

PIRATES BEHIND AN AJAR DOOR, AND AN OCEAN AWAY: U.S.-CHINA WTO DISPUTES, INTELLECTUAL PROPERTY PROTECTION, AND MARKET ACCESS

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I. INTRODUCTION

Intellectual property (IP) is, as one Chinese commentator succinctly and half-jokingly noted, “what China is always in trouble with the United States for.”¹ Indeed, IP issues have become increasingly important in United States-China trade relations.² These issues attract the attention of the public in both countries, partly because of the genuine seriousness of the problems³ and partly because of high profile incidents, inflammatory comments, and disturbing news images.⁴

Over the last thirty years, China has demonstrated its commitment to intellectual property right (IPR) protections through a series of actions. China has enacted laws to cover patent, copyright, and trademark registration and protection; administrative agencies have been established and reformed to adjust to both the

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1. REBECCA ORDISH & ALAN ADCOCK, CHINA INTELLECTUAL PROPERTY – CHALLENGE & SOLUTIONS: AN ESSENTIAL BUSINESS GUIDE vii (2008).

2. See GARY CLYDE HUFBAUER ET AL., U.S.-CHINA TRADE DISPUTES: RISING TIDE, RISING STAKE 39 (2006) (stating that “China’s failure to protect intellectual property is probably the second most important source of friction in the bilateral U.S.-China economic relationship”) (internal quotation marks omitted). Additionally, Hufbauer notes that “IPR violations were clear priority and emphasized throughout the Top-to-Bottom Review on China published by the USTR in February 2006.” *Id.*

3. For example, China has been constantly placed on the Priority Watch List and the Watch List in the Office of the United States Trade Representative [hereinafter “USTR”] special 301 placement. See KONG QINGJIANG, WTO, INTERNATIONALIZATION AND THE INTELLECTUAL PROPERTY RIGHTS REGIME IN CHINA 179-80 (2005). “The ‘Special 301’ Report is an annual review of the global state of intellectual property rights (IPR) protection and enforcement.” USTR Reports and Publications, <http://www.ustr.gov/about-us/press-office/reports-and-publications> (last visited February 13, 2011).

4. For example, the U.S. Trade Representative Charlene Barshefsky was caught with counterfeit Beanie Babies she purchased in China *right after* she participated in talks pressuring China to strengthen its IPR regime. ANDREW MERTHA, THE POLITICS OF PIRACY: INTELLECTUAL PROPERTY IN CONTEMPORARY CHINA 1 (2005). Myron A. Brilliant referred to China as “public enemy No. 1” when it came to IPR theft. Elizabeth Becker, *Chamber of Commerce Asks U.S. to Crack Down on Chinese Copyright Violations*, N.Y. TIMES, Feb. 10, 2005, <http://query.nytimes.com/gst/fullpage.html?res=9D04E5D8163AF933A25751C0A9639C8B63>. See also ORDISH & ADCOCK, *supra* note 1, at 3.

increasing need for IP regulation and enforcement of IPR protection.⁵ China has also joined international treaties with respect to IPR protection.⁶ The enforcement of IPR protection has been strengthened by the dramatic increase in the number of IPR actions in both the judicial and administrative branches.⁷

The United States has encouraged, pressured, and assisted both the buildup and development of the IPR protection regime in China. For example, the United States has heavily influenced copyright protection in China. As early as 1979, after the official normalization of relations between the two countries, China promised to provide copyright protection to U.S. nationals, after the United States requested such action.⁸ China's copyright law was promulgated in 1991, under strong pressure from the United States.⁹ During the U.S.-China negotiation to join the WTO (then the General Agreement on Trade and Tariffs), the United States "consciously" used "the draft TRIPS agreement as a 'carrot' to get China to better protection of U.S. copyright in China."¹⁰ The United States also sponsored numerous IPR training programs in China.¹¹

Despite all the efforts from both parties and the progress towards greater IPR protection, the IPR problems in China have actually intensified. The rampant circulation of pirated products continues to siphon away profits from U.S. companies.¹² Furthermore, counterfeit goods made in China have reached other markets around the world, including the United States.¹³ Meanwhile, the Chinese government has continued to impose strict restrictions on IP product importation and distribution, especially for copyrighted materials.¹⁴ When it comes to IPR, disputes or even threats of sanctions have become the norm during U.S.-China trade talks.¹⁵ Deeply disappointed, the United States finally decided to initiate two

5. See generally KONG, *supra* note 3.

6. For a concise yet extensive review of China's IPR regime (patent law not included) establishment and accession or joining of international agreement, see KONG, *supra* note 3, at 15-44. China has promulgated and amended the Trademark Law, the Copyright Law, and numerous specialized regulations, such as laws or regulation concerning computer software. *Id.*

7. See KONG, *supra* note 3, at 48; ORDISH & ADCOCK, *supra* note 1, at 182-85.

8. MERTHA, *supra* note 4, at 120.

9. *Id.* at 122.

10. *Id.* at 127. TRIPS is the abbreviation of the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights. *Understanding the WTO: The Agreements, Intellectual Property: Protection and Enforcement*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm (last visited Mar. 31, 2011).

11. KONG, *supra* note 3, at 191-92.

12. *Hearing on China's Enforcement of Intellectual Property Rights and the Dangers of the Movement of Counterfeited and Pirated Goods into the United States Before U.S.-China Economic and Security Review Commission* (2006) (testimony of Congresswoman Diane E. Watson), [available at http://www.uscc.gov/hearings/2006hearings/written_testimonies/06_06_07wrts/06_06_7_8_watson_diane.pdf](http://www.uscc.gov/hearings/2006hearings/written_testimonies/06_06_07wrts/06_06_7_8_watson_diane.pdf).

13. *Id.*

14. USTR, 2008 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE 21 (2008), [available at http://www.ustr.gov/sites/default/files/asset_upload_file192_15258.pdf](http://www.ustr.gov/sites/default/files/asset_upload_file192_15258.pdf) [hereinafter "USTR 2008 REPORT"].

15. *Id.* at 181-82.

actions in the WTO against China, claiming failures by China to fulfill its WTO treaty obligations.¹⁶ The United States' complaints focused on two issues: (1) China's failure to provide adequate IPR protection and (2) China's restricted market access to U.S. products and services.¹⁷ After almost two years, the WTO handed down its panel reports on both complaints, supporting the United States on the majority of its claims.¹⁸

This comment analyzes the two WTO rulings. It first details the background of the claims, both parties' arguments, the WTO's reasoning, and their potential impacts on both U.S. IPR protection and market access of copyright-intensive products in China. After the introduction, Part II briefly reviews the history of copyright issues in China, focusing on matters related to the United States, as well as attempts to address these issues. Part III examines the two WTO disputes and the panels' resolutions. Part IV provides a personal analysis on the impact that the WTO rulings will have on the ability of U.S. enterprises to protect their IPR and expand the market in China. This analysis suggests that it is counter-productive for the United States to have brought the WTO actions because the potential negative reactions from China will outweigh any positive progress they achieve. Despite this setback, the United States can remain optimistic about the status of its copyright-intensive products on the Chinese market, with respect to IPR protection and market access. Part V concludes this comment by suggesting that the United States should use the WTO dispute mechanism sparingly if it is to maintain a strong relationship with China and achieve its trade related goals.

II. BACKGROUND

A. U.S. Copyright-Intensive Products in China

Copyright issues are the "most contentious of the three IPR subfields" of the U.S.-China trade relationship.¹⁹ Two major issues dominate negotiations between the two countries: (1) the effectiveness of copyright protection and (2) market access of copyright-intensive products.²⁰

16. PANEL REPORT, *CHINA – MEASURES AFFECTING THE PROTECTION AND ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS*, ¶ 1.1, WT/DS362/R (JAN. 26, 2009) [HEREINAFTER "THE IPR REPORT"]; PANEL REPORT, *CHINA – MEASURES AFFECTING TRADING RIGHTS AND DISTRIBUTION SERVICES FOR CERTAIN PUBLICATIONS AND AUDIOVISUAL ENTERTAINMENT PRODUCTS*, ¶ 1.1, WT/DS363/R (AUG. 12, 2009) [HEREINAFTER "THE MARKET ACCESS REPORT"].

17. The IPR Report, *supra* note 16, ¶¶ 2.2-2.4; The Market Access Report, *supra* note 16, ¶ 2.2.

18. WTO Dispute Settlement: Dispute DS 362, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm (last visited February 13, 2011); WTO Dispute Settlement: Dispute DS 363, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm (last visited February 13, 2011). For the WTO Rulings, *see infra* Part III.

19. MERTHA, *supra* note 4, at 126.

20. *See* USTR 2008 REPORT, *supra* note 14, at 4-5, 22.

1. Copyright Protection

In theory, Chinese laws have evolved to provide adequate IPR protection to copyright-intensive products, as a condition to WTO accession, yet China still fails to provide meaningful copyright protection.²¹ China is the world's largest manufacturer of pirated copyrighted products.²² According to United States Trade Representative (USTR) reports, about eighty percent of business software used in China is pirated, while the level of piracy of other copyright products reaches ninety to ninety five percent.²³ The estimated financial loss for copyright owners due to piracy in China was \$3.5 billion in 2008, not including the loss from movies and entertainment software.²⁴ These counterfeit goods were not just consumed in China; a significant amount of these products also reached other markets around the world, including the United States.²⁵ For the fiscal year 2008, eighty one percent of the counterfeit products seized by the Border Protection Agency were from China and valued at \$221.6 million.²⁶

Scholars and experts offer different explanations for China's lack of enforcement.²⁷ Some focus on the Communist Culture, combined with cultural roots in Confucianism.²⁸ Other scholars attribute it to the early stages of China's economic development, arguing that the United States had similar experiences during its early economic development. In any event, the lack of enforcement is most likely a combination of multiple factors, including "absence of law, corruption, lack of an efficient judicial enforcement mechanism, fiscal concerns, and local culture and prejudices."²⁹

21. See GUIGUO WANG, *THE LAW OF THE WTO: CHINA AND THE FUTURE OF FREE TRADE*, 461-69 (2005) (detailing China's commitment to IPR protection upon accession to WTO); see also KONG, *supra* note 5 (reviewing China's accession to the WTO); ORDISH & ADCOCK, *supra* note 1, at 9.

22. *Piracy and Counterfeiting in China: Hearing before the Senate Committee on Commerce, Science and Transportation Subcommittee on Trade, Tourism and Economic Development* (2006) (testimony of Franklin J. Vargo, Vice President, National Association of Manufacturers), available at <http://www.nam.org/~media/Files/PDF/2008%2008/236535.ashx>.

23. USTR 2008 REPORT, *supra* note 14, at 5.

24. Letter from the International Intellectual Property Alliance (IIPA), *Written Comments Regarding Copyright Protection and Services/Market Access in China in response to the Request for Comments and Notice of Public Hearing Concerning China's Compliance with WTO Commitments* 4 (August 31, 2009) available at <http://www.iipa.com/pdf/IIPACHinaTPSCwrittencomments092209.pdf>.

25. *Id.*

26. U.S. Customs and Border Protection, U.S. Immigration and Customs Enforcement Intellectual Property Rights Seizure Statistics: FY 2008 (2009), available at http://www.customs.gov/linkhandler/cgov/trade/priority_trade/ipr/pubs/seizure/fy08_final_stat.ctt/fy08_final_stat.pdf.

27. Donald P. Harris, *The Honeymoon is Over: The U.S.-China WTO Intellectual Property Complaint*, 32 FORDHAM INT'L L.J. 96, 103-04 (2008).

28. *Id.* ("Put in overly simplistic terms, the Chinese culture subordinates individual interests to group interests, in stark contrast to the protection of individual property rights.")

29. *Id.* (quoting DORIS E. LONG & ANTHONY D'AMATO, *A COURSEBOOK IN INTERNATIONAL INTELLECTUAL PROPERTY* 578 (2000)).

2. Market Access of U.S. Copyright-Intensive Products in China

While China has fulfilled its WTO obligations to allow U.S. firms to operate directly in China by removing obstacles to trade rights and distribution service in most industry sectors, it continues to impose severe restrictions on copyright-intensive products.³⁰ According to Chinese government regulations, U.S. and other foreign companies cannot engage in the importation of movies, books, magazines, videos, audios, and other copyright-intensive products. Companies are also restricted in the distribution of these products.³¹ Furthermore, the Chinese government imposes importation quotas and censor requirements on certain products.³²

These market access restrictions create two major problems. First, U.S. companies are deprived of the opportunity for fair competition in China's copyright-intensive products market.³³ Second, Chinese consumers have to turn to pirated products because there are simply no legitimate products on the market, which in turn stimulates the piracy industry.³⁴

China treats copyright-intensive products differently because these products, such as books, newspapers, and movies, were traditionally under the direct control of the Communist Party and government. Organizationally, the Ministry of Culture of the People's Republic of China, not the Ministry of Commerce, is in charge of the policy and regulation of such products.³⁵ Its responsibilities include "[t]o stipulate policies and plans for cultural industries, guide and coordinate their development, promote international exchange and cooperation in cultural industries."³⁶ By contrast, the USTR represents all U.S. business interest in international trade, including trade in IP-intensive products.³⁷ The unique status of "cultural goods" in China is due to the traditional communist wisdom that these goods are a tool for ideological control. Attempts by Western countries, especially the United States, to saturate the Chinese market with "cultural products" are not viewed merely as methods of commercial conduct, but rather as components of "ideological

30. USTR 2008 REPORT, *supra* note 14, at 6-7

31. The Market Access Report, *supra* note 16, ¶ 2.3.

32. *See, e.g., id.* ¶¶ 4.107, 4.188. China requires content review for "cultural goods" because of the goods' "major impact on societal and individual morals." China also sets the movie import quota at twenty films per year. China usually uses the term "cultural goods" or "cultural products" for copyright-intensive products. *Id.* In the following discussion, these three terms are interchangeable. *Id.*

33. *See id.* ¶ 2.3 (describing the Chinese copyright-intensive market).

