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The TRIPS Enforcement Dispute

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I. INTRODUCTION

2010 marks the fifteenth anniversary of the entering into force of the Agreement on Trade-Related Aspects of Intellectual Property Rights[1] (TRIPS Agreement) of the World Trade Organization (WTO). When the Agreement was drafted, commentators quickly extolled the unprecedented benefits of having a set of multilateral enforcement norms built into the international intellectual property regime.[2] For

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US–China Panel Report: Findings and Implications for the Future of IPRs Enforcement" in Geneva organized by UNCTAD and the International Centre for Trade and Sustainable Development (ICTSD), the "International Dialogue on WTO Dispute Settlement Mechanism" in Beijing organized by ICTSD, the 16th, 17th, and 18th Fordham Annual International Intellectual Property and Policy Conferences at Fordham University School of Law, two Distinguished Professor Presentations at John Marshall Law School, the "IP Enforcement and Awareness Raising in Asia" Conference at the Centre for Comparative Law and Development Studies in Asia and the Pacific in the University of Wollongong, the Regional Capacity Building in Intellectual Property Law Scholarship Programme in the Faculty of Law at the National University of Singapore, the 2008 Scholarly Symposia Series at the University of Dayton School of Law, the "Intellectual Property Developments in China: Global Challenge, Local Voices" Conference at Drake University Law School, the 12th Overseas Young Chinese Forum Annual Meeting organized by the University of Chicago Center for East Asian Studies, the "Legal Issues in Supply Chain Management" Conference at Vanderbilt University Law School, the "Beyond TRIPS: The Current Push for Greater International Enforcement of Intellectual Property" Conference at American University Washington College of Law, the 2009 International Law Weekend in New York, the International Law Weekend—West at Willamette University College of Law, the Roundtable on Intellectual Property, Media and Competition Law in the Faculty of Law at the University of Hong Kong, the Workshop on "Protecting and Enforcing Your IP rights in China: Practical Solutions from the Experts" organized by the European Chamber of Commerce, the "Doing Business in China: Resolving Today's Challenges" Workshop at PLI New York City Center, and a lecture at Fudan University School of Law. The Author would like to thank Christoph Antons, Margaret Blair, Michael Carroll, Anne Cheung, John Du, Sean Flynn, Richard Gruner, Hugh Hansen, Christopher Heath, Paul Heald, Kelly Henrici, Anselm Kamperman Sanders, Ahmed Abdel Latif, Liu Sida, James Nafziger, Ng-Loy Wee Loon, Pedro Roffe, and Sun Su for their kind invitations and hospitality and to the participants of these events, in particular Christoph Antons, James Bacchus, Mark Cohen, Victoria Espinel, Daniel Gervais, Jennifer Groves, Richard Gruner, Paul Heald, Justin Hughes, Patricia Judd, Atul Kaushik, the late Sir Hugh Laddie, Daryl Lim, Doris Long, Li Mingde, Li Xuan, Stanford McCoy, Wolf Meier-Ewert, Sisule Musungu, Ng-Loy Wee Loon, Joost Pauwelyn, Louise Pentland, Eric Smith, Sun Haochen, Wang Qian, Xue Hong, Geoffrey Yu, and Zhang Naigen, for their valuable comments, suggestions, and helpful exchanges. He is also grateful to Elaine Newby, Lindsey Purdy, and Megan Snyder for excellent research and editorial assistance.

1. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement].
2. *See* Panel Report, *United States—Section 211 Omnibus Appropriations Act of 1998*, ¶ 8.97, WT/DS176/R (Aug. 6, 2001) [hereinafter Section 211 Panel Report] ("The inclusion of [Part III] on enforcement in the TRIPS Agreement was one of

many, the introduction of the mandatory WTO dispute settlement process was a, if not the, crowning achievement of the Uruguay Round of Trade Negotiations (Uruguay Round).[3]

Notwithstanding these high praises, the purported major strength of the TRIPS Agreement, oxymoronically, turns out to be also a major weakness. Unlike the substantive provisions in the Paris Convention for the Protection of Industrial Property[4] and the Berne Convention for the Protection of Literary and Artistic Works[5] (Berne Convention), the two century-old international intellectual property agreements that have now been incorporated into the TRIPS Agreement,[6] the TRIPS enforcement provisions were rather new and primitive. As Je-

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the major accomplishments of the Uruguay Round negotiations as it expanded the scope of enforcement aspect of intellectual property rights. Prior to the TRIPS Agreement, provisions related to enforcement were limited to general obligations to provide legal remedies and seizure of infringing goods."); DANIEL GERVAIS, THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS 440 (3d ed. 2008) ("The enforcement section of the TRIPS Agreement is clearly one of the major achievements of the negotiation."); UNCTAD-ICTSD, RESOURCE BOOK ON TRIPS AND DEVELOPMENT 629 (2005) [hereinafter TRIPS RESOURCE BOOK] ("The introduction of a detailed set of enforcement rules as part of TRIPS has been . . . one of the major innovations of this Agreement."); Carlos M. Correa, *The Push for Stronger Enforcement Rules: Implications for Developing Countries*, *in* INT'L CTR. FOR TRADE & SUSTAINABLE DEV., ISSUE PAPER NO. 22, THE GLOBAL DEBATE ON THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS AND DEVELOPING COUNTRIES 27, 34 (2009) [hereinafter GLOBAL DEBATE ON THE ENFORCEMENT] ("The TRIPS Agreement is the first international treaty on IPRs that has included specific norms on the enforcement of IPRs." (footnote omitted)); Adrian Otten & Hannu Wager, *Compliance with TRIPS: The Emerging World View*, 29 VAND. J. TRANSNAT'L L. 391, 403 (1996) ("[The enforcement] rules constitute the first time in any area of international law that such rules on domestic enforcement procedures and remedies have been negotiated."); Peter K. Yu, *Currents and Crosscurrents in the International Intellectual Property Regime*, 38 LOY. L.A. L. REV. 323, 366 (2004) [hereinafter Yu, *Currents and Crosscurrents*] ("Part III of the TRIPS Agreement delineated international standards for the enforcement of intellectual property rights for the first time, including civil, administrative, and criminal procedures and remedies and measures related to border control.").

