the United States recalls that during the 2002 WTO Review of Legislation in the TRIPS Council, in response to a question asking China to specify the “relevant laws” referred to in Article 4.1, China answered as follows:

²²¹ Responses of the People’s Republic of China to the Questions of the Panel, para. 163.

²²² See Oral Statement of the People’s Republic of China at the First Panel Meeting, para. 81.

²²³ Responses of the People’s Republic of China to the Questions of the Panel, para. 180 (“If a work has been subject to content review by a competent authority, and if that authority has made a finding that the work contains prohibited content, then China is of the view that the authority sitting in jurisdiction over an Article 4.1, i.e., the NCAC or a court, would be deferential to the content review finding.”).

²²⁴ First Written Submission of the People’s Republic of China, para. 249, fn. 255. See, also, Regulations on the Administration of Films, article 25 (Exhibit US-9); Regulations on the Management of Publications, articles 26-27 (Exhibit US-10); and Regulation on the Management of Audiovisual Products, article 3. (Exhibit US-11).

²²⁵ First Written Submission of the People’s Republic of China, para. 249, fn. 255.

[A:] The first sentence of Article 4 of the Copyright Law refers to the works of which the publication or distribution is prohibited by such laws and regulations as the Criminal Law, the Regulations on the Administration of Publishing Industry, the Regulations on the Administration of Broadcasting, the Regulations on the Administration of Audiovisual Products, the Regulations on the Administration of films, and the Regulations on the Administration of Telecommunication.²²⁶

In other words, China's current position does not sit well with the position that China expressed to WTO Members *before* having to respond in this dispute: in 2002, China explained that the copyright denial in Article 4 of its Copyright Law is the result of prohibitions in other laws, not a separate assessment by NCAC.

202. Moreover, prominent Chinese copyright scholars writing at the time of the adoption of Article 4 have confirmed that the intended purpose of the first sentence of Article 4 was to deny copyright protection to works prohibited by other laws:

The criterion of whether a work falls into para[graph] 1 of Art[icle] 4 and is thus regarded as not protectable will be the subject of a News and Publications Law which will give detailed principles and rules dealing with this question²²⁷

In other words, the purpose of promulgating Article 4.1 was to deny copyright protection to works for which the publication or distribution of which are prohibited by other laws.

203. *Third*, as explained in the U.S. first submission,²²⁸ in China, the power to interpret Chinese law rests with the Standing Committee of the National People's Congress. With respect to judicial and procuratorial (prosecution) work, the Standing Committee has delegated a portion of that interpretive power to the Supreme People's Court and the Supreme People's Procuratorate for matters under judicial [*sifa*] review. Administrative agencies (such as the NCAC), however, do not have such delegated authority for cases under judicial review, and thus cannot – as a matter of Chinese law – issue interpretations of Chinese law for purposes of civil or criminal matters heard by the courts or being considered by the procuratorate.²²⁹

204. Thus, while the United States welcomes the actions taken by the NCAC to protect works of foreign authors, those actions do not represent a definitive interpretation of Article 4 of the

²²⁶ Exhibit US-18, p. 26.

²²⁷ Zheng Chengsi and Michael Pendleton, *Copyright Law in China* (CCH International, 1991), pp. 80-81 (Exhibit US-71). While the United States is not aware that China has adopted a law named the "News and Publications Law" that applied such criteria, it appears from China's answer in the 2002 WTO Review of Legislation that China adopted other laws for that purpose.

²²⁸ First Submission of the United States, para. 23.

²²⁹ China notes that "the application of civil and criminal procedures is governed by China's judicial authorities, while the NCAC is in charged of administrative enforcement." Responses of the People's Republic of China to the Questions of the Panel, para. 164.

Copyright Law, at least with respect to China’s TRIPS obligations to afford civil and criminal remedies for copyright infringements heard by the courts and procuratorate.