34. *See* Maya Alexandri, *U.S. Files "We're Too Old" Case*, DANWEI.ORG (April 12, 2007), http://www.danwei.org/media_business/us_vs_china_at_the_wto_were_to.php (describing market access restrictions in China).

35. *See* Ministry of Culture, <http://www.ccnt.gov.cn/English/index.html> (last visited Feb. 11, 2010) (describing the role of the Ministry of Culture).

36. *Id.*

37. *See* Mission of the USTR, <http://www.ustr.gov/about-us/mission> (last visited Feb. 11, 2010) (describing the role of the USTR in international trade).

warfare.”³⁸ An American legal scholar has suggested that the Chinese government views media and ideas as “an impediment to government control” and that it therefore has no intention to open this market.³⁹

B. The U.S. Efforts to Protect Copyrights and the Open Market in China

The U.S. government has been working persistently to improve copyright protection in China and gain market access for U.S. companies. These efforts stretch to almost all means imaginable, including the placement of pressure on the enactment and enforcement of IP laws, multiple rounds of bilateral negotiations, cooperation with Chinese authorities, and finally, the utilization of the WTO dispute mechanism.⁴⁰

The Copyright Law of China was enacted under strong U.S. influence and pressure. China started to draft its copyright law in 1979, right after the first trade agreement subsequent to the normalization of the relationship between the United States and China.⁴¹ The drafting process was a slow one, until the United States exerted extra pressure in early 1989 by making enactment of copyright law by China a condition for continued U.S.-China trade agreements.⁴² The Copyright Law was finally passed on September 7, 1990 and took effect on June 1, 1991.⁴³ The Copyright Law was subsequently amended to accommodate China’s obligations under international agreements.⁴⁴

Further U.S.-China negotiations led to two important bilateral agreements: (1) the 1992 Memorandum of Understanding on the Protection of Intellectual Property (MOU), and (2) the 1995 Intellectual Property Rights Enforcement Agreement (1995 Agreement).⁴⁵ In the 1992 MOU, China promised to strengthen IPR protection and accede to international treaties for copyright protection.⁴⁶ The 1995 Agreement is far more detailed than the 1992 MOU. Among other things, the 1995 Agreement required China to provide better border controls, intensify efforts on piracy crackdown, clean up the copyright market, establish a training program on IPR protection,⁴⁷ and open its market to copyright-intensive products.⁴⁸

38. See Minister Wu Cai *Emphasizes the Importance of Establishment of New Concept on Culture Development*, http://www.ccnt.gov.cn/sjzz/jgdw/zxdw/200810/t20081026_58723.html (last visited Feb. 25th, 2010).

39. Steve Dickinson, *The WTO, China's Media, Copyrights and Other IP. It's a Control Thing*, CHINA LAW BLOG, http://www.chinalawblog.com/2009/02/the_wto_chinas_media_copyright.html.

40. See USTR 2008 REPORT, *supra* note 14, at 4-6 (describing methods taken by the US to improve IPR protection in China).

41. MERTHA, *supra* note 4, at 120.

42. *Id.* at 124.

43. *Id.*

44. See *id.* at 126-33 (describing the passage of the Copyright Law).

45. KONG, *supra* note 3, at 19.

46. See *id.* at 20.

47. *Id.*

48. Joseph A. Massey, *The Emperor Is Far Away: China's Enforcement of Intellectual Property Rights Protection, 1986-2006*, 7 CHI. J. INT'L L. 231, 232 n.6 (2006).

The United States also engaged in cooperative activities to help China improve its IPR protection regime and to encourage China to open the market. The efforts included detailed discussions between the two countries and training programs held by U.S. experts for Chinese officials and judges.⁴⁹ These cooperative activities accomplished at least two goals. First, they helped to establish a high standard IPR regime and to educate Chinese officials. Second, they fostered the mutual understanding between Chinese IPR enforcement officials and their U.S. counterparts, as well as U.S. industries, thus facilitating cooperation between two countries in IPR enforcement.⁵⁰

China's accession into the WTO brought new flavor into the U.S.-China copyright relationship. The United States pressed China to commit to full compliance with TRIPS as a condition on China's accession to the WTO in a 1999 agreement.⁵¹ Upon its accession to the WTO in 2001, China committed itself to implementing the TRIPS agreement immediately.⁵² Thus, the United States now had an additional mechanism, namely the WTO forum, at its disposal to resolve copyright issues with China and compel China to fulfill its IPR protection obligations.

In 2007, the United States decided to bring two actions before the WTO. On April 10, 2007, the United States requested consultations with China regarding certain measures pertaining to the protection and enforcement of intellectual property rights in China (hereinafter "IPR Protection Dispute").⁵³ On the same day, the United States requested consultations with China with respect to certain measures intended to restrict trading rights and market access for copyright

49. KONG, *supra* note 3, at 190-92. From October 1998 to June 2000, the United States held nineteen training sessions for Chinese officials and judges. *Id.* The sponsoring institutions include U.S. government agencies, such as the Department of Justice, U.S. Patent and Trademark Office, U.S. Customs, and trade associations, such as Music Publishers' Association. *Id.*

50. *Id.* at 190.

51. *Id.* at 184.

52. *Id.* at 185.

53. The IPR Report, *supra* note 16, ¶ 1.1; *see infra* Part III.A for the measures in dispute. It is helpful to have a basic understanding of WTO procedure. Briefly, a WTO action starts with a consultation request from complaining country (the United States) to the respondent country (China). *See* Understanding the WTO: Settling Disputes, http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm (last visited Feb. 11, 2010). The complaining and respondent countries have to try to negotiate to settle the dispute in 60 days. *Id.* When the negotiation fails, the complaining country can ask the Dispute Settlement Body (DSB) to create a panel, which is similar to a tribunal, to hear the case. *Id.* After reviewing both parties' written arguments and hearing oral arguments, the panel will submit its first draft, which includes facts and arguments from both parties, to the parties for comments. *Id.* The panel then submits an interim report, which contains its finding and conclusion, to both sides for reviewing. After all the procedures, the panel will submit two parties a final report, which will be circulated three weeks later. *Id.* If the panel finds the disputed measures inconsistent with the respondent country's obligation under the WTO treaties, it will recommend the measures be made to conform to WTO rules. *Id.* The report becomes DSB's ruling unless both parties reject it. Both parties can appeal the ruling. *Id.* The procedure is governed by the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). *Id.*

products (hereinafter “Market Access Dispute”).⁵⁴ The WTO issued its ruling on the IPR Protection Dispute on January 26, 2009.⁵⁵ The Market Access Dispute ruling was issued on August 12, 2009.⁵⁶

III. THE WTO DISPUTES

A. *The IPR Protection Dispute*

1. The U.S. Complaints

The United States accused China of failing to fulfill its obligations under TRIPS in three respects. First, it alleged that China did not provide sufficient criminal sanctions for trademark counterfeiting and copyright piracy because the threshold to trigger criminal procedure and penalties was too high. Thus, certain infringements that occur outside the reach of criminal penalties are in a “safe harbour.”⁵⁷ Specifically, China’s criminal law provides that only infringements involving “relatively large” “illegal gains” or “circumstances” that are “serious” or “especially serious” are subject to criminal prosecution or conviction.⁵⁸

The United States argued that these measures do not fulfill the requirement of the first sentence of Article 61 of the TRIPS agreement.⁵⁹ Article 61 provides that “[m]embers shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a *commercial scale*.”⁶⁰ The key issue in the U.S. allegation is the meaning of the

54. The Market Access Report, *supra* note 16, ¶ 1.1. See *infra* Part III.B for the measures in dispute.

55. The IPR Report, *supra* note 16.

56. The Market Access Report, *supra* note 16.

57. See The IPR Report, *supra* note 16, ¶¶ 7.621, 7.622 and accompanying footnotes (describing China’s criminal procedure for trademark infringement).

58. *Id.* at Annex A-1, Executive Summary of the First Submission of the United States, ¶ 5. The major measures at dispute are the *Criminal Law of the People’s Republic of China*, art. 213, 214, 215, 217, 218; the *Interpretation by the Supreme People’s Court and the Supreme People’s Procuratorate of Several Issues Concerning the Specific Application of Law in Handling Criminal Cases Involving Infringement of IPR* (Dec. 2004); and the *Interpretation by the Supreme People’s Court and the Supreme People’s Procuratorate of Several Issues Concerning the Specific Application of Law in Handling Criminal Cases Involving Infringement of IPR (II)* (April 2007). *Id.* ¶ 3. Some other amendments and/or implementations were also included. According to the interpretation of China’s Supreme People’s Court, which is the equivalent of the U.S. Supreme Court, for criminal copyright infringement purposes, the “relatively large” gain is no less than 30,000 Yuan (approximately U.S. \$4,400), and the “huge” gain is no less than 100,000 Yuan (approximately U.S. \$14,660). To satisfy the “other serious circumstances,” the infringer must reproduce or distribute no less than 500 copies of pirated works. *Id.* ¶¶ 7.399-7.415.

59. *Id.* at Annex A-1, ¶ 13.

60. Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 61, Apr. 15, 1994, available at http://www.wto.org/english/docs_e/legal_e/27-trips.pdf [hereinafter TRIPS Agreement] (emphasis added); see also Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197, available at http://www.wto.org/english/docs_e/legal_e/04-wto.pdf.

term “commercial scale.” The United States interpreted the term to extend both to “those who engage in commercial activities in order to make a ‘financial return’ in the marketplace . . . [and] to those whose actions, regardless of motive or purpose, are of a sufficient extent or magnitude to qualify as ‘commercial scale.’”⁶¹

Based on these interpretations, the United States attacked China’s criminal measures for two reasons. First, the amount and magnitude threshold requirements shield certain activities with “commercial scale” from criminal sanctions. Second, the standards adopted by China ignore the fact that some activities do not necessarily involve finished products. The component producers of pirated goods are essentially immune from criminal prosecution and conviction under China’s criminal law. The United States also cited a report prepared by the China Copyright Alliance which demonstrates the inadequacy of China’s criminal laws in penalizing the copyright infringers.⁶² Contingent upon this allegation, the United States further contended that these measures are inconsistent with the second sentence of Article 61, and Article 41.1 of TRIPS.⁶³

The second accusation by the United States is that China’s measures with respect to the disposal of confiscated IP-infringing goods are inconsistent with China’s obligation under Article 59 of TRIPS. Various Chinese regulations and measures confer on Chinese Customs the authority to handle confiscated goods that infringe IP rights, including copyrights, upon importation and exportation.⁶⁴ According to the U.S. interpretation of the measures, Chinese Customs officials first seek to donate the goods to public welfare bodies. The second option is to assign the goods to IP rights owners with compensation. When both of the options are unavailable, an auction will be held after “removal of the infringing features.”⁶⁵ The goods must be destroyed only if the infringing features are impossible to eradicate.⁶⁶

The United States claimed that these measures are inconsistent with Article

61. The IPR Report, *supra* note 16, at Annex A-1, ¶ 25.

62. *See id.* at Annex A-1 ¶¶ 42-44 (stating that according to the *Report on Copyright Complaints, Raid and Resulting Criminal Actions in China* which was prepared by the China Copyright Alliance, less than 20% of China’s retailers who sold copyright-infringing music CDs or DVDs faced possible criminal prosecution or conviction).

63. *Id.* at Annex A-1, ¶¶ 45-46. The second sentence of Article 61 of TRIPS provides that “[r]emedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent” TRIPS Agreement, *supra* note 60, art. 41.1. Article 41.1 of TRIPS provides that “[m]embers shall ensure that enforcement procedures as specified in this Part are available under their law” *Id.* art. 61. The United States claimed that China did not provide remedies and punishment. These claims depend on the criminal threshold claim.

64. *Id.* at Annex A-1, ¶ 8. The measures in dispute are the *Regulations of the People’s Republic of China for Customs Protection of Intellectual Property Rights*, the *Implementing Measures of Customs for the People’s Republic of China for the Regulations of the People’s Republic of China on Customs Protection of Intellectual Property Rights*, and *Announcement No. 16 of the General Administration of Customs*. *Id.* at Annex A-1, ¶ 9.

65. The IPR Report, *supra* note 16, at Annex A-1, ¶ 8.

66. The IPR Report, *supra* note 16, at Annex A-1, ¶ 8.

59 of TRIPS, which incorporates Article 46 of TRIPS.⁶⁷ The first two options available to Chinese Customs do not “avoid harm” to the IPR owners. Furthermore, Chinese Customs lack the “authority” within the meaning of Article 46 because they do not have the discretion to choose to destroy the infringing goods or dispose of the goods outside of the channel of commerce without recourse to the first two options.⁶⁸

The third contention raised by the United States is that the Copyright Law of China does not provide protection for certain copyrighted works.⁶⁹ Copyrighted works that cannot access China’s market for various reasons, such as “prohibited by law,” are stripped of copyright protection, thus protecting the infringers from any legal liability.⁷⁰ Because the legality of copyrighted works depends on the content review result, these works enjoy no copyright protection in the review period, during which infringers can manufacture and circulate pirated copies without fear of legal actions.⁷¹ As a result, the lack of legal consequences for infringement, combined with the overwhelming demand for supply due to the market access restrictions, creates a huge black market for “[p]irated copies of films, publications, music, and other creative works.”⁷²

The United States argued that, by stripping prohibited products of copyright protection, China violates its duty under Article 9.1 of TRIPS, which incorporates the Berne Convention.⁷³ Under the Berne Convention and TRIPS, the United

67. *Id.* at Annex A-1, ¶ 48. Article 59 of the TRIPS Agreement stipulates:

Without prejudice to other rights of action open to the right holder and subject to the right of the defendant to seek review by a judicial authority, 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. In regard to counterfeit trademark goods, the authorities shall not allow the re-exportation of the infringing goods in an unaltered state or subject them to a different customs procedure, other than in exceptional circumstances.