3. *See* William J. Davey, *The WTO Dispute Settlement System: The First Ten Years*, 8 J. INT'L ECON. L. 17, 32 (2005) [hereinafter Davey, *WTO Dispute Settlement System*] ("Dispute settlement is one of the great successes of the WTO."); Rochelle Cooper Dreyfuss & Andreas F. Lowenfeld, *Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together*, 37 VA. J. INT'L L. 275, 275 (1997) (noting that the two achievements of the Uruguay Round are, as the title suggests, "Putting TRIPS and Dispute Settlement Together"); Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75, 149–50 (2000) ("One of the most celebrated accomplishments of the WTO system is the dispute resolution mechanism which adds legitimacy to the overall design of the new trading system." (footnote omitted)).
4. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, *revised at Stockholm* July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305.
5. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *revised at Paris* July 24, 1971, 828 U.N.T.S. 221 [hereinafter Berne Convention].
6. *See* TRIPS Agreement arts. 2, 9.

rome Reichman and David Lange observed, the enforcement procedures "on closer inspection appear to constitute a set of truly minimum standards of due process on which future legislation will have to build."[7] It is small wonder that Professors Reichman and Lange have considered Part III of the Agreement its "Achilles' heel."[8]

After more than a decade of implementation, the effectiveness of the enforcement provisions in the TRIPS Agreement was finally called into question before the WTO Dispute Settlement Body (DSB). In January 2009, the DSB released an important panel report on the U.S.–China dispute over the protection and enforcement of intellectual property rights under the TRIPS Agreement.[9] In this report, a WTO panel, for the first time, focused primarily on the interpretation and implementation of the TRIPS enforcement provisions.[10] In addition to examining in great detail and depth the obligations under Articles 41,[11] 46,[12] 59,[13] and 61[14] of the TRIPS Agreement, the panel also briefly explored the implications of Articles 1.1[15] and 41.5,[16] the two provisions that are highly important to less developed countries—which include, in WTO parlance, both developing and least developed countries.

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7. J.H. Reichman & David Lange, *Bargaining Around the TRIPS Agreement: The Case for Ongoing Public-Private Initiatives to Facilitate Worldwide Intellectual Property Transactions*, 9 DUKE J. COMP. & INT'L L. 11, 34 (1998).
8. *Id.* at 34–40 (explaining why the enforcement provisions are the "Achilles' heel of the TRIPS Agreement"); *accord* Peter K. Yu, *TRIPS and Its Achilles' Heel*, 18 J. INTELL. PROP. L. (forthcoming 2011) [hereinafter Yu, *TRIPS and Its Achilles' Heel*] (same). As Professors Reichman and Lange observed, "[T]he enforcement provisions are crafted as broad legal standards, rather than as narrow rules, and their inherent ambiguity will make it harder for mediators or dispute-settlement panels to pin down clear-cut violations of international law." Reichman & Lange, *supra* note 7, at 35. They further predicted that "the level of enforcement under the TRIPS Agreement will greatly disappoint rightsholders in the developed countries, and that recourse to coercive measures will not appreciably improve the situation in the short and medium terms." *Id.* at 38–39.
9. Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R (Jan. 26, 2009) [hereinafter TRIPS Enforcement Panel Report].
10. This panel report, however, is not the first one involving a TRIPS provision concerning the enforcement of intellectual property rights. In *United States—Section 211 Omnibus Appropriations Act of 1998*, the WTO panel and subsequently the Appellate Body examined Section 211 of the U.S. Omnibus Appropriations Act of 1998 in relation to Article 42 of the TRIPS Agreement. Section 211 Panel Report, *supra* note 2, ¶¶ 8.92–.102; Appellate Body Report, *United States—Section 211 Omnibus Appropriations Act of 1998*, ¶¶ 203–32, WT/DS176/AB/R (Jan. 2, 2002) [hereinafter Section 211 Appellate Body Report].
11. *See* TRIPS Enforcement Panel Report, *supra* note 9, ¶¶ 7.161–.181, 7.676–.680.
12. *See id.* ¶¶ 7.255–.285, 7.356–.394.
13. *See id.* ¶¶ 7.197–.394.
14. *See id.* ¶¶ 7.182–.185, 7.480–.675.
15. *See id.* ¶¶ 7.198–.199, 7.511–.513.
16. *See id.* ¶¶ 7.591–.599.

The release of this panel report cannot be timelier for researchers who study closely the international intellectual property regime. In the past few years, developed countries—in particular the United States, the European Union, Japan, and Switzerland—have been actively pushing for the development of new international intellectual property enforcement norms through bilateral, plurilateral, and regional trade agreements.[17] These countries were also the main drivers of the highly controversial Anti-Counterfeiting Trade Agreement (ACTA), which utilized a "country club" approach to strengthen international intellectual property enforcement norms.[18] Commentators have heavily criticized that approach for undermining the integrity of the existing international trading system.[19]

Meanwhile, less developed countries successfully established various development agendas at the WTO, the World Intellectual Property Organization (WIPO), as well as other international fora.[20] At the WTO, for example, the initiation of the Doha Development Round of Trade Negotiations has led to the adoption of the Declaration on the TRIPS Agreement and Public Health[21] (Doha Declaration) and the unprecedented acceptance of a protocol to formally amend the TRIPS Agreement.[22] A few years later, WIPO followed suit by establishing a WIPO Development Agenda,[23] which included the adoption of forty-five recommendations for actions, ranging from technical assistance and capacity building to norm setting and public policy, and from technology transfer to assessment, evaluation, and impact studies.[24]

17. *See* Yu, *Currents and Crosscurrents*, *supra* note 2, at 392–400 (discussing the growing use of bilateral, plurilateral, and regional trade agreements); Peter K. Yu, *Sinic Trade Agreements*, 44 U.C. DAVIS L. REV. (forthcoming 2011) [hereinafter Yu, *Sinic Trade Agreements*] (critically examining the strengths and weaknesses of bilateral and plurilateral trade agreements).

18. For an overview of the many concerns in ACTA, see generally Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA*, 64 SMU L. REV. (forthcoming 2011) [hereinafter Yu, *Six Secret Fears*].

19. *See id.*

20. For a discussion of the development agendas at different international fora, see generally Peter K. Yu, *A Tale of Two Development Agendas*, 35 OHIO N.U. L. REV. 465, 511–40 (2009) [hereinafter Yu, *A Tale of Two Development Agendas*].

21. World Trade Organization, Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2, 41 I.L.M. 755 (2002) [hereinafter Doha Declaration].

22. General Council, *Amendment of the TRIPS Agreement*, WT/L/641 (Dec. 8, 2005), *available at* http://www.wto.org/english/tratop_e/trips_e/wtl641_e.htm; *see also* Peter K. Yu, *The International Enclosure Movement*, 82 IND. L.J. 827, 872–86 (2007) [hereinafter Yu, *The International Enclosure Movement*] (tracing the development of proposed Article 31*bis* of the TRIPS Agreement).

23. World Intellectual Prop. Org. [WIPO], *Proposal to Establish a Development Agenda for WIPO: An Elaboration of Issues Raised in Document WO/GA/31/11*, IIM/1/4 (Apr. 6, 2005), *available at* http://www.wipo.int/edocs/mdocs/mdocs/en/iim_1/iim_1_4.pdf.

