

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

(WT/DS362)

**CLOSING STATEMENT OF THE UNITED STATES OF AMERICA
AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL**

April 16, 2008

1. On behalf of the United States, we would like to begin by thanking the Panel, the Secretariat staff, and the delegation of China for their time and attention during our session this week.

I. Introduction

2. At the end of this first meeting of the Panel, taking into account the submissions and statements that have been provided by both the Parties and the Third Parties, we would like to offer some observations.

3. In our view, the meeting this week has provided useful discussions to assist the Panel's assessment of whether the three sets of China's measures that we have challenged are consistent with the TRIPS Agreement.

4. First, we commend to the Panel the views expressed by Third Parties that there is no special burden of proof required for this dispute. Indeed, like all disputes, the burden of proof provided by the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") governs here. We are pleased to note that China now appears to agree that no higher burden of proof applies for any of the claims in this dispute.¹

5. We believe that the meeting this week confirms that the United States has fully demonstrated that the Chinese measures at issue are inconsistent with the relevant provisions of the TRIPS Agreement.

II. China's Criminal IPR Thresholds for Trademark Counterfeiting and Copyright Piracy

6. The obligations in Article 61 are straightforward and unambiguous. Members must criminalize all wilful commercial-scale trademark counterfeiting and copyright piracy. WTO Members must implement this minimum standard in their domestic IPR regimes.

¹ Oral Statement of the People's Republic of China at the First Substantive Meeting of the Panel with the Parties, para. 39.

7. We would commend in particular to the Panel the views expressed by a number of the Third Party WTO Members that the minimum enforcement standards established by Article 61 for all WTO Members are not modified by Article 1.1 or Article 41.5 of the TRIPS Agreement. To the contrary, the United States recalls the language of the first sentence of Article 1.1; that China must “give effect” to the obligations of Article 61.

8. Turning to Article 61, it is unfortunate that China’s Oral Statement repeats the misreading of the position of the United States regarding the proper interpretation of “on a commercial scale” in Article 61. As we set out in paragraph 108-110 of our First Submission and paragraph 17 of the U.S. Oral Statement, commercial scale does not mean commercial “purpose” or commercial “intent.”

9. Please allow me to clarify the U.S. position again. The U.S. position is based on the well-established principles that govern treaty interpretation in WTO dispute settlement pursuant to Article 3.2 of the DSU. Those who are engaging in commercial activities (and thus do have a profit motive) are acting on a “scale” that is “commercial.” But, that is not the end of the analysis. The “scale” of what is “commercial” in each market will necessarily vary by many factors, including the object of the infringement and the market for the infringed items.

10. Indeed, while the TRIPS Agreement obligation to provide for criminal procedures and penalties for acts of “commercial scale” trademark counterfeiting and copyright piracy remains unchanged, the factual situations that represent “commercial scale” may indeed change over time, as technologies and market conditions evolve.

11. On the other hand, the TRIPS Agreement deals with *non-criminal* remedies in other sections of Part III of the TRIPS Agreement. Therefore, a Member’s *non-criminal* remedies are neither the subject of Section 5 of the TRIPS Agreement obligations concerning “criminal procedures,” nor are they relevant in dealing with a Members’ compliance with those obligations.

12. When we apply the Article 61 standard, it is evident that China’s measures do not provide for criminal penalties and procedures for all wilful commercial-scale counterfeiting and piracy.

13. The *first* fundamental problem is that China’s thresholds 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 that are below the thresholds but are still “on a commercial scale.”

14. The *second* fundamental problem is that the structure of the thresholds requires Chinese authorities to rely exclusively on a limited set of one-size-fits-all tests for counterfeiting and piracy that can be subject to criminal prosecution or conviction under Chinese law. A range of factors are capable of being probative of “commercial scale,” but China’s rigid criminal thresholds preclude their use. In this connection, the United States would note the many potentially relevant factors raised by several Third Party WTO Members.

15. Mr. Chairman, and Members of the Panel, the United States appreciates the sincere efforts of dedicated law enforcement officials throughout China who are trying to fight counterfeiting and piracy. Unfortunately, in this instance, the law is an obstacle.

16. It is regrettable that, under China’s criminal IPR thresholds, its prosecutors and judges cannot, as a matter of law, reach the acts of “commercial scale” piracy and counterfeiting that fall in the safe harbor from criminal procedures and penalties that are below the thresholds’ flat volume or value metric. This state of the law is also inconsistent with China’s obligations under the TRIPS Agreement.

III. China’s Border Measures for Disposal of Confiscated Goods

17. With regard to our second claim, as explained in our First Submission and our Oral Statement, China’s Customs regulations create a mandatory hierarchy of actions that binds China’s Customs authorities. The rigidity of this system constrains Chinese Customs authorities, so that in many circumstances, they do not have the authority, much less the discretion, to act in accordance

with the principles in the first sentence of Article 46 concerning proper disposal or destruction of goods.

18. We note in this regard that China has not contested the relevance or compulsory language of the Customs IPR Implementing Measures.² Rather, China now asserts that China Customs has sufficient discretion to act in accordance with Article 46 principles. It does so by characterizing Customs' fact finding obligations, which determine which step in the hierarchy is applicable, as “discretion.” However, this assertion ignores the plain text of China’s measures.

19. When China Customs reaches a given step in its hierarchy, if a particular fact situation is presented, the Customs IPR Implementing Measures require Customs to take certain prescribed actions that do not satisfy the principles of Article 46. Yet Article 59 obligates Members to provide authority consistent with these principles.

20. The rigid Chinese system likewise prevents Chinese authorities from meeting the principle in the last sentence of Article 46, since once auction becomes the required step in China’s hierarchy, China Customs is required, where feasible, to auction goods after the infringing mark has been removed.

IV. Article 4 of China’s Copyright Law and the Denial of Copyright Protection

21. The text of Article 4.1 is straightforward. Article 4, first sentence, provides that “[w]orks the publication or distribution of which is prohibited by law shall not be protected by this Law.”

22. Nothing China has presented overcomes the plain meaning of that provision – that Article 4.1 denies copyright protection to content that has not been approved. As we note in our Oral Statement, China’s reliance on the NCAC administrative actions does not demonstrate that Article 4.1 operates contrary to its text. Accordingly, the evidence continues to indicate that China

² Exhibit US-6

does not satisfy its TRIPS obligations (including those incorporated from the Berne Convention) to provide the full range of rights and to provide those rights upon the creation of the work without the imposition of formalities. Moreover, this means that China does not afford civil and criminal remedies for infringements heard by the courts.

23. In light of the foregoing, the United States believes that Article 4.1 of China's Copyright Law is inconsistent with China's obligations under the TRIPS Agreement.

V. Conclusion

24. Mr. Chairman, and Members of the Panel, we would again like to thank you, and the Secretariat staff assisting you, for your efforts on this dispute, and for your time and attention this week. We look forward to receiving the written version of your questions, and to filing our responses and our rebuttal submission. We also look forward to seeing you again in June.