TRIPS Agreement, *supra* note 60, art. 59. Article 46 states:

[T]he judicial authorities shall have the authority to order that goods that they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder.

Id. art. 46.

68. *Id.* at Annex A-1, ¶¶ 52-56.

69. *Id.* at Annex A-1, ¶ 58. The challenged measure is *Article 4 of the Copyright Law*, which provides that “[w]orks the publication or distribution of which is prohibited by law shall not be protected by this law.” *Id.*

70. *Id.* at Annex A-1, ¶ 59.

71. The IPR Report, *supra* note 16, at Annex A-1, ¶¶ 67-68.

72. *Id.* at Annex A-1, ¶ 59.

73. *Id.* at Annex A-1, ¶¶ 61-63. The Berne Convention for the Protection of Literary and Artistic Works is a treaty for the protection of copyright. *See* Berne Convention for the Protection of Literary and Artistic Works art. 1, Sept. 9, 1886, as revised on July 24, 1971 and amended in 1979, S. Treaty Doc. No. 99-27 (1986), *available at* http://www.wipo.int/export/sites/www/treaties/en/ip/berne/pdf/trtdocs_wo001.pdf [hereinafter Berne Convention] (“The countries to which this Convention applies constitutes a Union for the protection of the rights of authors in their literary and artistic works.”). It underwent several amendments since its first adoption in Berne, Switzerland in 1886. *Id.* Articles 1 through 21 of The Berne Convention as amended in 1971 were incorporated into TRIPS. TRIPS Agreement,

States argued, “a work acquires copyright protection immediately and automatically.”⁷⁴ The protection should also be available to a work regardless of its legality in the Member state.⁷⁵ The United States conceded that China has the right to prohibit the publication and distribution of certain works, but asserted that it cannot refuse to provide the copyright owners of these works the protection and remedies against infringers that they deserve without violating its commitment to the WTO agreement.⁷⁶

2. China’s Defenses

China contended that the United States failed to meet its burden of proof to demonstrate China’s failure to comply with its obligation under TRIPS.⁷⁷ As a threshold matter, China emphasized that Member States have great discretion to “determine the appropriate method of implementing the provisions [of TRIPS] within their own legal systems.”⁷⁸

With respect to the criminal threshold claim of the United States, China asserted that the United States misstated and mischaracterized the IPR protection regime in China.⁷⁹ According to China, even though the criminal system does not cover all infringement activities, Chinese law provides other mechanisms to combat these, such as an administrative enforcement regime which seeks to deter IP infringements not punishable under criminal law.⁸⁰

China based its argument on international law principles. First, China observed that, pursuant to customary international law, criminal law can only be established by the sovereign.⁸¹ Since the United States advanced a proposal that greatly departed from this international legal norm, it must overcome a “significantly high burden” of proving its claim by “persuading this panel that the

supra note 60, art. 9.1.

74. *Id.* at Annex A-1 ¶ 57.

75. *Id.* at Annex A-1, ¶ 63. Article 2(1) of The Berne Convention provides that “every production in the literary, scientific and artistic domain” should be protected. Berne Convention, *supra* note 72, art. 2(1) (emphasis added).

76. The IPR Report, *supra* note 16, at First U.S. Submission., ¶ 69.

77. The IPR Report, *supra* note 16, at Annex B-1, Executive Summary of the First Written Submission of China, ¶ 1 [hereinafter First China Submission].

78. *Id.*

79. *Id.* at First China Submission, ¶ 8. China accused the United States of ignoring certain practices China adopted to enforce the copyright protection through criminal law. For example, China asserted that the United States does not consider how Chinese authorities collect evidence to determine whether an infringer’s activities meet the threshold requirements. *Id.*

80. *Id.* at First China Submission, ¶ 9.

81. *Id.* at First China Submission., ¶ 12 (“A review of international law shows that states have traditionally regarded criminal law as the exclusive domain of sovereign jurisdiction; where sovereign governments are subject to international commitments concerning criminal law, these commitments afford significant discretion to governments regarding implementation; and international courts have been exceedingly reluctant to impose specific criminal standards on states.”).

parties to TRIPS agreed to an obligation to reform their criminal laws.”⁸² Second, China interpreted the term “commercial scale” in its plain meaning and context, concluding that the term “commercial scale” under TRIPS 61 is a broad standard which a Member state has great discretion to define.⁸³ The interpretation proposed by the United States, according to China, is inconsistent with the principle that “Article 61 must be read so as to give full effect to all words of the provision”⁸⁴ and the object and purpose of TRIPS, which allows a Member state to develop criminal measures “that reflect its own legal norms and public interests.”⁸⁵ China then urged the Panel to conclude that China’s criminal thresholds are appropriate in light of both China’s criminal law structure and the scale of commerce within China.⁸⁶

Regarding the second claim, which criticized China’s disposal of seized infringing goods, China argued that Chinese Customs, contrary to U.S. allegations, do possess the authority to dispose or destroy the goods in compliance with Article 59 of TRIPS.⁸⁷ As to the practice of public auction by Chinese Customs, China contended that it is consistent with its obligation under Article 59 because TRIPS does not limit Customs to disposal authority and destruction authority.⁸⁸ China further pointed out that fifty-eight percent of seized goods were destroyed and only two percent of the goods were auctioned.⁸⁹ Moreover, Chinese Customs implemented procedures to protect the interests of IPR holders.⁹⁰

China asserted that the United States based its third claim on a fundamental misstatement of Chinese law. The Copyright Law of China provides automatic protection upon the completion of a work by any author from a TRIPS Member State.⁹¹ Therefore, as a matter of law, the U.S. claim that copyright protection in China is contingent upon content review is erroneous.⁹² Content review, as China pointed out, is completely independent of the grant of copyright protection. Content review only involves the license for distribution and has no relationship to copyright protection. Besides, these two functions are administered by different government entities, and their decisions do not bind each other.⁹³

82. The IPR Report, *supra* note 16, at First China Submission, ¶¶ 11, 13.

83. *Id.* at First China Submission, ¶ 27.

84. *Id.* at First China Submission, ¶ 17.

85. *Id.* at First China Submission, ¶ 23.

86. *Id.* at First China Submission, ¶¶ 28-32.

87. The IPR Report, *supra* note 16, at First China Submission, ¶¶ 40-44.

88. *Id.* at First China Submission, ¶ 45.

89. *Id.* at First China Submission, ¶¶ 44-45.

90. *Id.* at First China Submission, ¶ 47.

91. *Id.* at First China Submission, ¶ 59. Article 2 of China’s Copyright Law states that “[a]ny work of a foreigner or stateless person which enjoys copyright under an agreement concluded between the country to which the author belongs or in which the author permanently resides and China, or under an international treaty to which both countries are parties, shall be protected by this Law.” The Copyright Law of China, promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 7, 1990, effective June 1, 1991, art. 2, *available at* <http://www.chinaiprlaw.com/english/laws/laws10.htm>.

92. The IPR Report, *supra* note 16, at First China Submission, ¶ 60.

93. *Id.* at First China Submission, ¶ 61. Content review is conducted by administrative

Upon the questioning of the Panel, China admitted that it would not enforce copyrights on the prohibited works or parts of works that should be edited.⁹⁴ China argued that Article 4(1) of the Copyright Law will not affect the “copyright” vested under Article 2 of the Law on the grounds that “copyright” and “copyright protection” are distinguishable.⁹⁵ Furthermore, China claimed that the United States did not establish a prima facie case and failed to meet its burden of proof. Therefore, the whole claim with respect to Article 4(1) of the Copyright Law of China must fail.⁹⁶

3. The WTO’s Finding and Ruling

a. Copyright Law

The WTO Panel (Panel) first dealt with the third claim raised by the United States. The Panel agreed with the United States that Chinese Copyright Law denies protection to certain works by its own citizens and nationals from WTO Member states.⁹⁷

The Panel drew this conclusion from the text of the Copyright Law of China. While Article 2 provides copyright protection when a work is created, Article 4(1) explicitly declares that certain works “shall not be protected by this law.”⁹⁸ The Panel found further support from other sources. In its own submission, China admitted that Article 4(1) denies protection to works that are “unconstitutional or immoral.”⁹⁹ Furthermore, the National Copyright Administration of China expressed the opinion that “[o]nly works the publication and dissemination of which are prohibited by law are not protected by the copyright law.”¹⁰⁰ The Panel further dismissed China’s argument that Article 4(1) only denies “copyright protection,” but not “copyright,” finding it “difficult to conceive that copyright

agencies under the State Council, the highest executive organ in China, which supervises and coordinates the works of ministries and commissions. *The State Council*, THE CENTRAL PEOPLE’S GOVERNMENT OF THE PEOPLE’S REPUBLIC OF CHINA, http://english.gov.cn/2008-03/16/content_921792.htm (last visited Feb. 11, 2010). Copyright enforcement is the responsibility of the judicial system and the National Copyright Administration of China. The IPR Report, *supra* note 16, at First China Submission, ¶ 61.

94. After content review, some works will not get the permission to be published in China. Some works will have to undergo editing. China would not enforce copyright for the prohibited works and the unedited works. The IPR Report, *supra* note 16, ¶ 7.20.

95. The IPR Report, *supra* note 16, ¶ 7.21.

96. *Id.* ¶ 7.23. China contends that a respondent Member enjoys a “strong” presumption that its measures are WTO-compliant in cases of a facial attack. Thus, China asserts that since the United States has not offered any evidence other than the text of the Copyright Law, it fails to satisfy its burden of proof. *Id.*

97. *Id.* ¶ 7.50.

98. *Id.* ¶ 7.46.

99. *Id.* ¶ 7.53.

100. The IPR Report, *supra* note 16, ¶ 7.54. The National Copyright Administration of China is the government agency in charge of copyright enforcement. The IPR Report, *supra* note 16, at First China Submission, ¶ 47.

would continue to exist, undisturbed” if copyright protection is not guaranteed.¹⁰¹

After determining the scope of the works that are denied copyright protection, the Panel addressed whether China’s copyright law is inconsistent with its obligation under TRIPS.¹⁰² China is a WTO Member and is bound by TRIPS.¹⁰³ Pursuant to Article 9.1 of TRIPS, China has an obligation to protect the rights to works that were denied copyright protection due to censorship.¹⁰⁴ While the Panel recognized China’s right to regulate the circulation of certain works under Article 17 of the Berne Convention, it asserted that censorship cannot eliminate the protected rights to those works.¹⁰⁵ China further argued that, because of the censorship, the copyright protection to the prohibited works is a “legal and material nullity.”¹⁰⁶ The Panel disagreed, noting that China’s assertion was not supported by sufficient evidence, and that even if China’s claim was accepted, the works by a WTO member national are still potentially affected.¹⁰⁷

The Panel further examined several claims raised by the United States under other TRIPS provisions. These claims were either deemed unnecessary for the Panel to consider, or were held to have essentially collapsed into the same consideration under Article 4(1) of Copyright Law of China.¹⁰⁸ Overall, the Panel concluded that the China’s Copyright Law, “especially the first sentence of Article 4, is inconsistent with China’s obligation under . . . Article 9.1 of TRIPS agreement[,] and Article 41.1 of TRIPS agreement.”¹⁰⁹

b. Customs Measures

The United States raised this claim under Article 59 of TRIPS, which

101. *Id.* ¶ 7.66.

102. *Id.* ¶¶ 7.103-7.133.

103. *Members and Observers*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Mar. 31, 2011).

104. The IPR Report, *supra* note 16, ¶ 7.119. Such denials are not permitted by any exceptions. *Id.* ¶ 7.114.

105. *Id.* ¶ 7.132. Article 17 of the Berne Convention “covers the right of governments to take the necessary steps to maintain public order. On this point, the sovereignty of member countries is not affected by the rights given by the Convention The Article therefore gives Union countries certain powers to control.” *Id.* ¶ 7.131. Article 17 was later amended in 1979 and states that its provisions “cannot in any way affect the right of the Government of each country of the Union to permit, to control, or to prohibit . . . the circulation, presentation, or exhibition of any work or production in regard to which . . . it may find it necessary to exercise that right.” Berne Convention, *supra* note 72, art. 17.

106. The IPR Report, *supra* note 16, ¶ 7.134.

107. *Id.* ¶¶ 7.137, 7.139.

108. *Id.* ¶¶ 7.145-7.190. Because the Panel did not consider these claims on their merits, and since these claims depended on the Copyright Law claim, this comment will not discuss them.

109. *Id.* ¶ 7.191. China’s obligation under Article 9.1 of TRIPS originated from Article 5(1) and 5(2) of the Berne Convention (1971). The Panel agreed with the United States that copyright protection should be available to *any* works created by *any* WTO Member nationals. The Article 41.1 obligation flows naturally from the protection commitment. For Article 41.1 text, see *supra* note 60.

provides that “competent authority shall have the authority to order the destruction or disposal of infringing goods in accordance with the principles set out in Article 46.”¹¹⁰ The Panel found that China’s measures to destroy infringing goods or donate such goods to social welfare bodies are consistent with the requirement of Article 59.¹¹¹ With respect to the auction of infringing goods, the United States did not establish that Chinese Customs was deprived of the authority “to order the destruction or disposal of infringing goods” that Article 59 of TRIPS requires because Chinese Customs has the discretion to determine the manner in which confiscated goods would be disposed.¹¹² Nonetheless, the auction of infringing goods was inconsistent with the fourth sentence of Article 46, even where their unlawfully affixed trademarks were removed.¹¹³

c. Criminal Thresholds

The Panel summarized the U.S. claims concerning both the level of the thresholds and the limited set of numerical tests in the thresholds.¹¹⁴ The questions before the Panel were (1) whether China’s criminal thresholds are too high and (2) whether China should consider other factors raised by the United States besides the threshold to meet its TRIPS obligation.¹¹⁵

Having reviewed China’s criminal procedure and penalty measures with respect to copyright and trademark infringement activities, the Panel concluded that certain infringement activities fell below the applicable thresholds and were therefore not subject to any criminal action.¹¹⁶ The question then became whether these activities were “willful trademark counterfeiting or copyright piracy on a commercial scale.”¹¹⁷

The Panel first determined that Article 61 imposes an obligation on Member states, including China, to provide criminal measures against “trademark counterfeiting and copyright piracy on a commercial scale.”¹¹⁸ The principal inquiry of the Panel was then focused on the interpretation of the phrase “on a

110. *Id.* ¶ 7.213. For Article 59 and Article 46 text, see *supra* note 60.