24. Press Release, WIPO, Member States Adopt a Development Agenda for WIPO (Oct. 1, 2007), *available at* http://www.wipo.int/pressroom/en/articles/2007/article

Outside the multilateral fora, the WTO panel report also has important ramifications for bilateral or plurilateral state-to-state negotiations—most notably those between China and the United States. Because the lack of intellectual property protection and enforcement has been the subject of perennial disputes between China and the United States since China reopened the country to foreign trade in the late 1970s,[25] the panel report also provides policymakers and commentators with a rare opportunity to fully evaluate the use of the WTO approach to enhance protection and enforcement of intellectual property rights in China. This new approach did not exist before China joined the international trading body in December 2001;[26] at that time, the United States had to rely on threats of trade sanctions, threats of non-renewal of most favored nation status, and opposition to China's entry into the WTO to induce China to strengthen intellectual property protection and enforcement.[27]

This Article provides an in-depth and comprehensive analysis of the WTO panel report on *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*. It focuses on the lessons the WTO panel report has provided to policymakers, commentators, and intellectual property rights holders. It also advances a novel

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_0071.html; *see also* WIPO, *The 45 Adopted Recommendations Under the WIPO Development Agenda*, http://www.wipo.int/ip-development/en/agenda/recommendations.html (last visited Feb. 15, 2011) (listing all the forty-five recommendations). The six different clusters include: (1) technical assistance and capacity building; (2) norm-setting, flexibilities, public policy and public domain; (3) technology transfer, information and communication technologies and access to knowledge; (4) assessment, evaluation and impact studies; (5) institutional matters including mandate and governance; and (6) other issues. *Id.*

25. For discussions of ongoing disputes between China and the United States over the protection and enforcement of intellectual property rights, see generally Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-first Century*, 50 AM. U. L. REV. 131 (2000) [hereinafter Yu, *From Pirates to Partners*]; Peter K. Yu, *From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China*, 55 AM. U. L. REV. 901 (2006) [hereinafter Yu, *From Pirates to Partners II*]; Peter K. Yu, *Intellectual Property, Economic Development, and the China Puzzle*, *in* INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS-PLUS ERA 173 (Daniel J. Gervais ed., 2007) [hereinafter Yu, *The China Puzzle*].

26. On December 11, 2001, China formally became the 143rd member of the WTO. *See generally* Symposium, *China and the WTO: Progress, Perils, and Prospects*, 17 COLUM. J. ASIAN L. 1, 2 (2003) (remarks of the Author) (discussing the ramifications of China's entry into the WTO).

27. *See* Yu, *From Pirates to Partners II*, *supra* note 25, at 903. China's WTO accession, however, has made many of these aggressive measures unavailable to the United States. *See id.* at 904. Instead, the United States now has to rely on the WTO process, which includes good offices, consultations, negotiations, dispute settlement, and arbitration. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes arts. 5–6, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 405–406.

argument that the outcome of the present dispute reflects the common mistakes foreign businesses in China have made. This Article demonstrates that the present panel report is unlikely to result in dramatic improvements in intellectual property protection and enforcement in China. It underscores the importance of this report for not only intellectual property rights holders, but also those who study China and Chinese law as well as those who intend to conduct business in the Middle Kingdom.

Part II of the Article discusses the key arguments made by China and the United States as well as the major findings in the WTO panel report. Part III focuses on the remedial actions China has undertaken in an effort to bring its laws into conformity with the TRIPS Agreement. This Part explores the limitations of the panel report in providing intellectual property rights holders with meaningful protection. Conscious of these limitations, Part IV examines the key benefits of the WTO panel report to the United States, China, and other less developed countries. Part V outlines the many lessons the report has provided for intellectual property rights holders. It concludes with some concrete suggestions on how to revamp the United States' intellectual property enforcement strategy vis-à-vis China.

II. THE DISPUTE

In April 2007, the United States requested consultations with China concerning China's failure to protect and enforce intellectual property rights pursuant to the TRIPS Agreement.[28] As the Office of the United States Trade Representative (USTR) stated in its press release: "Over the past several years China has taken tangible steps to improve IPR protection and enforcement. However, we still see important gaps that need to be addressed. We will pursue this legal dispute in the WTO and will continue to work with China bilaterally on other important IPR issues."[29]

Although the United States framed the complaint as a gap-filling exercise, China had a rather different reaction to the complaint. As the spokesperson of China's permanent mission to the WTO declared:

> For nearly 30 years and particularly since joining the WTO in 2001, China has spared no efforts to improve its IPR legislation, and now the legislation is in full accordance with WTO rules. . . .

28. *See* Request for Consultations by the United States, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/1 (Apr. 16, 2007) [hereinafter TRIPS Enforcement Complaint].

29. Press Release, Office of the U.S. Trade Rep. [USTR], United States Requests WTO Panel in Case Challenging Deficiencies in China's Intellectual Property Rights Laws (Aug. 13, 2007), *available at* http://www.ustr.gov/about-us/press-office/press-releases/archives/2007/august/united-states-requests-wto-panel-case-chal.

> By initiating the case, the United States is actually trying to change the WTO legal structure on IPR protection, with an attempt to impose extra obligations on developing members . . . .[30]

While some U.S. policymakers have argued that the United States should file a WTO complaint over a lack of enforcement of intellectual property rights based on a general impression,[31] the USTR eventually filed a much narrower complaint challenging Chinese intellectual property laws on only an "as such" basis.[32] This complaint focused on four particular issues: (1) the high thresholds for criminal procedures and penalties in the intellectual property area;[33] (2) the failure of the Chinese customs authorities to properly dispose of infringing goods seized at the border;[34] (3) the denial of copyright protection to works that have not been authorized for publication or dissemination within

30. *WTO Panel to Probe U.S.–China Dispute on IPR Protection*, XINHUA NEWS AGENCY, Sept. 25, 2007, http://news.xinhuanet.com/english/2007-09/26/content_6792520.htm.

31. For example, Patrick Mulloy, a commissioner of the U.S.–China Economic and Security Review Commission, declared:

> My thought is that we ought to bring the WTO case the best way we can bring it. We don't care what the multinationals say. Bring the case because it's in the national interest to bring it.
>
> Then if you lose it, and the problem continues, then you got [sic] to say, well, [the TRIPS Agreement] doesn't work, we have to develop other instruments . . . .

Intellectual Property Rights Issues and Imported Counterfeit Goods: Hearing Before the U.S.–China Econ. & Sec. Review Comm'n, 109th Cong. 226 (2006) [hereinafter *U.S.C.C. Hearing*], *available at* http://www.uscc.gov/hearings/2006hearings/transcripts/june7_8/06_06_7_8_trans.pdf (remarks of Patrick A. Mulloy, Comm'r, U.S.–China Econ. & Sec. Review Comm'n).

32. As the Appellate Body declared in *United States—Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*:

> When a measure is challenged "as such", the starting point for an analysis must be the measure on its face. If the meaning and content of the measure are clear on its face, then the consistency of the measure as such can be assessed on that basis alone. If, however, the meaning or content of the measure is not evident on its face, further examination is required.