205. Moreover, China’s discussion of the *Zheng Haijin* case fails to demonstrate that the content review process is separate from copyright in the work. China notes that in that case, the NCAC replied to a question from the Supreme People’s Court by drawing a distinction between works whose content is illegal (such works are denied copyright) and works for which certain publication formalities have not been respected (such works, according to the NCAC, have copyright protection).

206. However, it is the courts that apply the law in cases under adjudication, as China has acknowledged in its answers to the Panel’s questions,²³⁰ and not the NCAC. In fact, China’s Supreme People’s Court (SPC) issued guidance in this case when it was under review by the Hunan High Court. The letter to the Hunan High Court, which the SPC issued after receiving the NCAC guidance was subsequently redistributed by the SPC in 2000. That letter provides, in relevant part, as follows:

It is this Court’s position after review: The *Inside Story* was initially published in the magazine “Yanhuang Chunqiu” (1994, No.2). In May of the same year, the United Front Department of the Sichuan Provincial Communist Party Committee reviewed the book and approved its publication. Nothing was found in the text of the *Inside Story* to violate any laws. *Therefore*, it is correct for the courts of the first and second instances to provide it protection under the Copyright Law.²³¹

207. Thus, in this guidance document, the SPC appears to have considered that copyright protection was contingent on the work’s successful completion of content review.²³²

208. China’s answer to the Panel’s question regarding this SPC guidance document is confusing.²³³ China has been arguing that content review and copyright are independent of one another, but China’s response acknowledges that, in the *Zheng Haijin* case, the SPC “endorsed the finding that there was no basis to deny the protection of the copyright law to the work.”²³⁴ If China is stating that the SPC was endorsing a “finding” of the *content review* authority with respect to the *copyright law*, then that confirms the U.S. view.

²³⁰ Responses of the People’s Republic of China to the Questions of the Panel, para. 234.

²³¹ Exhibit US-60, emphasis added.

²³² In its Responses to the Panel’s Questions, China does not contradict this guidance from the Supreme People’s Court. *See* paras. 168-169. Indeed, China admits that “if a work had passed or *failed* content review, then that would constitute compelling evidence of legality or illegality, respectively.” (Emphasis added). *Id.*, at para. 169.

²³³ Responses of the People’s Republic of China to the Questions of the Panel, paras. 167-170.

²³⁴ Responses of the People’s Republic of China to the Questions of the Panel, para. 168.

209. However, if China is suggesting that the SPC was merely endorsing a lower court’s finding, then that suggestion sits very uneasily with what the SPC actually said. The SPC relied upon a series of events: a content “review” by the United Front Department; an “approv[al] [of] publication” by the United Front Department; and a statement “[n]othing was found in the text . . . to violate any laws.” The SPC says that “*therefore*” (i.e., for those reasons) the lower court’s protection of copyright was correct. The United Front Department’s review and approval were indispensable to the court’s opinion.

210. Additionally, China’s assertion in its answer that the “not yet been approved for publication” defense would fail²³⁵ is unsupported by the *Zheng Haijin* case. The claim in that case involved publication in violation of regulations the allocation of (and prohibiting the sale of) *book numbers* – not publication in violation of the results of content review.²³⁶ If anything, the *Zheng Haijin* case demonstrates that, even in such a case – where book numbers rather than content are at issue – courts examine the content of a publication before deciding whether or not copyright is protected.

211. *Fourth*, as noted above, China claims that “copyright” and “copyright protection” are distinguishable under the Chinese system. China argues that this distinction means that Article 4 “would not remove the “residual copyright under Article 2,” but rather, would merely “deny the particularized rights of private copyright enforcement” to works that are determined to be prohibited by law.²³⁷ However, this is a distinction without any legal effect under Article 5(2) Berne Convention.