111. The IPR Report, *supra* note 16, ¶¶ 7.286-7.324.

112. *Id.* ¶¶ 7.312, 7.324, 7.354-7.355.

113. The IPR Report, *supra* note 16, ¶¶ 7.356-7.394. Article 46 of TRIPS provides that “[i]n regards 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.” TRIPS Agreement, *supra* note 60, art. 46. The Panel did not find any “exceptional cases” for China to establish a defense. The IPR Report, *supra* note 16, ¶¶ 7.393-7.394.

114. *Id.* ¶ 7.494.

115. *Id.* ¶ 7.496.

116. *Id.* ¶ 7.479.

117. *Id.*, ¶ 7.517.

118. *Id.*, ¶ 7.528, 7.520-7.523. China argued that Article 61 did not provide any specific obligation. The Panel disagreed. See *id.* ¶¶ 7.506-7.508. See TRIPS Agreement, *supra* note 60 and The IPR Report, *supra* note 16 for the text of Article 61.

commercial scale.”¹¹⁹ The Panel dismissed the U.S. argument that “commercial scale” means everything commercial except certain *de minimis* activities.¹²⁰ The Panel concluded that “counterfeiting or piracy ‘on a commercial scale’ refers to counterfeiting or piracy carried on at the magnitude or extent of typical or usual commercial activity with respect to a given product in a given market,”¹²¹ which is close to the interpretation proposed by China.¹²²

Applying this interpretation to the measures at issue, the Panel assessed the criminal thresholds by reference to China’s marketplace, to which both parties agreed.¹²³ The Panel noted that the United States provided press articles and notes as evidence. The panel found that while the publications were from reputable sources, they failed to constitute reliable evidence.¹²⁴ Furthermore, the United States could have easily produced more reliable and relevant data to support its position.¹²⁵ Therefore, without considering the merit of the measures, the Panel concluded that the United States failed to establish a *prima facie* case that the thresholds for China’s criminal measures were too high.¹²⁶

The Panel also found that the United States failed to establish a *prima facie* case with respect to the second part of its challenge to China’s criminal threshold determination, particularly, that China should consider other factors in determining the threshold.¹²⁷ Specifically, the panel found that the United States did not recognize that other provisions, which deal with criminal activities in general, could have a bearing on the issue of evidence.¹²⁸ Furthermore, China submitted the judgment of a case which demonstrated that their courts did consider unfinished products as evidence.¹²⁹ The panel found that although the United States attempted to dismiss the case as an “outlier” it did not present evidence to back up its assertion.¹³⁰ As to the impact on the market, the Panel noted that the impact is not part of the act of infringement and is not associated with the term “on a commercial scale,” so the Panel refused to consider the issue.¹³¹

119. The IPR Report, *supra* note 16, ¶ 7.525.

120. *Id.* ¶¶ 7.551-7.553.

121. The IPR Report, *supra* note 16, ¶ 7.577. It follows that the measures must be evaluated in the context of the market and the product. The Panel further indicated that “this is a relative standard, which will vary when applied to different fact situation.” *Id.* ¶ 7.600.

122. *Id.* ¶ 7.481 (citing China’s written and oral statements on “commercial scale”).

123. *Id.* ¶ 7.604.

124. *Id.* ¶¶ 7.616, 7.627-7.629.

125. *Id.* ¶ 7.630.

126. *Id.* ¶ 7.632.

127. *Id.* ¶ 7.668.

128. The IPR Report, *supra* note 16, ¶ 7.635. The United States only provided Articles 1 to 12 of the Criminal Law of China and failed to consider Articles 22 and 23, which establish offense of preparation for crime and attempted crime and can take into account the unfinished products. *Id.* ¶ 7.636.

129. *Id.* ¶ 7.641. The Chinese court’s judgment in that case takes into account “both finished and semi-finished infringing products in its evaluation of the substantive crime under Article 213 of the Criminal Law.” *Id.*

130. The IPR Report, *supra* note 16, ¶ 7.644.

131. *Id.* ¶ 7.656.

The Panel then swiftly dismissed the other two U.S. claims because they were dependent on the outcome of the criminal threshold claim.¹³² The claim arising under the second sentence of Article 61 concerns the remedies of a criminal law violation.¹³³ The claim was dismissed because a Member state's obligation under that sentence is not triggered until an obligation under the first sentence can be identified, which, in this case, depends on the evaluation of the criminal threshold standards.¹³⁴ As to the U.S. claim under Article 41.1 of TRIPS, it is "consequent upon the outcome of the claims regarding the criminal measures under Article 61 of TRIPS agreement" and so the Panel refused to rule on this claim.¹³⁵

d. Summary

Based on the findings, the Panel drew conclusions with respect to each U.S. claim. On the issues of Copyright law, the Panel concluded that the Copyright Law of China, especially the first sentence of Article 4, was inconsistent with its obligation under Article 9.1 and 41.1 of TRIPS. On the issues of Chinese Customs measures, the United States failed to establish that Chinese Customs do not have the required authority to dispose of infringing goods. However, the practice of auction by Chinese Customs was inconsistent with Article 59 of TRIPS, as it incorporates the fourth sentence of Article 46. Finally, the United States failed to establish that the criminal thresholds are inconsistent with China's obligation under Article 61.¹³⁶

B. The Market Access Dispute

1. The U.S. Complaints

The United States accused China of not fulfilling its obligations under numerous treaties with respect to the trading rights and distribution of copyrighted material. These materials included books, magazines, video products, audio products, and films for theatrical release.¹³⁷ Specifically, the United States alleged that China failed to comply with its WTO obligation in three areas. First, foreign companies or individuals are prohibited from importing the products mentioned above.¹³⁸ Second, foreign distributors of copyright materials were discriminated against by legislations, administrative regulations, and judicial decrees.¹³⁹ Third,

132. *Id.* ¶¶ 7.670-7.671, 7.675-7.677, 7.680.

133. *Accord* TRIPS Agreement, *supra* note 60, art. 61 (stating the types of remedies available) *with* the IPR Report, *supra* note 16, ¶ 7.670 (stating the U.S. view that because China's measures are inconsistent with the first sentence of article 61, that China's measures are also inconsistent with the second sentence).

134. The IPR Report, *supra* note 16, ¶ 7.671.

135. *Id.* ¶ 7.680.

136. The IPR Report, *supra* note 16, ¶ 8.1.

137. The Market Access Report, *supra* note 16, ¶ 4.3.

138. *Id.* ¶ 4.4.

139. *Id.*

the imported copyright materials faced discriminatory measures in China.¹⁴⁰

According to several measures regulating the importation of copyright-intensive products, only certain wholly state-owned companies have the right to import such products.¹⁴¹ The United States contended that such measures conflicted directly with the commitments China made during its accession to WTO, wherein China promised to provide all enterprises and individuals, domestic or foreign, the right to trade in all goods with certain exceptions.¹⁴² Therefore, after a transition period, which ended on December 11, 2004, all the foreign companies and individuals should have the equal right to import.¹⁴³

The second U.S. claim concerns the Chinese copyright-intensive material distribution system, which consisted of different levels, including master distribution (*Zong Fa Xing*), distribution (*Fa Xing*), and sub-distribution (*Fen Xiao*); or master wholesale (*Zong Pi Fa*), wholesale (*Pi Fa*), and retail (*Ling Shou*).¹⁴⁴ Foreign invested enterprises are only allowed to engage in sub-distribution of reading materials.¹⁴⁵ For the distribution of audiovisual products, only Chinese-foreign contractual joint ventures where the Chinese party has the majority of shares can participate and engage in sub-distribution.¹⁴⁶ Foreign

140. *Id.*

141. *Id.* ¶¶ 4.5-4.14. The measures in dispute are the *Catalogue*, the *Foreign Investment Regulation*, the *Several Opinions*, the *Publications Regulation*, the *Importation Procedure*, the *1997 Electronic Publications Regulation*, the *2001 Audiovisual Products Regulation*, the *Audiovisual Products Importation Rule*, the *Audiovisual (Sub-)Distribution Rule*, the *Film Regulation*, the *Film Distribution and Exhibition Rule*, and the *Film Enterprise Rule*. *Id.*

142. The Market Access Report, *supra* note 16, ¶ 4.31. “The Protocol of Accession (the Panel used the term the ‘Accession Protocol’ in the report) for each new member of the WTO contains the terms it has negotiated to become a member, and which have been accepted by all other members of the WTO in the General Council or at a Ministerial Conference. The Protocol includes annexes for the commitments made by the new member for trade in goods and in services. The exceptions do not include copyright products.” *Protocols of Accession for Membership in the WTO*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/thewto_e/acc_e/protocols_acc_membership_e.htm (last visited Mar. 30, 2011). In China’s Accession Protocol, Annex 2A and Annex 2B provide lists of certain goods and services that are exempt from the general commitment of equal treatment. WORLD TRADE ORGANIZATION, *ACCESSION OF THE PEOPLE’S REPUBLIC OF CHINA*, WT/L/432 (2001) (To retrieve the China’s Accession Protocol, enter http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm in the browser’s address bar; click on the hyperlink for “China;” download or view the “Accession of the People’s Republic of China” in English, French or Spanish).

143. The Market Access Report, *supra* note 16, ¶ 4.33.

144. *Id.* ¶ 4.15. Distribution and wholesale are similar and overlapping but different concepts. See *infra* note 156 and accompanying text. The challenged measures are the *Publications Market Rule*, the *Publications (Sub-)Distribution Rule*, the *Sub-Distribution Procedure*, the *Imported Publications Subscription Rule*, the *1997 Electronic Publications Regulation*, the *Several Opinions*, the *Foreign Investment Regulation*, the *Catalogue*, the *2001 Audiovisual Products Regulation*, the *Audiovisual (Sub-)Distribution Rule*, the *Internet Culture Rule*, the *Circular on Internet Culture*, and the *Network Music Opinions*. The Market Access Report, *supra* note 16, ¶¶ 4.17, 4.20, 4.22.

145. The Market Access Report, *supra* note 16, ¶ 4.18.

146. *Id.* ¶¶ 4.19-4.20.

invested ventures are completely banned from engaging in the electronic distribution of sound recording materials.¹⁴⁷

The United States emphasized that China has committed itself to the General Agreement on Trade in Services (GATS).¹⁴⁸ Article XVII of the GATS provides a Member shall provide other Member's service suppliers national treatment.¹⁴⁹ China's measures regarding the wholesale of reading materials and electronic distribution of sound recordings treated foreign-invested enterprises less favorably compared to its treatment of domestic companies, and thus are inconsistent with its obligation.¹⁵⁰ Regarding the audiovisual products distribution, China's measures are inconsistent with Article XVI of the GATS, which provides that a Member is prohibited from limiting the participation of foreign investment.¹⁵¹

The third U.S. accusation focused on China's treatment of imported copyright-intensive products. The United States complained that: (1) China restricted the distribution channels for imported reading materials while similar domestic materials suffered no such limitations; (2) China disadvantaged imported sound recordings that were intended to be distributed electronically by imposing an extra content-review procedure; and (3) China only allowed two state controlled distributors to distribute imported films for theatrical release, while domestic movies can be distributed by any distributor.¹⁵² According to the United States, a Member breaches Article III:4 of the General Agreement on Tariffs & Trade (GATT) if the Member accords the imported product less favorable treatment compared to similar domestic products.¹⁵³ Therefore, China's measures are

147. *Id.* ¶ 4.22.

148. *Id.* ¶¶ 4.49, 4.72. The GATS is a WTO agreement focusing on trade in services, instead of merchandise trade; for general information on GATS, see *Services – The GATS: Objectives, Coverage, and Disciplines*, WTO, http://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm (last visited Feb. 13, 2011). The GATS instrument is available at http://www.wto.org/english/docs_e/legal_e/26-gats.pdf (last visited Feb. 13, 2011).

149. See General Agreement on Trade in Services art. XVII, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 1125 (concerning national treatment) [hereinafter GATS].

150. The Market Access Report, *supra* note 16, ¶¶ 4.52, 4.70.

151. *Id.* ¶ 4.61. Article XVI of GATS concerns market access. GATS, *supra* note 149, art. XVI.

152. The Market Access Report, *supra* note 16, ¶¶ 4.79-4.84. The challenged measures are the *Imported Publications Subscription Rule*, the *Publications (Sub-) Distribution Rule*, the *2001 Audiovisual Products Regulation*, the *Audiovisual Products Importation Rule*, the *Internet Culture Rule*, the *Network Music Opinions*, the *Film Regulation*, the *Film Enterprise Rule*, and the *Film Distribution and Exhibition Rule*. *Id.* ¶ 4. 73.