Appellate Body Report, *United States—Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, ¶ 168, WT/DS244/AB/R (Dec. 15, 2003). *But see* Susy Frankel, *Challenging TRIPS-Plus Agreements: The Potential Utility of Non-Violation Disputes*, 12 J. INT'L ECON. L. 1023, 1059 (2009) ("Given the lack of detail in the enforcement provisions the US argument was really more of a non-violation complaint. The essence of what the USA was really complaining about was that a benefit it expected from the TRIPS Agreement was better levels of enforcement."); Daniel Gervais, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, 103 AM. J. INT'L L. 549, 549 (2009) [hereinafter Gervais, *China—IP Measures*] (noting that the WTO panel's analysis may have "blurred both the traditional distinction between 'as such' and 'as applied' claims and the line separating TRIPS violations from non-violations").

33. *See* TRIPS Enforcement Complaint, *supra* note 28, at 1–2.

34. *See id.* at 3.

China;[35] and (4) the unavailability of criminal procedures and penalties for infringing activities that involved either reproduction or distribution, but not both.[36]

On the same day when the TRIPS enforcement complaint was filed, the United States initiated another complaint over the denial of trading rights and market access for distribution services for publications, sound recordings, and audiovisual entertainment products.[37] Specifically, the complaint stated China's failure to honor the commitments to "fully open the right to trade . . . within three years after accession," as explicitly stated in the Accession Protocol.[38] Although the second complaint was technically different from the TRIPS enforcement complaint, focusing primarily on market access, it served as a strategic reminder of the interrelationship between intellectual property protection and market access.

The United States' decision to simultaneously file the two complaints is understandable. A strong information control policy will result in the reduced competitiveness of U.S. cultural and entertainment products.[39] Because of censorship and distribution restrictions, many American copyrighted products, movies in particular, fail to obtain approval despite their undeniable success in foreign markets.[40] Because rights holders are unable to distribute their products in China, consumers have to resort to other channels of dissemination or settle for goods in the black market.[41] Although these substitutes are often inferior to the genuine products, many consumers do not have counterparts with which to compare or from which to select.[42] As time passes, the Chinese market becomes saturated with unauthorized substitutes.[43] By the time the market barriers are finally removed, foreign rights holders will have great difficulty entering the market.[44]

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35. *See id.* at 3–6.
36. *See id.* at 6.
37. Request for Consultations by the United States, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/1 (Apr. 16, 2007).
38. *Id.* at 2.
39. *See* Peter K. Yu, *Piracy, Prejudice, and Perspectives: Using Shakespeare to Reconfigure the U.S.-China Intellectual Property Debate*, 19 B.U. INT'L. L.J. 1, 31–32 (2001) [hereinafter Yu, *Piracy, Prejudice, and Perspectives*].
40. For discussions of the quota on the importation of foreign movies to China, see generally Mary Lynne Calkins, *Censorship in Chinese Cinema*, 21 HASTINGS COMM. & ENT. L.J. 239, 291–96 (1999); Carl Erik Heiberg, Note, *American Films in China: An Analysis of China's Intellectual Property Record and Reconsideration of Cultural Trade Exceptions Amidst Rampant Piracy*, 15 MINN. J. INT'L L. 219, 233–37 (2006).
41. *See* Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 39, at 31–32.
42. *See id.* at 31.
43. *See id.* at 32.
44. *See id.*

By August 2007, the consultations between the two parties had yet to resolve most of the dispute. The only issue that was resolved concerned a clarification of Article 217 of the Criminal Law through the 2007 Judicial Interpretation on the Issues Concerning the Specific Application of Law in Handling Criminal Cases of Infringement of Intellectual Property Rights (2007 Judicial Interpretation),[45] which permitted the word "and" to be interpreted as "and/or."[46] As a result, the United States requested the establishment of a panel to examine only the three remaining claims.[47]

Because the two parties failed to reach a consensus on how the panel was to be composed, the WTO Director-General named the three panel members pursuant to WTO rules.[48] Serving as chair was Adrian Macey, a New Zealand diplomat who was involved in the General Agreement on Tariffs and Trade (GATT)/WTO negotiations during the Uruguay Round. Rounding out the panel were Marino Porzio, a Chilean lawyer who served as WIPO Deputy Director-General during 1980–1987, and the late Sivakant Tiwari, a Singaporean government attorney who chaired the APEC Intellectual Property Rights Experts' Group.[49] In addition to China and the United States, the dispute involved twelve third parties—namely, Argentina, Australia,

45. Interpretation II of the Supreme People's Court and the Supreme People's Procuratorate of the Issues Concerning the Specific Application of Law in Handling Criminal Cases of Infringement of Intellectual Property Rights (最高人民法院、最高人民检察院关于办理侵犯知识产权刑事案件具体应用法律若干问题的解释) (promulgated by the Supreme People's Court, Apr. 5, 2007, and the Supreme People's Procuratorate, Apr. 5, 2007, effective on Apr. 5, 2007), http://www.lawinfochina.com/NetLaw/display.aspx?db=1&id=5983 (China) [hereinafter 2007 Judicial Interpretation].

46. *See id.* art. 2 (noting that, for the purpose of Article 217 of the Criminal law, the term "reproduce [/] distribute" means to reproduce, distribute, or reproduce *and* distribute); *see also* Donald P. Harris, *The Honeymoon Is Over: The U.S.-China WTO Intellectual Property Complaint*, 32 FORDHAM INT'L L.J. 96, 119 n.99, 124 (2008) (noting the clarification); Xue Hong, *An Anatomical Study of the United States Versus China at the World Trade Organisation on Intellectual Property Enforcement*, 31 EUR. INTELL. PROP. REV. 292, 293 n.12 (2009) (noting the clarification); Zhu Lanye & Liu Jiarui, *Sino-US Intellectual Property Dispute: A New Chapter in WTO History*, 3 J. INTELL. PROP. L. & PRAC. 194, 199–200 (2008) (discussing the phrase *"fuzhi faxing"* in Article 217 of the Criminal Law).

47. Request for the Establishment of a Panel by the United States, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/7 (Aug. 21, 2007).

48. Constitution of the Panel Established at the Request of the United States, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, ¶ 3, WT/DS362/8 (Dec. 13, 2007); *see also* William J. Davey, *Dispute Settlement in the WTO and RTAs: A Comment*, *in* REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 343, 346 (Lorand Bartels & Federico Ortino eds., 2006) ("In practice, [the parties] are usually unable to agree on all three [panel members], with the result that the panel selection is completed by the WTO Director-General on request of one of the parties.").

49. TRIPS Enforcement Panel Report, *supra* note 9, ¶ 1.5.

Brazil, Canada, the European Communities, India, Japan, Mexico, South Korea, Taiwan, Thailand, and Turkey.[50] After a request for an extension of the original deadline, the WTO panel released its long-awaited interim report in October 2008.[51] The release of a 135-page final report followed three months later.