212. Article 5(2) of the Berne Convention prohibits subjecting the enjoyment and exercise of the rights mentioned in Article 5(1) (i.e., the “rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention”) to any formality. Indeed, Berne Article 5.2 states that both “the enjoyment and exercise of rights shall not be subject to any formality.”²³⁸ Therefore, a content review that affects the exercise of an author’s exclusive rights still would impose a “formality” under the Berne Convention. For example, according to a leading international copyright treatise:

An author may be vested with copyright, but unable to enforce her rights unless she complies with a variety of prerequisites to suit. Hence, the addition by the Berlin Act of the word ‘exercise,’ so that Article 4(2) now read: ‘The enjoyment and exercise of these rights shall not be subject to any formality . . .’. This appeared to cover any provision that, as distinct from making the recognition of

²³⁵ Responses of the People’s Republic of China to the Questions of the Panel, para. 169.

²³⁶ See Exhibit CHN-118), at p. 1 (“based on the materials provided by the court, [although] Zheng Haijin purchased and sold the book number, the book was indeed composed solely by himself, and the contents were not illegal, thus it is proper to affirm that Zheng Haijin is entitled to the copyright of Inside.”) (Emphasis added).

²³⁷ Responses of the People’s Republic of China to the Questions of the Panel, para. 156.

²³⁸ Emphasis added.

an author’s rights contingent upon compliance with some formality, made the bringing of proceedings subject to a formality . . . ²³⁹

213. Accordingly, even if China’s arguments are accepted, and its mandatory content review procedures are a pre-requisite for the enforcement of rights, they are still inconsistent with Article 5.2 of the Berne Convention.

214. In sum, the United States has demonstrated that Article 4.1 is inconsistent with Article 5(2) of the Berne Convention because, at least in some cases, it provides that approval of the contents of a work is a condition of protection. Article 5(2) of the Berne Convention provides that the “enjoyment and exercise of these rights shall not be subject to any formality” To the extent that the first sentence of Article 4 of the Copyright Law makes the exercise and enjoyment of copyright rights in civil and criminal matters dependent upon the successful completion of some type of content review, Article 4 appears also to be inconsistent with Article 5(2) of the Berne Convention, and thus inconsistent with Article 9.1 of the TRIPS Agreement for that reason as well.

3. The Failure to Ensure that Enforcement Procedures are Available under Chinese Law is Inconsistent with China’s Obligations Under the TRIPS Agreement

215. As described by the United States in its First Written Submission, a consequence of the denial of copyright protection is that the provisions of Chapter V of China’s Copyright Law (“Legal Liability and Enforcement Measures”) are unavailable with respect to such works.²⁴⁰ Such procedures and remedies include civil liability for infringement, damages for actual losses, injunctions to prevent infringement, and criminal prosecution.²⁴¹

216. China has conceded that Article 4.1 denies copyright protection to works prohibited by law.²⁴² China indirectly concedes this point again in arguing that Article 4.1 only denies “copyright protection,” leaving the “Article 2 copyright . . . preserved” because “any use is effectively unauthorized.”²⁴³

217. Therefore, authors of the works for which copyright protection is denied also do not benefit from the remedies specified in Articles 46 and 47 of China’s Copyright Law, which provide civil liability (and in some cases, administrative and/or criminal liability) for copyright infringement. Moreover, authors cannot take advantage of other remedies provided by Articles

²³⁹ Sam Ricketson and Jane C. Ginsburg, *International Copyright and Neighboring Rights, Volume I*, (2006), at 325 (Exhibit US-72).

²⁴⁰ First Submission of the United States, paras. 232-243.

²⁴¹ First Submission of the United States, para. 233.

²⁴² See, e.g., Responses of the People’s Republic of China to the Questions of the Panel, para. 154.

²⁴³ Responses of the People’s Republic of China to the Questions of the Panel, paras. 156-157.

48 and 49 of this law that, respectively, provide for monetary damages and the ability to seek a court order to stop an infringement that is being committed.²⁴⁴

218. China therefore fails to ensure that enforcement procedures as specified in Part III of the TRIPS Agreement are available to copyrighted works that should be protected upon creation in order to permit effective action and expeditious remedies against copyright infringements. Such procedures include, *inter alia*, civil judicial procedures (Article 42); judicial authority to order a party to desist from an infringement (Article 44.1); and judicial authority to order the infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered because of an infringement (Article 45.1).²⁴⁵ To the extent that these procedures are made available in China, it is the enforcement provisions of Chapter V of China’s Copyright Law that do so. China is therefore not in compliance with its obligations under Article 41.1 of the TRIPS Agreement.