153. *Id.* ¶ 4.74. The GATT is a WTO agreement covering international trade on goods, first adopted in 1947. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, available at http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf [hereinafter GATT 1947]. The term GATT is also used to describe the multilateral trading system under the treaty, the predecessor of the WTO. GATT 1947 was incorporated into GATT 1994. General Agreement on Tariffs and Trade 1994 § 1(a), Apr. 5, 1994, Marrakesh Agreement Establishing the World Trade Organization, 33 I.L.M. 1125, available at

inconsistent with its obligation under this treaty provision.¹⁵⁴

2. China's Defenses

To defend its position with respect to trading rights, China divided the relevant “products,” which the United States treated wholly, into three categories: films for theatrical release, audiovisual products for publication, and reading materials and audiovisual products.¹⁵⁵ China characterized the films for theatrical release as “services” instead of goods, and the audiovisual products for publication as “copyright licensing” instead of goods.¹⁵⁶ Since the Accession Protocol only covers trade in goods, China argued that it could not have violated its obligations with respect to these two categories.¹⁵⁷ As far as reading materials and audiovisual products were concerned, China invoked Article XX of the GATT, which justified their measures for the purpose of protecting public morals due to the fact that the selection of importation entities was necessary for that purpose.¹⁵⁸

China then blamed the United States for creating an inaccurate picture of its reading material distribution system with respect to the bar on the participation of foreign-invested enterprises. China claimed that it had only committed itself to include the traditional distribution system (*Fen Xiao*) to the GATS, while it had never intended to include another autonomous system (*Zong Fa Xing*) in the scope of distribution services because it was essentially a direct sale to the end consumer, not a distribution channel in the traditional sense. Therefore, China did not have any obligation to permit foreign invested enterprises to engage in any distribution services other than *Fen Xiao*.¹⁵⁹ China later argued that prohibition on *Zong Pi Fa* had been eliminated because of the adoption of a new measure.¹⁶⁰ In response to the U.S. accusation of discriminatory requirement on foreign invested enterprise premised upon Article XVII of the GATS, China admitted that the United States had demonstrated “a formally different treatment between domestic and foreign services and service suppliers.”¹⁶¹ However, China contended that the United States failed to prove that China had disadvantaged the foreign services or service

http://www.wto.org/english/docs_e/legal_e/06-gatt.pdf [hereinafter GATT 1994]. Article III: 4 provides for the equal treatment of imported products. *See* GATT 1994, art. III:4.

154. The Market Access Report, *supra* note 16, ¶ 4.86.

155. The Market Access Report, *supra* note 16, ¶¶ 4.96-4.120.

156. *Id.* ¶¶ 4.101, 4.105.

157. *Id.* ¶ 4.104.

158. *Id.* ¶¶ 4.113-4.115. Article XX(a) of GATT 1994 provides that “nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures ... necessary to protect public morals.” GATT 1994, *supra* note 150, art. XX.

159. The Market Access Report, *supra* note 16, ¶¶ 4.123-4.127. Essentially, China's argument is solely based on its interpretation of the terms. Because only *Fen Xiao* is the wholesale service that China committed itself to national treatment of foreign invested enterprises, China did not break any promise. *Id.*

160. *Id.* ¶ 4.582. China claimed that the adoption of *Interim Provisions on the Administration of the Publications Market* in 1999 eliminated the prohibition on *Zong Pi Fa*. *Id.*

161. *Id.* ¶ 4.131. *See supra* text accompanying notes 145-148 for the U.S. allegations.

supplier.¹⁶²

With respect to audiovisual products distribution, the alleged violation of Article XVI of the GATS, as China interpreted the measures, only limited the allocation of profits, upon which the Article does not impose any obligation.¹⁶³ For the Article XVII challenges, China raised a defense similar to those it used for the reading materials.¹⁶⁴ For the electronic music distribution, China insisted that it should not be committed to any obligation because such a service did not really exist during its negotiations to join WTO. Invoking the principle of *in dubio mitius*, China contended that this service should not be included in its commitment to the GATS.¹⁶⁵

Turning to the imported copyright-intensive products distribution complaint, China first challenged that the panel should not have considered the allegations regarding reading materials and sound recordings because of the procedural failure by the United States regarding reading materials and sound recordings. Specifically, the United States was barred from raising the issues during the proceeding because it had not included them in its request for consultation.¹⁶⁶ In the event that WTO decided to consider the merits of these issues, China claimed that it did not treat imported reading material differently.¹⁶⁷ With respect to electronic distribution of sound recordings, China asserted that they are not “physical products” and therefore not subject to Article III:4 of GATT.¹⁶⁸

For the imported movies, China argued that it did not limit the number of the companies that can be approved to distribute. The only reason that there were two approved distributors for the imported movies was that China limited its importation to twenty movies, which is consistent with China’s commitment under

162. The Market Access Report, *supra* note 16, ¶¶ 4.131-4.136. China argued that the treatment to foreign-invested enterprises is only “formally different.” *Id.*

163. *Id.* ¶¶ 4.138-4.140. See *supra* text accompanying notes 149-151 for the U.S. allegation based on this provision.

164. The Market Access Report, *supra* note 16, ¶¶ 4.141-4.146. See *supra* text accompanying notes 158-159 for the similar defense China raised in response to reading materials allegation.

165. The Market Access Report, *supra* note 16, ¶¶ 4.160-4.162. The principle of *in dubio mitius*, a canon of international treaty interpretation, means that where “the meaning of a term is ambiguous, the meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties.” (internal quotation marks omitted). Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, ¶ 165 n.154, WT/DS26/AB/R (Jan. 16, 1998), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm/.

166. The Market Access Report, *supra* note 16, ¶¶ 4.163, 4.175. See *supra* note 53 for a general description of the WTO dispute settlement procedure. See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, available at http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf [hereinafter DSU] for a discussion of the procedural requirement.

167. The Market Access Report, *supra* note 16, ¶ 4.170.

168. *Id.* ¶¶ 4.177-4.182.

the GATS.¹⁶⁹ Furthermore, the imported movies not only did not receive any less favorable treatment, they actually enjoyed certain advantages that some domestic movies did not. As a result, foreign films, particularly U.S. films, saw a significant increase in market share in China.¹⁷⁰

3. The WTO's Finding and Ruling

The Panel first determined the scope of its review. Based upon the procedural requirements and the nature of the measures, the Panel excluded certain measures that the United States requested in its submission.¹⁷¹ After resolving the preliminary issues, the Panel turned to the merits of the dispute.

a. Trading Rights

The United States based its complaint upon China's commitment that "[w]ithout prejudice to China's right to regulate trade in a manner consistent with WTO agreement . . . all enterprises in China shall have the right to trade in all goods throughout the customs territory of China . . . All such goods shall be accorded national treatment False"¹⁷² Before addressing the U.S. claims, the Panel first engaged in the interpretation of the terms in this text.¹⁷³

After examining China's Accession Protocol to WTO and the Working Party Report, the Panel concluded that China cannot limit trade rights in goods that are not listed in Annex 2A of the Accession Protocol without breaching its obligation under WTO agreement; China was also obliged to grant equal trading rights to all the enterprises regardless of their location of registration and investment status in China.¹⁷⁴ China's commitment "to grant[ing] trading rights to foreign enterprises and individuals in a 'non-discretionary' way" means that "any Chinese authority charged with granting trading rights cannot have the freedom to choose, based essentially on its own preference, whether or not such rights are granted."¹⁷⁵ Furthermore, the Panel concluded that both films for theatrical release and the audiovisual products for publication are considered "goods."¹⁷⁶

169. *Id.* ¶¶ 4.187-4.188.

170. *Id.* ¶¶ 4.191-4.193. Imported movies are distributed on "a large scale and in the most important market." *Id.* ¶ 4.191. "By contrast, most Chinese movies do not have access to these nation-wide and large-scale distribution networks." *Id.*

171. *Id.* ¶ 7.226. The Panel excluded the following measures: the *Film Distribution and Exhibition Rule*, the *2001 Audiovisual Products Regulations*, the *Audiovisual Products Importation Rule*, the *Importation Procedure* and the *Sub-Distribution Procedure*. *Id.* Except for the last two measures, the Panel refused to consider the measures because the United States failed to raise them in its request for consultation. *Id.*; see DSU, *supra* note 163 (describing the procedural requirement). The last two are not "measures" within the meaning of Article 3.3 of the DSU. *Id.* art. 3(3); see also *infra* notes 215-216 and accompanying text for a discussion of the meaning of the term "measures."

172. The Market Access Report, *supra* note 16, ¶ 7.235.

173. *Id.* ¶ 7.236.

174. The Market Access Report, *supra* note 16, ¶¶ 7.279, 7.292, 7.299.

175. *Id.* ¶ 7.324.

176. *Id.* ¶¶ 7.526, 7.642. This finding rejected China's argument that those products are not

Against such an interpretation of China's obligation, the Panel then examined each of the challenged measures.¹⁷⁷ With a few exceptions, the Panel found that most measures challenged by the United States were indeed inconsistent with China's obligation under the Accession Protocol.¹⁷⁸ In response to China's assertion of justification to protect "public morals" under Article XX(a) of the GATT, the Panel proceeded to address the argument before reaching the final conclusion.¹⁷⁹ The Panel was convinced that at least one of the measures proposed by the United States constituted a "reasonably available" alternative to China's limitation on trading right.¹⁸⁰ Thus, it concluded that "China has not established that the measures at issue are 'necessary' within the meaning of Article XX(a) to protect public morals."¹⁸¹ Overall, the Panel ruled in favor of the United States, concluding that China acted inconsistently with its WTO obligation with regard to the trading rights measures that the United States had challenged.¹⁸²

b. Distribution Service

The Panel also addressed the U.S. distribution challenges in light of the treaty provisions under which the United States raised its claim.¹⁸³ For the reading materials distribution, the Panel first examined the claim against the prohibitions on foreign-invested enterprises under Article XVII of the GATS.¹⁸⁴ The Panel found that the services challenged by the United States, regardless of China's characterization, all fell within the scope of China's commitment to national treatment under Article XVII of the GATS.¹⁸⁵ China defended its measures primarily based on the interpretation of terms and did not rebut the U.S. claims.¹⁸⁶ The Panel had little difficulty agreeing with the United States that the challenged

"goods." See *supra* text accompanying notes 153-154 (setting forth China's argument that films for theatrical release and audiovisual products for publication do not constitute "goods").

177. The Market Access Report, *supra* note 16, ¶ 7.332.

178. *Id.* ¶ 7.706.

179. *Id.* ¶ 7.707.

180. *Id.* ¶ 7.886. For example, the Panel considered the U.S. proposal that the Chinese Government conduct the review of relevant products imported into China. *Id.* ¶ 7.887. This proposal involves no restriction of the right to import. *Id.* It is also "reasonably available" to China. *Id.* ¶¶ 7.887-7.909.

181. *Id.* ¶ 7.912. Article XX(a) of GATT 1994 provides that "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures [] necessary to protect public morals." GATT 1994, *supra* note 150, art. XX(a). The provision requires the Member state to adopt "necessary" measures. *Id.* Here, because there are "reasonable available" alternatives, China's measures are not "necessary." The Market Access Report, *supra* note 16, ¶ 7.908.

182. *Id.* ¶ 7.917.

183. The Market Access Report, *supra* note 16 ¶¶ 7.925-7.1412.

184. *Id.* ¶¶ 7.933-7.1142.

185. *Id.* ¶¶ 7.1015, 7.1028, 7.1058, 7.1068.

186. *Id.* ¶¶ 7.941, 7.1032. See *supra* note 152-155 (describing China's redefinition of the relevant "products"). China's defense was solely based on its interpretation of the terms. It did not attempt to raise any other defense.

measures constituted breach of Article XVII of the GATS.¹⁸⁷

Next, the Panel examined the discriminatory requirements that apply only to foreign-invested enterprises.¹⁸⁸ Upon examining the relevant measures, the Panel found that Chinese-owned companies had significantly lower capital requirements compared to foreign invested companies.¹⁸⁹ Furthermore, the alleged benefits enjoyed by foreign invested companies disappeared after the amendment of the Company Law in 2005.¹⁹⁰ Therefore, a foreign company was treated “less favorably” in contravention of the requirements under Article XVII of the GATS.¹⁹¹ The same conclusion was drawn with respect to the operation term requirement.¹⁹²

Turning to the distribution of music on networks, the Panel engaged in lengthy interpretation efforts and concluded that China’s commitment on “[s]ound recording distribution services . . . extends to sound recordings distributed in non-physical form, through technologies such as the internet.”¹⁹³ Relying on this interpretation, China had failed to provide any specific response to the U.S. claim.¹⁹⁴ In large part because of its reliance on this adopted interpretation, the Panel determined that all but one of the challenged measures were inconsistent with Article XVII of the GATS.¹⁹⁵

The third distribution service in dispute concerned audiovisual products. The Panel, after another lengthy interpretation, concluded that China’s commitment to video distribution services covered the wholesale, retail, and rental of physical audiovisual products.¹⁹⁶ The measures requiring “a limitation on the participation of foreign capital in contractual joint ventures engaging in the distribution of AVHE products” were thus inconsistent with China’s commitment under Article XVI of the GATS.¹⁹⁷ Furthermore, the United States challenged certain measures similar to those in reading materials distribution, and they were similarly found to breach China’s obligation under Article XVII of the GATS.¹⁹⁸

187. *Id.* ¶¶ 7.997, 7.1058, 7.1094.

188. *Id.* ¶¶ 7.1099-7.1142.

189. *Id.* ¶ 7.1108.

190. *Id.* ¶ 7.1111. Before 2005, only foreign invested, not Chinese-owned companies enjoyed flexibility “to pay in the registered capital amount in installments [sic],” which “balanced” the greater capital requirement. *Id.* ¶ 7.1109. However, after the amendment of the Company Law, all the companies “may contribute their registered capital in installments over the same period of time.” *Id.* ¶ 7.1111.

191. *Id.* ¶¶ 7.1119-7.1120.