Due to space constraints, this Part does not provide an in-depth discussion of all the claims made in the dispute or all the findings of the WTO panel. Instead, it summarizes the key claims made by China and the United States as well as the panel's major findings. Unlike the panel report, which reversed the order of the claims in the complaint, this Part discusses the claims in the order stated in the original complaint.

A. Thresholds for Criminal Procedures and Penalties

The first claim concerned the thresholds for criminal procedures and penalties. Many commentators and rights holders considered it the most important claim in the dispute.[52] Article 61 of the TRIPS Agreement states: "Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale."[53] Because each WTO member is required to apply criminal procedures and penalties to *all* cases involving "wilful trademark counterfeiting or copyright piracy on a commercial scale," the United States claimed that China had failed to honor its TRIPS commitments by including in its laws high thresholds for applying criminal procedures and penalties to intellectual property infringement.[54]

Consider, for example, the provision for criminal copyright infringement. Article 217 of the Criminal Law states:

> Whoever, for the purpose of making profits, commits any of the [specified] acts of infringement on copyright shall, if the amount of illegal gains is relatively large, or if there are other serious circumstances, be sentenced to fixed-term imprisonment of not more than three years or criminal detention and shall also, or shall only, be fined; if the amount of illegal gains is huge or if there are other especially serious circumstances, [the offender] shall be sen-

50. *Id.* ¶ 1.6.

51. *Id.* ¶ 1.8.

52. *See, e.g.*, Harris, *supra* note 46, at 118–19 (contending that the criminal thresholds claim is "the most significant claim in the United States' complaint"); Joost Pauwelyn, *The Dog that Barked but Didn't Bite: 15 Years of Intellectual Property Disputes at the WTO*, 1 J. INT'L DISP. SETTLEMENT 389, 414 (2010) (pointing out that the criminal threshold claim "was no doubt its most important claim in this dispute").

53. TRIPS Agreement art. 61.

54. *See* TRIPS Enforcement Complaint, *supra* note 28, at 1–2.

> tenced to fixed-term imprisonment of not less than three years but not more than seven years and shall also be fined . . . .[55]

Although the provision neither stipulates the amount of illegal gains nor defines such phrases as "relatively large" or "serious circumstances," Article 5 of the 2004 Judicial Interpretation on Several Issues of Concrete Application of Laws in Handling Criminal Cases of Infringing Intellectual Property establishes the amount for "relatively large" as not less than 30,000 Yuan[56]—about US$4,500 at the time of the panel report. Article 1 of the 2007 Judicial Interpretation further defines "other serious circumstances" as actions taken by anybody who, "for the purpose of making profits, reproduces/distributes, without permission of the copyright owner, a written work, musical work, cinematographic work, television or video works, computer software and other works of not less than 500 *zhang* [copies] in total."[57] Adopted a few days before the filing of the WTO complaint and in direct response to U.S. pressure, the threshold reduced the number of copies by half from 1000.

The United States argued that those thresholds, along with other thresholds concerning "illegal business operation volume, amount of illegal gains (or profits), amount of sales, number of 'copies' and 'other serious circumstances,'"[58] provided a safe harbor to shelter pirates and counterfeiters from criminal prosecution.[59] In the United States' view, China failed to provide criminal enforcement and legal remedies as required by Articles 61 and 41.1, respectively, of the TRIPS Agreement.

The United States' active push for greater criminal enforcement in China can be attributed to a number of reasons. First, due to the high costs incurred in enforcing intellectual property rights, the more a country is required to criminalize infringing activities, the more the

55. Criminal Law of the People's Republic of China (中华人民共和国刑法) (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 14, 1997, effective Oct. 1, 1997), art. 217, http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/11/content_21899017.htm [hereinafter Chinese Criminal Law].

56. Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues of Concrete Application of Laws in Handling Criminal Cases of Infringing Intellectual Property (最高人民法院、最高人民检察院关于办理侵犯知识产权刑事案件具体应用法律若干问题的解释) (adopted by the Supreme People's Court, Nov. 2, 2004, and the Supreme People's Procuratorate, Nov. 11, 2004, effective Dec. 22, 2004), art. 5, http://www.wipo.int/wipolex/en/text.jsp?file_id=182471 (China).

57. 2007 Judicial Interpretation, *supra* note 45, art. 1, *as quoted in* TRIPS Enforcement Panel Report, *supra* note 9, ¶ 7.411.

58. TRIPS Enforcement Panel Report, *supra* note 9, ¶ 7.451.

59. *See id.* ¶ 7.478.

costs and risks of protection will shift from private rights holders to national governments.[60]

Second, rights holders can consider criminal enforcement as a supplementary option (in addition to civil enforcement, mediation, and arbitration). The existence of the criminal enforcement option for foreign rights holders in China is particularly important, considering the many complaints they have voiced over the low penalties handed down by Chinese courts.[61] As foreign businesses often observe, you can win the lawsuit but still lose money in China. Thus, many American rights holders remain reluctant to fund litigation efforts that most likely will not result in meaningful compensation.

Finally, a number of rights holders sincerely believe that strong criminal enforcement would provide the much-needed deterrent to reduce piracy and counterfeiting.[62] As a result, criminal enforcement is a key component of not only the U.S.–China intellectual property enforcement strategy,[63] but is also at the top of the agenda for ongoing

60. *See* NIE JIANQIANG, THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS IN CHINA 130 (2006) ("[I]n developed countries, enforcement is generally left up to private parties. That means rights holders (or organizations of right holders) bear the expense of monitoring infringement, initiating action, and directing the dispute resolution process."); *see also* Ricardo Meléndez-Ortiz, *Foreword* to GLOBAL DEBATE ON THE ENFORCEMENT, *supra* note 2, at ix, ix ("IPRs are private rights and upholding them is, first and foremost, the responsibility of private rights holders. Given that governments play an important role in ensuring the enforcement of these private rights, the debate is . . . about how to achieve an appropriate balance between private rights and public interest in setting and implementing IPRs enforcement standards and in allocating resources for IPRs enforcement in the face of other competing, and more immediate, public policy priorities, particularly in developing countries."); Peter K. Yu, *Enforcement, Economics and Estimates*, 2 WIPO J. 1, 2–6 (2010) (noting that high intellectual property enforcement standards often come with a hefty price tag and difficult tradeoffs); *cf.* Gregor Urbas, *Criminal Enforcement of Intellectual Property Rights: Interaction Between Public Authorities and Private Interests*, *in* NEW FRONTIERS OF INTELLECTUAL PROPERTY LAW 303, 303 (Christopher Heath & Anselm Kamperman Sanders eds., 2005) ("[T]he division of labour between public and private enforcement of intellectual property not only varies considerably between countries, but is also often not clearly defined. Significant public/private sector interaction is often required at the investigation stage for the identification of pirated or counterfeit goods, and similarly for the collection and presentation of appropriate evidence in any subsequent criminal prosecution.").