219. Furthermore, because criminal procedures under Article 47 of the Copyright Law are not available at all with respect to works whose distribution or publication in China is prohibited, no criminal procedures or remedies are available when piracy of those works occurs on a commercial scale. Accordingly, China is not meeting its obligations under Article 61, first and second sentence, of the TRIPS Agreement.

220. While China argues that if it “publicly” censors a work, then enforcement of “private censorship” under copyright is not necessary,²⁴⁶ the widespread copyright piracy documented in China can attest to the fact that all right holders need the tools to combat copyright piracy that the copyright law is intended to furnish.²⁴⁷

4. Article 4.1 and China’s Content Review Regime

221. China makes a number of references to its right under the Berne Convention to conduct censorship reviews.²⁴⁸ However, Article 17 of the Berne Convention does not authorize a content review system that denies all enforceable copyright protection (including denial of protection of the rights of reproduction, translation, adaptation, etc.) to all works that have not been approved for publication or distribution. Article 17 merely states that countries’ obligations to protect covered expressive works do not inhibit their ability to control or prohibit “the circulation,

²⁴⁴ See First Submission of the United States, para. 233.

²⁴⁵ See First Submission of the United States, paras. 235-236.

²⁴⁶ Response of the People’s Republic of China to the Questions of the Panel, para. 155.

²⁴⁷ See First Submission of the United States, paras. 200-202.

²⁴⁸ See First Written Submission of the People’s Republic of China, paras. 255-263; Oral Statement of the People’s Republic of China at the First Panel Meeting, para. 81.

presentation or exhibition” of those works.²⁴⁹ Thus, Article 17 does not permit Members to deny copyright protection to authors in their respective works.

222. In this dispute, the United States challenges the TRIPS-inconsistent copyright consequences of Article 4.1. That is, the content review measures to which the United States has drawn the Panel’s attention do not create the inconsistency with the TRIPS Agreement; rather we have drawn the Panel’s attention to them because (as China has effectively acknowledged) they provide one important basis for the denial of copyright protection under Article 4.1. It is, however, Article 4.1 of the Copyright Law that causes China to deny copyright protection in a manner that is inconsistent with China’s obligations under the TRIPS Agreement.

C. Conclusion

223. In its First Written Submission, and in its responses to the questions of the Panel, China concedes that the first sentence of Article 4 of its Copyright Law operates to deny copyright protection to certain works, including those containing prohibited content.²⁵⁰

224. As demonstrated by the United States, the first sentence of Article 4 of China’s Copyright Law is inconsistent with China’s obligations under Articles 9.1, 41.1 and 61 of the TRIPS Agreement. Therefore, the United States respectfully requests that this Panel conclude that China is acting inconsistently with its obligations under the TRIPS Agreement.

V. CONCLUSION

225. The United States respectfully requests the Panel to find that China’s measures, as set out in the U.S. panel request and discussed in the submissions of the United States, are inconsistent with China’s obligations under the TRIPS Agreement. The United States further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that China bring its measures into conformity with the TRIPS Agreement.

²⁴⁹ During the legislative debates leading up to the adoption of the Copyright Law, some participants appeared to have recognized that China’s Berne Article 17 interests are reflected in the *second* sentence of Article 4. See Zheng Chengsi and Michael Pendleton, *Copyright Law in China* (CCH International, 1991), p. 81 (Exhibit US-71). Indeed, Article 4.2 of the Copyright Law provides that “copyright owners, in exercising their copyright, shall not violate the Constitution or laws or prejudice the public interests.”

²⁵⁰ First Written Submission of the People’s Republic of China, para. 243; Response of the People’s Republic of China to the Questions of the Panel, para. 154. (“Article 4 of China’s Copyright Law empowers China’s courts and the National Copyright Administration to deny copyright protection to works that are prohibited by law.”)