192. The Market Access Report, *supra* note 16, ¶ 7.1141.

193. *Id.* ¶¶ 7.1220, 7.1247, 7.1265.

194. *Id.* ¶ 7.1270; *see id.* ¶¶ 4.160-4.162 (discussing China’s dismissal of the claim regarding electronic music distribution).

195. *Id.* ¶¶ 7.1311-7.1312.

196. The Market Access Report, *supra* note 16, ¶ 7.1349.

197. *Id.* ¶ 7.1396; *see supra* text accompanying notes 138, 143 (discussing the restriction on sub-distribution of audio-visual products).

198. The Market Access Report, *supra* note 16, ¶ 7.1426; *see also* notes 176-184 (providing the Panel’s reasoning with respect to reading materials).

c. Imported copyright-intensive materials

The U.S. claim arose under Article III:4 of the GATT, which is violated when three elements exist: (1) “like” domestic and imported products; (2) measures, such as a “law, regulation, or requirement affecting . . . distribution;” and (3) “less favorable” treatment accorded to imported products.¹⁹⁹ The Panel examined each category of product in the U.S. complaint regarding these three elements.

The Panel first examined the claim concerning reading materials. The Panel found that under one challenged “measure,” imported reading materials were “like” products to their domestic counterparts in China. Further, China’s measure imposed an additional limitation on imported reading material sub-distribution, which did not apply to their domestic counterparts. Thus, the “less favorable” treatment element was satisfied, and this measure was deemed inconsistent with Article III:4 of the GATT.²⁰⁰ For sound recordings, the Panel concluded that the United States failed to establish that the relevant measures “affected” distribution.²⁰¹ For films for theatrical release, the United States failed to establish that China’s distribution system is a “measure” because the United States failed to attribute the system to China.²⁰² Thus, these particular challenged measures were not found inconsistent with Article III:4 of the GATT, as the United States failed to demonstrate all three required elements.²⁰³

d. Summary

The United States prevailed on most of its claims.²⁰⁴ The Panel found that China acted “inconsistently with provisions of its Accession Protocol, the GATS, and the GATT 1994.”²⁰⁵

C. Appeals Decision and Appellate Body Proceedings

Both China and the United States agreed not to appeal the Panel decision on IPR protection and informed the WTO that they agreed that China would need twelve months to implement the recommendation.²⁰⁶

China appealed the Panel decision on the Market Access Dispute on September 29, 2009 by filing an appellant’s submission to the Appellate Body.²⁰⁷

199. The Market Access Report, *supra* note 16, ¶ 7.1442; *see also* GATS, *supra* note 146 (identifying the requirement of national treatment under Article XVII of the GATS).

200. The Market Access Report, *supra* note 16, ¶¶ 7.1506, 7.1523, 7.1545. The measure is the Publications (Sub-) Distribution Rule.

201. *Id.* ¶ 7.1652.

202. *Id.* ¶ 7.1693.

203. *Id.* ¶¶ 7.1654, 7.1694.

204. *Id.* ¶ 8.1.

205. The Market Access Report, *supra* note 16, ¶ 8.4.

206. WTO, Dispute Settlement: Dispute DS362, *supra* note 18.

207. WTO, Dispute Settlement: Dispute DS363, *supra* note 18; *see also* WTO, Understanding the WTO: Settling Disputes, *supra* note 53. (describing how disputes are settled by the WTO). Both parties in a dispute can appeal the ruling to the Appellate Body. *Id.*

The United States filed its own appellant's submission on October 7, 2009. On October 19, 2009, China and the United States each filed an appellee's submission.²⁰⁸ The Appellate Body upheld the Panel decision, issuing its opinion on December 21, 2009.²⁰⁹

IV. ANALYSIS

A. China's Compliance with WTO Rulings

Existing empirical data is insufficient to support predictions about whether and how China will respond to the WTO Rulings. China has been a respondent in seventeen WTO disputes. Of those, six were resolved with an agreement between the parties, five were resolved by a final decision from the Panel, and six disputes are still pending.²¹⁰ Of the five disputes where the WTO reached a judgment, including the IPR Dispute and the Market Access Dispute, all ruled against China on all or some of the claims.²¹¹ However, this sample size is simply too small to conduct any statistically significant study.

Except for the IPR Dispute, China appealed all other disputes, and the Appellate Body upheld all the Panel reports.²¹² China reached agreement with the United States to implement the DSB recommendations only in the IPR Dispute.²¹³ China received the first adverse WTO ruling on July 18, 2008, and the first adverse Appellate Panel report on January 12, 2009.²¹⁴ China appeared to be implementing measures to comply with the WTO rulings in the three disputes unrelated to IP issues. However, it has been suggested that the WTO ruling may not be a significant factor in the implementation.²¹⁵

It is reasonable to believe that China will comply with the WTO rulings in both disputes. First, China has been making significant progress (although not necessarily at a satisfactory pace) to fulfill its WTO obligations, suggesting a

208. WTO, Dispute Settlement: Dispute DS363, *supra* note 18.

209. *Id.* Due to the time and size limit, this comment will not discuss the appellate body's opinion.

210. *Dispute Settlement: the Disputes, Disputes by Country, Territory*, WTO, http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (last visited Feb. 12, 2011). In the "Table of Dispute by Members," follow the hyperlink of the cases in which China is respondent.

211. *Id.* China was ruled against in DS399, DS340, DS342, DS362, and DS363. Follow the hyperlink of each case to see the detailed case information.

212. *Id.*

213. WTO, Dispute Settlement: Dispute DS362, *supra* note 18.

214. WTO, Dispute Settlement: Dispute DS339, China — Measures Affecting Imports of Automobile Parts, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds339_e.htm (last visited Feb. 12, 2011).

215. Simon Lester, *China's Implementation in WTO Dispute Settlement*, INTERNATIONAL ECONOMIC LAW AND POLICY BLOG, (Aug. 28, 2009 7:25 AM), <http://worldtradelaw.typepad.com/ielpblog/2009/08/chinas-implementation-in-wto-dispute-settlement.html>.

general attitude favoring compliance.²¹⁶ Second, “[every] WTO Member found in violation of its WTO obligations [in a dispute] has indicated its intention to bring itself into compliance and in most cases has already done so” within a reasonable time,²¹⁷ suggesting strong incentive to comply with WTO rulings and/or disincentive to ignore the obligations. For the purpose of further discussion, it will be assumed that China will comply with the WTO rulings.

B. The Limits of the WTO Actions and the Effects of such Limits

1. The Jurisdictional Limitation of the WTO

In a WTO dispute, the complaining party must identify the “specific measures at issue.”²¹⁸ It has been noted that “any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings. The acts or omissions . . . are, in the usual case, the acts or omissions of the organs of the state, including those of the executive branch.”²¹⁹ Because of this requirement, the United States was essentially limited to challenging laws, regulations, and other instruments.

However, the WTO is not the best nor the most suitable forum for the United States to address its most urgent problems in IPR protection within China. The problem in China is not the lack of measures providing IPR protection, but rather the lack of enforcement of existing measures.²²⁰ Commentators identified local protectionism and corruption as the biggest issues in IPR enforcement in China.²²¹

216. See USTR 2008 REPORT, *supra* note 14, at 3 (finding that while China’s WTO compliance “does not appear to be complete in every respect, China’s implementation of its WTO commitments has led to increases in U.S. exports to China, while deepening China’s integration into the international trading system and facilitating and strengthening the rule of law and the economic reforms that China began thirty years ago”).

217. Bruce Wilson, *Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings: The Record to Date*, 10 J. INT’L ECON. L. 397, 399 (2007).

218. DSU, *supra* note 168, art. 6.2.

219. WTO, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, ¶ 81 WT/DS244/AB/R (Dec. 15, 2003). “The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.” WTO, DISPUTE SETTLEMENT UNDERSTANDING art. 3.3 (1994), *available at* http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm. In the Market Access Report, the Panel interpreted the provision as “only measures taken by another Member are subject to review under the DSU.” The Market Access Report, *supra* note 16, ¶ 7.166.

220. See Massey, *supra* note 48, at 232 (“[T]he major continuing issue has been Beijing’s failure to get its laws and international obligations adequately and effectively enforced.”).

221. See, e.g., *id.* at 232-33 (“Chinese provincial authorities, ‘far away over the mountains,’ benefit financially or politically from the proceeds of piracy or, instead, turn a blind eye to powerful local interests that do.”). The title of the article originated from an ancient Chinese folk poem. “The mountains are high and the emperor is far away . . .” which means that remote areas are beyond the control of a central government. See *id.* at 231-33; see also Daniel C.K. Chow,

Theoretically, the United States can bring an action challenging these issues before the WTO under an “omission” theory (that Chinese local governments’ failure to enforce the relevant measures and stop corruption amounts to an “omission”). However, such a theory would be extremely difficult, if not impossible, to prove. Besides, a WTO panel would be very reluctant to touch such a thorny issue as it could provoke serious sovereignty arguments.²²²

2. The Limited Objectives of the United States

The United States brought the WTO actions for limited purposes, some of which are not actually related to IP-associated issues within China. One legal scholar has argued that the United States utilized the WTO dispute settlement mechanism because of “domestic pressures or pragmatic, short-term and highly contextual calculations that it served the U.S. interests better than alternative arrangements.”²²³ After examining the U.S. complaint on the IPR Protection dispute, one commentator concluded that the United States, specifically the Bush Administration, brought the action because of “domestic industry pressures” and “congressional pressure.”²²⁴ Another legal scholar explicitly stated that “the [United States] did this to appease U.S. media companies who want to see some action on the issue of market access.”²²⁵ He went on to declare that “[t]his would explain why the case was so weak: it was not taken seriously by the people who brought it.”²²⁶ This suggestion is supported by the failure of United States to provide reliable evidence and consider other criminal law provisions in its criminal threshold claim.²²⁷ Therefore, the limited U.S. objectives, combined with the jurisdictional limits of the WTO, render the two disputes and the decisions less significant than they appear to be.

C. The Effects of the WTO Rulings

In the short term, the WTO rulings on the two disputes will be unlikely to produce any immediate legal and/or economic impact on copyright protection and market access for the U.S. enterprises in China. In the long run, the United States may achieve its goal by showing China its determination to solve the IPR related issues and its willingness to resort to the WTO dispute settlement mechanism. However, this may be a pyrrhic victory for the United States, as the negative effects of the WTO disputes might diminish or even outweigh any positive

Organized Crime, Local Protectionism, and the Trade in Counterfeit Goods in China, 14 CHINA ECON. REV. 473 (2003) (examining how organized crime and the local government’s failure to enforce the law promotes and protects the trade of counterfeit goods).

222. See Dickinson, *supra* note 39 (“No WTO panel is going to tell a country how to organize its criminal system.”).

223. Harris, *supra* note 27, at 177 (internal quotation marks omitted).

224. *Id.* at 179-86.

225. Dickinson, *supra* note 39.

226. Dickinson, *supra* note 39. He saw that the two WTO disputes both served the purpose of opening China market. *Id.*

227. See *supra* notes 120-28 and accompanying text (discussing the Panel’s decision regarding the United States’ burden and evidence of China’s criminal measures thresholds).

progress.

1. Legal and Economic Effects

Usually, a WTO action is initiated because the complainant has suffered economic damages. It seems obvious that the United States brought these two actions to protect its economic interest. However, while the two rulings provide the United States some comfort in the sense that it “prevailed” in the majority of its claims, they can hardly give U.S. businesses any immediate relief for their grievances in China.

a. IPR Protection Dispute

i. Copyright Law

The WTO ruling requires China to implement measures to provide adequate copyright protection to the works for which government approval is pending or denied.²²⁸ For pending works that are ultimately authorized for publication and release in China’s market, the measures appear to protect the market from pirated works. However, such a scenario is oversimplified and inaccurate. As the United States admitted, “China’s framework of laws, regulations and implementing rules remains largely satisfactory in most respects.”²²⁹ Yet, infringement problems have not decreased; instead, the problems have become more serious.²³⁰ The real solution lies in enhancing the ability to enforce current measures.²³¹ The expectation that a change or changes in Article 4 of the Copyright Law of China would, alone, significantly improve the protection of works that are unprotected under the current regime is thus naïve and inaccurate.

ii. Custom Measures

To comply with the WTO ruling, China will also need to adopt new measures to dispose of confiscated IP-infringing goods. The Panel’s decision is very narrow on this claim, stating that only the auction of the goods is inconsistent with China’s obligations.²³² The ruling has little significance in reality. As China claimed, only two percent of the confiscated goods were auctioned.²³³

More importantly, the corruption that permeates the Chinese Customs system

228. *See supra* notes 97-109 and accompanying text (discussing the WTO’s findings and rulings on China’s copyright law); *see also* The IPR Report, *supra* note 16, ¶¶ 8.1, 8.4 (reviewing the Panel’s conclusions and recommending that “China bring the Copyright Law and the Customs measures into conformity with its obligations under the TRIPS Agreement”).

229. USTR 2008 REPORT, *supra* note 14, at 13.

230. *See supra* Part II.A.1 (discussing the continuing problem of piracy and copyright infringement in China regardless of the improved IPR protections).

231. *See supra* notes 216-18 and accompanying text.

232. *See supra* notes 110-13 and accompanying text (discussing China’s customs measures of seizing and disposing of infringing goods).