61. *See* Yu, *From Pirates to Partners II*, *supra* note 25, at 962–64 (discussing the low monetary penalties Chinese courts have awarded to rights holders).

62. *See* DANIEL C.K. CHOW, A PRIMER ON FOREIGN INVESTMENT ENTERPRISES AND PROTECTION OF INTELLECTUAL PROPERTY IN CHINA 217 (2002) [hereinafter CHOW, A PRIMER] ("Criminal enforcement is widely recognized as the single most effective deterrent against counterfeiting.").

63. *See* USTR, 2011 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 71 (2011) [hereinafter 2011 NTE REPORT] (noting that "weaknesses in China's enforcement system—criminal, civil and administrative—contribute to China's poor IPR enforcement record").

efforts to target internet file sharing and to develop ACTA[64] and other bilateral, plurilateral, and regional trade agreements.[65]

In response to the U.S. claims, China pointed out that the country had in place a unique parallel administrative enforcement system that "does not have a parallel in most Western systems, including the US legal system."[66] Due to limited resources and a vastly different socio-legal tradition, public security authorities in China handle serious cases (cases above the thresholds), while administrative copyright and commerce authorities tackle low-scale infringements (cases below the thresholds).[67] Thus, instead of providing a safe harbor for intellectual property criminals, Chinese law subjects "infringement on *any scale*" to enforcement.[68]

As China informed the panel, the country "employs thresholds across a range of commercial crimes, reflecting the significance of various illegal acts for overall public and economic order and China's prioritization of criminal enforcement, prosecution and judicial resources."[69] In China's view, "the criminal thresholds for counterfeiting and piracy are reasonable and appropriate in the context of [its] legal structure and the other laws on commercial crimes."[70] This is

64. *See* Yu, *Six Secret Fears*, *supra* note 18.

65. *See, e.g.*, INTELLECTUAL PROPERTY AND FREE TRADE AGREEMENTS (Christopher Heath & Anselm Kamperman Sanders eds., 2007) (collecting essays discussing free trade agreements in the intellectual property context); Robert Burrell & Kimberlee Weatherall, *Exporting Controversy? Reactions to the Copyright Provisions of the U.S.–Australia Free Trade Agreement: Lessons for U.S. Trade Policy*, 2008 U. ILL. J.L. TECH. & POL'Y 259 (criticizing the U.S.–Australia Free Trade Agreement); Jean-Frédéric Morin, *Multilateralizing TRIPs-Plus Agreements: Is the US Strategy a Failure?*, 12 J. WORLD INTELL. PROP. 175 (2009) (examining the United States' free trade agreement strategy); Pedro Roffe et al., *Intellectual Property Rights in Free Trade Agreements: Moving Beyond TRIPS Minimum Standards*, *in* 1 RESEARCH HANDBOOK ON THE PROTECTION OF INTELLECTUAL PROPERTY UNDER WTO RULES 266 (Carlos M. Correa ed., 2010) (discussing free trade agreements in relation to the TRIPS framework); Yu, *Currents and Crosscurrents*, *supra* note 2, at 392–400 (discussing the growing use of bilateral, plurilateral and regional trade agreements to push for higher intellectual property standards); Yu, *Sinic Trade Agreements*, *supra* note 17 (critically examining the strengths and weaknesses of bilateral and plurilateral trade agreements).

66. TRIPS Enforcement Panel Report, *supra* note 9, annex B–1, ¶ 9.

67. *See id.* ¶ 7.476.

68. *Id.*

69. *Id.* ¶ 7.425; *see also id.* annex B–1, ¶ 29 (stating that the U.S. position would require that China "create an unworkable regime of criminal law enforcement, and prioritize the criminal enforcement of intellectual property offenses over that of other extremely serious crimes, such as currency counterfeiting and bribery").

70. *Id.* ¶ 7.425; *see also id.* ¶ 7.591 ("China submits that Article 41.5 of the TRIPS Agreement makes clear that none of the enforcement provisions can be read to require Members to set out low-scale—and therefore high resource—thresholds for the criminalization of intellectual property infringement. It later clarified that low-scale thresholds implied high amounts of resources because the first sentence of Article 61 is only satisfied by criminal measures that are actually

particularly true when one considers that Chinese criminal law allows private prosecution,[71] which, China claimed, "could unleash a large volume of private enforcement actions and impose a significant burden on the judicial system."[72] China also contended that the existing thresholds are beneficial to rights holders, because they provide standards that are "flexible enough to capture a small number of high-value goods or a large number of low-value goods"[73]—a point on which the United States did not comment.[74]

In addition to justifying the need for criminal thresholds, China explained to the panel the complexity of its criminal law. It also noted the irony that the United States employs numerical thresholds to distinguish between felonies and misdemeanors in the area of intellectual property crimes.[75] As China observed, "US authorities [in reality] applied criminal procedures to acts associated with at least $2,000 of infringement."[76] When asked specifically about the number of criminal prosecutions and convictions per year the United States had for willful trademark counterfeiting and copyright piracy that involved amounts below the Chinese thresholds, the United States could only respond, "The U.S. Department of Justice . . . does not track federal intellectual property prosecutions or convictions at a level of detail sufficient to respond to this question."[77]

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applied." (footnote omitted)); *id.* annex B–1, ¶ 31 ("It is appropriate . . . for a Member to set thresholds that are related to the indicators of a sustainable commercial enterprise."); *id.* ¶ 32 ("China has chosen its criminal thresholds not so as to minimize its obligations under TRIPS, but because in its sovereign judgment these thresholds best capture the points at which intellectual property infringement imperils the public order and warrants criminal enforcement."); *id.* annex B–4, ¶ 45 ("China's 50,000 RMB (US$6,900) threshold for illegal business volume is less than one per cent of the annual revenue of industrial enterprises that are officially 'small size' and less than 25 per cent of the annual revenue of the individual or household business operation (the smallest economic unit that China tracks).").

71. *See id.* ¶ 7.598.

72. *Id.*

73. *Id.* ¶ 7.470.

74. *See id.* ¶ 7.469.

75. *See* 18 U.S.C. § 2319 (2006) (providing for criminal penalty "if the offense consists of the reproduction or distribution, including by electronic means, during any 180-day period, of at least 10 copies or phonorecords, of 1 or more copyrighted works, which have a total retail value of more than $2,500"); *see also* Harris, *supra* note 46, at 155 (noting the "ten copy threshold" in U.S. law concerning criminal copyright infringement).

76. TRIPS Enforcement Panel Report, *supra* note 9, annex B–4, ¶ 38.

77. Responses by the United States of America to the Questions by the Panel to the Parties, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, ¶ 45, WT/DS362/1 (May 5, 2008) [hereinafter U.S. Responses to the WTO Panel], *available at* http://ustraderep.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file434_14436.pdf.

Nevertheless, U.S. practice is different from its Chinese counterpart. The former reflects mere prosecutorial discretion, as opposed to numerical thresholds used for criminal prosecution. To some extent, the United States' complaint reflects its preference for prosecutorial discretion over strict prosecutorial thresholds. As the United States made clear, it had no objection to China's having prosecutorial discretion.[78] Nor was it challenging numerical thresholds per se.[79] Taking note of the U.S. position, the panel stated expressly that its findings "are confined to the issue of what acts of infringement must be criminalized and not those which must be prosecuted."[80] The panel also recalled that it was "not asked to consider whether numerical thresholds, as a matter of principle, can implement an obligation in terms of cases 'on a commercial scale.'"[81]

China further pointed out that the United States had misstated the calculation of its thresholds. Although the United States repeatedly emphasized how counterfeiters could avoid criminal punishment by limiting their inventory to 499 copies,[82] the thresholds do not oper-

78. *See* TRIPS Enforcement Panel Report, *supra* note 9, ¶ 7.592 ("The United States does not claim that China has an obligation to prosecute all counterfeiting and piracy falling within the scope of the first sentence of Article 61.").

79. *See* Responses by the United States of America to the Second Set of Questions by the Panel to the Parties, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, ¶ 2, WT/DS362/1 (July 3, 2008), *available at* http://ustraderep.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file294_14436.pdf (stating that the United States does not "contend that numerical thresholds would always be *per se* inconsistent with Article 61"). As the United States wrote in its answers to the WTO panel's first set of questions:

> The United States takes issue in this dispute with China's use of the prices of the infringing goods to the extent that they do not permit prosecution or conviction of activity involving values of products that are below the thresholds but still "on a commercial scale." However, the United States does not take issue in this dispute with the use of prices of infringing goods with respect to assessing the gravity of a crime, such as in sentencing determinations.

U.S. Responses to the WTO Panel, *supra* note 77, ¶ 7.

80. TRIPS Enforcement Panel Report, *supra* note 9, ¶ 7.596.

81. *Id.* ¶ 7.495.

82. *See, e.g.*, *id.* annex A–1, ¶ 37 ("[I]f a copyright pirate makes 499 reproductions or a retailer stocks 499 copies in a store, they could not be prosecuted or convicted under Article 217 of the Criminal Law based on the copy threshold, because the relevant threshold of 500 copies provided by the April 2007 [Judicial Interpretation] would not be met."); *id.* annex A–2, ¶ 11 ("[T]he Article 217 500-copy threshold excludes acts of commercial scale piracy, as a copyright pirate that makes 499 reproductions or a retailer that stocks 499 copies in a store could not be prosecuted or convicted on that basis under Article 217."); *id.* annex A–4, ¶ 30 ("499 *unfinished* copies of a video game not yet bearing an infringing trademark still qualify as evidence of a 'commercial scale' operation, just as much as 499 *finished* video games bearing such a trademark."); *id.* annex A–6, ¶ 12 ("The reality is that in China, a producer can make 499 copies, or a retailer can sell 499 copies, and

ate in such a simple and rigid fashion. Nor should the panel focus on "a single moment of infringement" or "a snapshot in time," as opposed to sustained criminal activities over a long period of time.[83] For example, courts "may take into account multiple acts of infringement, and not simply the income, profits, sales or number of copies in a single transaction or at a single point in time."[84] They may also calculate the thresholds over a prolonged period of time—say, up to five years.[85] In addition, even though a wide variety of thresholds exists, these thresholds function as alternatives, and courts apply criminal procedures and penalties whenever any one of these thresholds is satisfied.[86]

If that is not enough, courts take into account "evidence of collaboration between infringers," using concepts such as joint liability, criminal groups, and accomplices as laid out in the Criminal Law.[87] In response to the U.S. claim that Chinese courts did not consider indicia of piracy and counterfeiting,[88] such as "packaging used for pirated CDs or DVDs, fabrics used for designer products, cartridge housings for video games, and other materials used to make counterfeit products,"[89] China pointed out that its courts "consider semi-finished or unfinished products . . . [as] evidence of preparation and attempt."[90] Chinese courts also use "materials and implements and other reliable indicia" to determine criminal infringement.[91]

Finally, China reminded the WTO panel that the dispute would "represent the first interpretation by the WTO of Articles 1.1 and 41.5 of the TRIPS."[92] Article 1.1 declares: "Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice."[93] Article 41.5 further stipulates that a WTO member is not required to devote more

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escape prosecution thanks to the safe harbor created by the thresholds for Article 217.").

83. *Id.* annex B–5, ¶ 9.

84. *Id.* ¶ 7.461.

85. *See id.* ¶¶ 7.457, 7.461.

86. *See id.* ¶ 7.454 ("Satisfaction of any one of those circumstances, or 'the amount of illegal gains' threshold, shall be deemed to satisfy the relevant conviction threshold.").

87. *Id.* ¶ 7.439; *see also* Chinese Criminal Law, *supra* note 55, arts. 25–27 (providing for joint criminal liability and liability for criminal groups and accomplices).

88. *See* TRIPS Enforcement Panel Report, *supra* note 9, ¶ 7.482.

89. *Id.* annex A–1, ¶ 40.

90. *Id.* ¶ 7.483.

91. *Id.* ¶ 7.648.

92. *Id.* annex B–2, ¶ 16; *see also id.* ¶ 15 ("China . . . wishes to emphasize the particular contextual role of Article 1.1 and Article 41.5 of TRIPS.").

93. TRIPS Agreement art. 1.1.

resources to intellectual property enforcement than to other areas of law enforcement.[94]

As China noted, both Articles 1.1 and 41.5 provided the much-needed context for interpreting the TRIPS Agreement.[95] Article 1.1, for example, provided what China described as "a specific 'caveat' that establishes boundaries on obligations, specifically in the realm of enforcement."[96] China also underscored the fact that "the balance of rights and obligations in TRIPS is . . . very much at stake in this dispute."[97] In its first written submission, China even argued that the United States should have a higher burden in substantiating its criminal thresholds claim before the DSB.[98] As China stated, "the Panel should treat sovereign jurisdiction over police powers as a powerful default norm, departure from which can be authorized only in light of explicit and unequivocal consent of State parties."[99] In later submis-

94. *Id.* art. 41.5; *cf.* Reichman & Lange, *supra* note 7, at 36 ("[F]oreign rightsholders are merely entitled to the same legal product as their national counterparts. Because the rule of law is notoriously weak in most developing countries, and the systemic capabilities of enforcing intellectual property rights remain especially rudimentary in many of these countries, foreign rightsholders could experience serious disappointments when they rely on the TRIPS enforcement procedures in actual practice.").