233. The IPR Report, *supra* note 16, ¶ 7.349.

will render any implementation of new measures futile. In China, the Customs Commission and the local customs districts, like a lot of government agencies, are not subject to rigorous reviews and checks, while the directors have almost unlimited power to conduct governmental functions. High-ranking customs officials therefore belong to a “high risk population” that is extremely vulnerable to corruption.²³⁴ Given the potentially high profit associated with the illegal disposal of the confiscated goods, it may be practically impossible to stop the infringing products from reentering the stream of commerce.

b. Market Access

China must also allow foreign invested enterprises to engage in the importation of copyright-intensive products, including books, movies, software, etc., without imposing extra burden on them compared to the products of Chinese companies, state or privately owned. To fulfill its obligations under the WTO decision, China should also remove the ban preventing foreign enterprises from engaging in all levels of distribution services as well as the capital limitations and other requirements placed on foreign invested enterprises. Further, China should remove any additional requirements on foreign invested companies related to the sub-distribution of imported reading-material.

This ruling was hailed by the U.S. media as a “major victory,” though with warnings that it may not immediately change the situation of copyright-intensive products in China.²³⁵ The economic benefit of this ruling is based on U.S. companies’ opportunity to be involved in the importation and distribution channels of copyright-intensive products. Theoretically, U.S. companies also will be able to sell to Chinese customers more directly, so the ruling could significantly increase the U.S. share of this market. Interestingly, a Chinese lawyer expressed concern that Chinese private-owned companies would face a competitive disadvantage from both state-owned enterprises and foreign-invested enterprises if the measures are only designed to give “foreign” companies equally favorable treatment.²³⁶

Despite the potential noted above, this ruling will probably not have any significant impact on the U.S. copyright-intensive products’ access to Chinese market. First, the content review requirement has not been eliminated. Second, the import limitation of twenty films remains in effect. Because these restrictions remain in place, the United States failed to effectively expand the China market for copyright-intensive products.

The United States essentially conceded that China has the authority to review

234. Wu Mo Xue Lang, *High Risk Population: Customs Directors* (Nov. 29, 2006), <http://jiangzhouhao.fyfz.cn/blog/jiangzhouhao/index.aspx?blogid=138585>.

235. Keith Bradsher, *WTO Rules Against China’s Limits on Media Imports*, N.Y. TIMES, Aug. 12, 2009, <http://www.nytimes.com/2009/08/13/business/global/13trade.htm>; Edward Cody & Annys Shin, *WTO Ruling Could Further Open China to U.S. Entertainment Industry*, WASH. POST, Aug. 13, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/12/AR2009081202971.html>.

236. Guofu Yu, *The Predicament of Chinese Private-owned Enterprises after the WTO DS 363 Decision* (Aug. 14, 2009), <http://yuguofu.blogspot.com/2009/08/wto-ds363.html>.

the content before granting the importation license without violating any of its WTO obligations.²³⁷ With content review in effect, the ruling did not significantly change the scope of the importable materials. As suggested by a Chinese publication expert, the WTO ruling will not create any significant change in the publication market because foreign publications can still only be distributed in China if there are no ideological conflicts, just as before the WTO dispute.²³⁸ It appears that the United States attempted to attack the content review measure indirectly in its challenge to the discriminatory measure against imported sound recording without success, as the Panel rejected that U.S. claim.²³⁹ By upholding China's right to exclude materials based on content, the Court has allowed China to retain the right to block U.S. imports from its markets without violating its WTO obligations.

Content review can also be used as a tool by the Chinese government to negate the impact of the ruling on like treatment. Under the current regime, state-owned enterprises have to apply for approval to import, or the regulatory agency appoints state-owned enterprises to import.²⁴⁰ Even though foreign invested enterprise and privately owned Chinese companies obtain access to the market, they can be easily disadvantaged by the content review process, in which the state-owned enterprises could obtain expeditious inter- or intra- agency approval more easily.²⁴¹

Because of the importance of content review measures, China claimed victory in IPR protection dispute when the rulings left the content review intact.²⁴² Interestingly, the United States did not appear bothered by the Panel's statement in that decision; however, as Terry Miller, the director of the Center for International Trade and Economics at the Heritage Foundation, pointed out after the Market Access dispute, the United States regarded China's content review as a major

237. The Market Access Report, *supra* note 16, ¶ 4.210, at 33. The United States did not challenge the content review requirement. It only argued that it is not "necessary" to limit the importation entities to achieve the goal of content review. *Id.* ¶ 4.211, at 33. To support its argument, the United States even suggested other means to conduct content review without restriction on the right to engage in importation. *See id.* ¶¶ 7.886-7.887, at 305.

238. Xiaofan Wang & Huan Ma, *A Temporary Lose in WTO Dispute: The Wolf is Coming on Cultural Products Market*, TIME-WEEKLY, Aug. 19, 2009, <http://business.sohu.com/20090820/n266115315.shtml>.

239. *See supra* notes 149, 198 and accompanying text.

240. The Market Access Report, *supra* note 16, ¶ 4.5 at 6.

241. For example, as noticed by the United States, some Chinese importers and distributors have 'in house' examination process. *See* The Market Access Report, *supra* note 16, ¶ 7.1614 at 442.

242. *Sino-U.S. IPR Dispute has no Impact on Content Review Authority of China*, THE STATE INTELLECTUAL PROPERTY OFFICE OF CHINA (March 24, 2009), http://www.sipo.gov.cn/sipo2008/mtjj/2009/200903/t20090324_447308.html. *See also supra* notes 70-71, 92-108. The Panel reached the conclusion that the Copyright Law of China is inconsistent with China's WTO obligation, but the Panel did not challenge the content review itself.

hurdle to its market and the major drawback of this otherwise “major victory.”²⁴³

The limitation of importing only twenty movies per year is the most protective measure China adopted for the movie industry.²⁴⁴ A reporter suggested that the unchanged quota is the major reason that U.S. companies should not be optimistic about their sales in China after the WTO ruling, but in addition it did not truly matter since Chinese consumers are used to cheaper pirated products.²⁴⁵ However, given the recent huge success of blockbuster movies in China,²⁴⁶ an open Chinese movie market would be extremely valuable to Hollywood.

2. Non-Legal, Non-Economic Effects

a. *The Fulfillment of U.S. Objectives*

Nominally, the United States appeared to achieve its goal in bringing the WTO actions.²⁴⁷ U.S. industries are generally pleased with the WTO decisions.²⁴⁸ Even with the limit on movie importation, Dan Glickman, Chairman of the Motion Picture Association of America, optimistically predicted that in light of the WTO decision, “it’s hard . . . to believe that the import quota, which has been in effect for ten years, will be there in perpetuity with the [Market Access] decision.”²⁴⁹ Although the United States was disappointed that the Panel did not declare that

243. Edward Cody & Annys Shin, *WTO Ruling Could Further Open China to U.S. Entertainment Industry*, WASH. POST, Aug. 13, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/12/AR2009081202971.html>.

244. See Xiaofan Wang & Huan Ma, *supra* note 238.

245. See Bradsher, *supra* note 232. Because Chinese consumers are used to paying much less for DVDs, American movie companies already sell authorized DVDs of their movies for far less in China than in the United States, yet still struggle for buyers. *Id.*

246. See *Avatar*, BOX OFFICE MOJO, <http://boxofficemojo.com/movies/?page=intl&id=avatar.htm> (last visited Feb. 10, 2011); *TRANSFORMERS: REVENGE OF THE FALLEN*, BOX OFFICE MOJO, <http://boxofficemojo.com/movies/?page=intl&id=transformers2.htm> (last visited Feb. 10, 2011). “Avatar” reaped more than 182 million dollars in China, falling second only to Japan which made over 186 million dollars. The reporting data from China, however, was only from 1/2/10 through 3/7/10, while in Japan it spanned almost a full year, from 12/23/09 through 10/24/10. In eight days, the box office take of “Transformers 2” reached more than \$33 million in China. Although the movie collected more than \$44 million in both South Korea and the United Kingdom market, it took more than five months and two months in these two markets, respectively.

247. See *supra* text accompanying notes 201-202.

248. See Press Release, Office of the U.S. Trade Representative, United States Wins WTO Dispute over Deficiencies in China’s Intellectual Property Rights Laws (Jan. 26, 2009), available at <http://www.ustr.gov/about-us/press-office/press-releases/2009/january/united-states-wins-wto-dispute-over-deficiencies-c> [hereinafter Press Release, USTR, United States Wins WTO Dispute] (where Acting U.S. Trade Representative Peter Allgeier referred to the WTO findings as “an important victory”); Press Release, USTR, World Trade Organization Report Upholds U.S. Trade Claims Against China (Aug. 12, 2009), available at <http://www.ustr.gov/about-us/press-office/press-releases/2009/august/world-trade-organization-report-upholds-us-trade-cl> (where U.S. Trade Representative Robert Kirk declared the WTO decision a “significant victory to America’s creative industries”).

249. Bradsher, *supra* note 232.

China's criminal measures were inadequate for IPR protection, then Acting U.S. Trade Representative Peter Allgeier claimed that the IPR Protection decision was "an important victory."²⁵⁰

Another important objective of the United States was to show China its willingness and determination to take WTO action when bilateral negotiations fail to reach a satisfactory result.²⁵¹ In this regard, the U.S. actions have much broader implications outside the IP sector. One obvious example would be the financial services sector, in which U.S. companies have confronted distribution service issues that are very similar to those disputed in Market Access complaint.²⁵² In fact, the United States requested WTO consultation with regard to China's measures affecting financial information service on March 3, 2008, which ultimately resulted in an agreement between the two States.²⁵³ When viewed together, these U.S.-initiated disputes seem to be calculated steps in a master plan to further open Chinese markets in all sectors, especially in tertiary industry.²⁵⁴

b. Negative Consequences

Whatever benefits the WTO dispute settlements can bring to the United States, the potential negative reactions from China cannot be ignored. The need to initiate the WTO actions is partially premised on the assumption that such actions would facilitate China's compliance with its WTO commitment. If China is meeting its WTO obligations without such actions, the WTO disputes may be counterproductive, actually delaying China's efforts to comply.

i. China's Compliance with WTO obligations

Chinese scholars generally believe that the Chinese legal regime has "not only [met], but also, on some points, exceed[ed] the standards of the international treaties[.]" while admitting that there are problems with enforcement.²⁵⁵ Such a belief is also supported by scholars from other countries. For example, an Israel commentator expressed the view that "overall China is meeting its WTO commitments" after carefully examining the USTR's 2005 report to Congress on

250. Press Release, USTR, United States Wins WTO Dispute, *supra* note 248.

251. USTR 2008 REPORT, *supra* note 14, at 5.

252. *Id.* at 81-83.

253. *Dispute Settlement: Dispute DS 373, China — Measures Affecting Financial Information Services and Foreign Financial Information Suppliers*, WTO, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds373_e.htm (describing the key facts of the complaint and its settlement).

254. *Tertiary Industry*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/287256/industry/3507/Tertiary-industry> (last visited Feb. 18, 2010). "This sector, also called service industry, includes industries that, while producing no tangible goods, provide services or intangible gains or generate wealth. In free market and mixed economies this sector generally has a mix of private and government enterprise." *Id.* This sector includes both entertainment and financial services.

255. KONG, *supra* note 3, at 45-48.

China's WTO compliance.²⁵⁶ Admitting the problems in IPR, the commentator considered them "minor."²⁵⁷ Furthermore, even the United States admitted itself that "China has put in place a largely satisfactory framework of laws and regulations aimed at protecting the intellectual property rights of domestic and foreign right holders."²⁵⁸

Given the progress made by China, it may not have been necessary for the United States to resort to WTO dispute settlement mechanism because the regime changes may be achieved by other means without significant delay.²⁵⁹ This observation seems to reinforce the notion that the United States initiated these actions because of domestic pressures.²⁶⁰

ii. China's Preference for Negotiation and Diplomacy

The WTO disputes may negatively affect China's previous cooperation with U.S. attempts to improve IPR protection and market access in China. China saw the actions as "smokeless wars initiated by the United States."²⁶¹ In April 2007, Yi Wu, then Chinese vice premier in charge of IP affairs, was outraged when she was informed that the United States had brought two WTO actions in the same day.²⁶² She accused the United States of ignoring the "enormous improvement" the Chinese government made during the last few years.²⁶³ While the Chinese traditionally hate litigation, Madame Wu indicated that China would "fight to the end."²⁶⁴ Meanwhile, Madame Wu urged that governments *shall* establish the notion that the communication is better than confrontation and cooperation is better than coercion.²⁶⁵

The preference for communication and cooperation was shared by WTO and U.S. diplomats.²⁶⁶ The USTR expressed that the United States is "committed to working constructively with China" on IPR issues.²⁶⁷ Only when bilateral

256. Marcia Don Harpaz, *China and the WTO: New Kid on the Developing Bloc?*, HEBREW UNIV. OF JERUSALEM INT'L L. FORUM, 46 n. 171, Feb. 2007, available at <http://www.ssrn.com/abstractid=961768>.

257. *Id.*

258. USTR 2008 REPORT, *supra* note 14, at 4.

259. *See infra* Part IV. C.

260. *See supra* text accompanying notes 220-24.

261. SIPO: A Smokeless War, http://www.sipo.gov.cn/sipo2008/yl/2009/200909/t20090917_475776.html (last visited Feb. 18, 2010).

262. People's Web, Yi Wu's Response to Sino-U.S. IP Dispute: Fight to the End, <http://finance.people.com.cn/GB/42774/5660896.html> (last visited Feb. 18, 2010).

263. *Id.*

264. *Id.* Madame Wu urged Chinese to discard the traditional teaching against litigation as expressed in an idiom cited by her: "A man would rather die of hunger than beg; a man would rather die of wrong than litigate." *Id.*

265. *Id.*

266. *See Harris, supra* note 27, at 175 (U.S. Treasury Secretary Henry Paulson explained that "[t]hrough candid discussions, we will ease, rather than increase, tensions and get to solutions and actions.").

267. USTR 2008 REPORT, *supra* note 14, at 5.

discussion fails to resolve key issues will the United States be “prepared” to take further actions, of which WTO dispute settlement is but one option.²⁶⁸ It has been suggested that “[t]he [U.S.] complaint[s] could harden stances on both sides making resolution problematic,” even though both China and the United States are taking “smaller, deliberate steps forward together to create momentum for greater change.”²⁶⁹

iii. China’s Popular Resistance

The U.S. actions may also hurt the Chinese government’s efforts to push IPR protection and open markets in China, which have received considerable resistance. Commentators generally believe that the Chinese Central Government is sincerely trying to implement the measures needed to improve IPR protection and enforcement, but that these efforts have met considerable resistance from both local governments and the people at large.²⁷⁰ Among other reasons, Chinese citizens have a deep distrust of IPR advocates from the United States, as a reaction to the “humiliation” suffered by China under Western imperialism from the mid-nineteenth to the mid-twentieth century.²⁷¹ Some Chinese commentators took the view that the WTO is a tool for the Western “hegemonies” to conduct “culture invasion” into China,²⁷² a notion reinforced by the U.S. “victory” in the WTO forum. Even in the context of inadequate IPR protections in China, some commentators cautioned against “over-protection” of IPR as a form of “hegemony.”²⁷³

To be sure, such criticisms are not unique to China. In expressing concern over the shrinking of cultural diversity, a U.S. scholar identified the WTO as a major institutional player in “‘hegemonic’ globalization.”²⁷⁴ The International Federation of Library Associations and Institutions, a non-governmental organization, also cautioned against the over-protection of copyright as it “could

268. *Id.*

269. Harris, *supra* note 27, at 175-76 (quoting Secretary Paulson, during a remark at the Heritage Foundation Lee Lecture: China and the Strategic Economic Dialogue (June 5, 2007)).

270. *See generally* Harris, *supra* note 27, at 168-70; Massey, *supra* note 48.

271. *See* Wei Shi, *Incurable or Remediable? Clues to Undoing the Gordian Knot Tied by Intellectual Property Rights Enforcement in China*, 30 U. PA. J. INT’L L. 541, 546-47 (2008).

272. *See* Bin He & Ruifang Qin, *Western Cultural Hegemony under WTO and the Challenge and Response to Collegiate Moral Education in China*, LIAONING STUDENT ONLINE ALLIANCE, http://www.stuln.com/shidejianshe/shidewenxian/2008-7-17/Article_16339.shtml (last visited Apr. 8, 2011). *See also* KONG, *supra* note 3, at 182, 195 n.13.

273. *See* Dingding Wang, *Intellectual Property is not Hegemony, Over-Protection Should Be Called “Hegemony”*, CHINA CULTURAL MARKET, MINISTRY OF CULTURE (April 1, 2005), <http://www.ccm.gov.cn/show.php?aid=30488&cid=30> (arguing that excessive protection of intellectual property rights equates to hegemony).

274. ANTHONY J. MARSELLA, “HEGEMONIC” GLOBALIZATION AND CULTURAL DIVERSITY: THE RISKS OF GLOBAL MONOCULTURALISM, AUSTL. MOSAIC, FALL 2005, AT 15, AVAILABLE AT <HTTP://WWW.HUMILIATIONSTUDIES.ORG/DOCUMENTS/MARSELLAHEGEMONICGLOBALIZATIONAUSTRALIANMOSAIC.PDF>.

threaten democratic traditions and impact on social justice principles by unreasonably restricting access to information and knowledge.²⁷⁵ However, it is probably a uniquely Chinese phenomenon that these two ideas are combined with anti-American sentiment²⁷⁶ to form strong resistance to government IPR enforcement and reform.

In sum, the WTO rulings provide the U.S. government some relief to ease domestic pressure. However, they achieved little, if anything, in the way of facilitating IPR regime change and market access in China. The negative consequences they aroused in China will prove to be costly to the United States. Based on such concerns, some have noted that it was “premature” for the United States to bring such WTO actions.²⁷⁷

C. An Optimistic Outlook

Although it appears that the WTO disputes have not actually done much to resolve the IPR problems in China in the short term, the long term outlook is more optimistic. Despite U.S. dissatisfaction, China has actually improved protections significantly in a relatively short time. The need to be competitive provides sufficient incentive for China to continue that trend. Finally, just as in other countries, China’s economic development will ultimately reach the stage where IPR enforcement is the norm.

It should not be forgotten that IPR is in its infancy in China. It was not until the 1980s that China started to enact IPR laws and begin to establish a legal framework for this area.²⁷⁸ In contrast, the United States has been protecting IPR since the colonial era, as evidenced by the U.S. Constitution.²⁷⁹ In a period of less than three decades, a relatively comprehensive system has been established within China. More and more foreign enterprises, as well as Chinese enterprises, are taking action in court to protect their IPR, with high profile success against

275. COMM. ON COPYRIGHT AND OTHER LEGAL MATTERS, *THE IFLA POSITION ON COPYRIGHT IN THE DIGITAL ENVIRONMENT*, Int’l Fed’n of Libr. Ass’ns & Inst., [HTTP://ARCHIVE.IFLA.ORG/III/CLM/P1/POS-DIG.HTM](http://archive.ifla.org/III/CLM/P1/POS-DIG.HTM) (LAST REVISED APR. 5, 2005).

276. *See An Analysis of the Anti-American Sentiments Among Some Chinese Internet Users*, U.S.-CHINA ECON. & SEC. REV. COMMISSION, http://www.uscc.gov/researchpapers/2000_2003/reports/sentim.htm (last visited Apr. 8, 2011) (detailing explanations of why some Chinese blog users cheered after the American space shuttle, Columbia, exploded, not because they were happy about human suffering, but because the Chinese government only allows media outlets to tell one side of the story of the relationship between the US and China, leading many Chinese to only see the bad side of this relationship).

277. Konstantina K. Athanasakou, *China IPR Enforcement: Hard as Steel or Soft as Tofu? Bringing the Question to the WTO under TRIPS*, 39 GEO. J. INT’L L. 217, 243-44 (2007); Harris, *supra* note 27, at 169-71; David Teece, *The World Should be Patient to China*, http://www.gov.cn/wszb/zhibo48/content_593633.htm (last visited Apr. 8, 2011).

278. *See* JIANQIANG NIE, ENFORCEMENT OF INTELLECTUAL PROPERTY IN CHINA 181-89 (2006) (providing an overview of the Post-Mao Era of intellectual property rights in China).

279. *See* U.S. CONST. art. I, § 8, cl. 8. (“The Congress shall have power...[to] promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”).

Chinese infringers.²⁸⁰ Through such litigation, courts have developed case law to interpret the rules and set out precedents.²⁸¹ If the trend continues, people have reason to be optimistic about their IPR future in China.

Because more Chinese enterprises are realizing that IP is the most important power underlying competitiveness in the current economy, they are more willing to participate in enforcing their own IPR. For example, in July 2005, a score of publication presses, law firms, and writers organized the Chinese Online Anti-Piracy Union.²⁸² The Union has successfully litigated against IP infringers, some of who are big names in the Chinese internet community.²⁸³ More importantly, these efforts by Chinese enterprises are changing the general attitude of the Chinese people towards IPR. As a result, they are beginning to realize that inadequate IPR protection will eventually hurt the long-term development of China.²⁸⁴

The economic development in China will also drive IPR protection and enforcement, as well as market access for IP-intensive products. Scholars have argued that the level of IPR protection that the United States desires may not yet be appropriate in China, given its current economic development status.²⁸⁵ Only after a country has a sufficiently advanced economy, in which businesses maintain competitive advantages through world-class innovations, can IPR protection become a priority.²⁸⁶ China has not reached this point in economic development and needs more time to progress to this stage.²⁸⁷

For this reason, the United States should be patient, as this time may come earlier than expected. China is undergoing an IP “revolution” and will eventually surpass the United States to become the world’s largest IP market.²⁸⁸ The landscape will transform completely in the near future. Meanwhile, the economic development will naturally create demands for foreign IP-intensive products, as evidenced by the huge success of Hollywood movies in the Chinese market and,

280. See, e.g., ORDISH & ADCOCK, *supra* note 1, at 182-85 and accompanying figures and tables. See also Chris Buckley, *China Jails Four for “Tomato Garden” Microsoft Piracy*, REUTERS, Aug. 20, 2009, <http://www.reuters.com/article/idUSTRE57K06620090821>. Microsoft prevailed against a bootleg version of Microsoft’s Windows XP program in what has been called the “biggest software piracy case.” *Id.*

281. See, e.g., ORDISH & ADCOCK, *supra* note 1, at 183. (discussing a case Starbucks won in Shanghai against Xingbake for trademark infringement and unfair competition).

282. Introduction to the Chinese Online Anti-Piracy Union, CHINESE ONLINE ANTI-PIRACY UNION, http://www.coapu.org/coapu/page/intro_coapu.htm (last visited Apr. 9, 2011).

283. COAPU’s Successful Cases, CHINESE ONLINE ANTI-PIRACY UNION, <http://www.coapu.org/coapu/research/succeed/index.htm> (last visited, Apr. 8, 2011).

284. See, e.g., Wang Shichuan, *Who is the Biggest Victim of Piracy?*, PEOPLE’S DAILY ONLINE, March 29, 2006, <http://opinion.people.com.cn/GB/51863/4248236.html> (last visited Feb. 19, 2010). The author agreed with Carlos Gutierrez, then U.S. Secretary of Commerce, that, eventually, China itself would suffer from piracy. *Id.*

285. See Harris, *supra* note 27, at 171.

286. *Id.*

287. *Id.* at 172.

288. Gary Zhang, *Patent Revolution*, FORBES, Sept. 28, 2009, <http://www.forbes.com/2009/09/25/patents-china-counterfeit-china-leadership-zhang.html>.

ironically, the existence of the piracy market itself.²⁸⁹ Even a totalitarian regime like the Chinese government may ultimately have to yield to such demand and allow greater market access.²⁹⁰

D. United States Strategies

The sheer size of China's market, the intrinsic conflicts in China, and the huge difference in culture, economy and ideology between the United States and China make it "mission impossible" to accurately predict and prescribe solutions to China's IPR protection. Undoubtedly, the United States will employ all means necessary to protect its interests in China and worldwide, including the WTO dispute settlement mechanism.²⁹¹ But the United States should also encourage U.S. enterprises to take private actions in China. On the governmental level, engagement and communication through diplomatic means is probably the best option for the United States, which is also true with respect to the broader U.S.-China relationship. The WTO dispute settlement, or any other means of "confrontational nature," should be used only sparingly.

In fact, private enterprises have already actively engaged in private actions in China, including judicial and administrative actions, and they have been fairly successful in securing favorable judgments. These cases are usually high profile because big names are involved.²⁹² One benefit of high profile private actions is that they can effectively educate ordinary Chinese citizens about the concept of IPR and the importance of IPR to an enterprise. Because there is no foreign government involvement in these private actions, Chinese people will feel less offended. Furthermore, foreign enterprises can also play an active role in pushing China's policy changes.²⁹³

As to the U.S. government, the discussion in this comment has indicated that

289. See Alexandri, *supra* note 34 ("[W]hen Hollywood releases don't appear in Chinese theaters, their absence creates demand for counterfeits...[C]ounterfeiting of motion pictures is inevitable.").

290. A recent example is illustrative as to the Chinese government's reaction to pressures. In 2009, the Chinese government announced that it would require all the computers pre-install a filtering software, "Green Dam," effective from July 1, 2009. Facing the protests from the internet community in China, private enterprises, and foreign governments, Chinese government withdrew the extremely unpopular plan at last minute. See Phelim Kine, Op-Ed., *Leaning on the Dragon*, N.Y. TIMES, July 6, 2009, <http://www.nytimes.com/2009/07/07/opinion/07iht-edkine.html?hpw>.

291. See generally USTR 2008 REPORT, *supra* note 14, at 7 ("[T]he United States will continue to pursue vigorous bilateral engagement with China in order to obtain progress on its outstanding concerns. The United States also will not hesitate to take other actions to resolve its concerns if dialogue fails, including WTO dispute settlement, where appropriate.").

292. See ORDISH & ADCOCK, *supra* note 1, at 183 (discussing a case Starbucks won in Shanghai against Xingbake for trademark infringement and unfair competition). See also China IPR Protection Web, *Foreign Enterprises Prevailed in Sixty Percent of the IPR Actions Involving Foreign Parties*, Jan. 8, 2007, <http://www.ipr.gov.cn/hwwq/sdfx/459093.shtml>. The "big names" include Starbucks, Microsoft and other high-profile companies.

293. See Kline, *supra* note 290. One important reason that Chinese government gave up the "Green Dam" plan is the lobby of private enterprises, including domestic and foreign ones.

confrontation is generally not a suitable approach to address the issues in the U.S.-China IPR disputes. Of course, it would be naïve to avoid confrontational mechanisms in all circumstances. After all, whether to take certain actions or not should be based on cost-benefit analysis. In this respect, the USTR, which has the expertise and knowledge on the trade issues, should educate and persuade Congress and the industry that any confrontational means should be the last resort and be used sparingly.

V. CONCLUSION

In the two IPR related WTO complaints against China, the IPR Protection and Market Access disputes, the United States prevailed on the majority of its claims. However, the WTO decisions will not effectively change China's substantive IPR protection regime, nor will they expand access to the Chinese market for U.S. copyright-intensive products. The United States did demonstrate its determination to have China comply with its WTO obligation. However, this approach may actually hurt the cooperation that has occurred between these two countries. In this sense, the success of the United States is limited. However, the outlook for IP protection and market access in China is optimistic, as a necessary component of its inevitable economic development. For these reasons, the United States should only use the WTO dispute mechanism sparingly, and instead rely on both private enterprise activities and governmental diplomacy and engagement as the main weapons in its fight against Chinese piracy. Ultimately, this strategy will allow the United States to close the door on Chinese pirates, while at the same time leaving its cooperative relationship with China intact.