95. *See* TRIPS Enforcement Panel Report, *supra* note 9, ¶ 7.481; *see also id.* annex B–2, ¶ 15 ("During the Uruguay Round negotiations, developing countries objected strenuously to new enforcement obligations that would prescribe rigid standards and would ignore principles of sovereignty. Developing countries prevailed, over opposition from the United States and others, on the inclusion of both Article 1.1 and Article 41.5.").

96. *Id.* ¶ 7.511.

97. *Id.* annex B–2, ¶ 2.

98. *See id.* ¶ 7.497. As China explained:

> In this particular instance . . . the United States bears a significantly higher burden than it would normally encounter. That is because the United States is advancing a claim—that Members of TRIPS must enact criminal laws that meet highly specific international standards—that cuts decisively against the tradition and norms of international law.
>
> International organizations accord great deference to national authorities in criminal law matters. 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.
>
> In light of prevailing international law, the United States must not merely show that its proposed interpretation of the TRIPS Article 61 obligation is correct by ordinary standards. It must also persuade this panel that the parties to TRIPS agreed to an obligation to reform their criminal laws of such specificity that it is a sharp departure from the practice of every country in every other international forum that relates to national criminal laws.

Id. annex B–1, ¶¶ 11–13.

99. *Id.* ¶ 7.497.

sions, however, China backed away from such a strong sovereignty-based position. Instead, it claimed that it merely sought to assert the "well-accepted interpretive canon *in dubio mitius*,"[100] which the Appellate Body has expressly adopted in other disputes.[101]

In its report, the WTO panel began by carefully explaining why Articles 1.1 and 41.5 do not relieve a WTO member of its obligations under the TRIPS Agreement. As the panel declared, Article 1.1 "does not permit differences in domestic legal systems and practices to justify any derogation from the basic obligation to give effect to the provisions on enforcement."[102] Instead of allowing a member to lower the specified TRIPS standards, the provision merely grants to a WTO member "freedom to determine the appropriate method of implementation of the provisions to which they are required to give effect."[103]

The panel further declared that "Article 41.5 is an important provision in the overall balance of rights and obligations in Part III of the TRIPS Agreement."[104] It nevertheless noted China's failure to substantiate how private enforcement would overburden its criminal law system.[105] After all, China conceded that eleven out of 117 crimes were not subject to any specific threshold.[106] As the panel noted, "whilst China may for internal policy reasons frequently use thresholds to define the point at which many classes of illegal act are considered serious enough to be criminalized, China's legal structure is capable of criminalizing certain acts without recourse to thresholds."[107]

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100. *Id.* annex B–3, ¶ 4. As China elaborated:

> This canon holds that when a treaty standard is vague or ambiguous the Panel should choose the interpretation that imposes the least imposition on a country's sovereignty. The Panel should choose a more intrusive interpretation only where there is clear and specific evidence that a more intrusive interpretation was meant.
>
> The logic behind this canon is that countries should not be assumed lightly to concede sovereignty. The Panel accordingly must find specific support for an interpretation that does involve an intrusive concession of sovereignty. . . .
>
> The international criminal law cited in China's first written submission makes clear that this canon has particular justification in the realm of criminal law.

Id. annex B–3, ¶¶ 4–6.

101. *E.g.*, Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products*, ¶ 165 n.154, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) (noting that *in dubio mitius* was an interpretive principle that had been "widely recognized in international law" as a tool to interpret ambiguous terms).

102. *Id.* ¶ 7.513.

103. *Id.*

104. *Id.* ¶ 7.594.

105. *See id.* ¶ 7.598.

106. *See id.* ¶ 7.429.

107. *Id.*

Notwithstanding its rejection of China's arguments under both Articles 1.1 and 41.5, the panel "acknowledge[d] the sensitive nature of criminal matters and attendant concerns regarding sovereignty."[108] It also recognized that "differences among Members' respective legal systems and practices tend to be more important in the area of enforcement."[109] In addition, the panel noted that Article 61 is subject to four limitations: (1) trademarks and copyrights (as opposed to all forms of intellectual property rights covered by the TRIPS Agreement); (2) counterfeiting and piracy (as opposed to mere infringement); (3) willful acts; and (4) infringements "on a commercial scale."[110]

Ultimately for the panel, the key to deciding the first claim lay in the definition of the term "commercial scale," which was "intentionally vague . . . and left undefined" in the TRIPS Agreement.[111] To give meaning to this important term, the United States proposed that the term be extended as follows:

> [1] to those who engage in commercial activities in order to make a "financial return" in the marketplace, and who are, by definition, therefore operating on a commercial scale, as well as [2] to those whose actions, regardless of motive or purpose, are of a sufficient extent or magnitude to qualify as "commercial scale" in the relevant market.[112]

In the United States' view, "WTO Members must criminalize acts that reach a certain extent or magnitude; in other words, that WTO Members must do so even where there is no evidence that the infringer has a commercial motive or purpose."[113] Among the open-ended quantitative and qualitative factors that the United States proposed for determining whether an activity is "on a commercial scale" are "the market for the infringed goods, the object of the infringement, the value of the infringed goods, the means of producing the infringed goods, and the impact of the infringement on the right holder."[114]

As the United States pointed out, "[s]ome activity would be so trivial or of a *de minimis* character so as *not* to be 'on a commercial scale' in some circumstances, such as occasional infringing acts of a purely personal nature carried out by consumers, or the sale of trivial

108. *Id.* ¶ 7.501.
109. *Id.* ¶ 7.513.
110. *See id.* ¶¶ 7.518–.528.
111. *Id.* annex B–1, ¶ 22.
112. *Id.* ¶ 7.480.
113. *Id.* annex A–1, ¶ 25.
114. *Id.* annex A–6, ¶ 8. As the United States explained: "[I]t is difficult to present an exhaustive list of potentially relevant factors. That is because it is difficult to identify in advance *all* of the circumstances under which infringers may infringe goods, particularly given the creativity of infringers and advances in technology." *Id.* annex A–6, ¶ 9.

volumes for trivial amounts."[115] Meanwhile, with respect to highly expensive items such as professional software, the United States took the view that "a single sale of an infringing product [could] qualify as 'commercial scale.'"[116] The United States also raised the concern that the Internet and digital technological advancements could permit commercial piracy and counterfeiting that creates major damage to a market, citing the example of HDVDs (high-definition digital video discs) which "can hold up to ten episodes of a TV series or several films."[117]

China, by contrast, proposed to limit "commercial scale" to "a significant magnitude of infringement activity," thus providing "a broad standard [that is] subject to national discretion and local conditions."[118] As China claimed, the U.S. approach "reads the word 'scale' completely out of the definition."[119]

In addition to China and the United States, virtually all third parties submitted their proposed definitions of "commercial scale."[120] While these definitions varied, many of them undoubtedly had been colored by recently signed free trade agreements, with the United States–Australia Free Trade Agreement being a notable example.[121]

In the end, the panel pointed out that the term "commercial scale" appeared in only a single provision in the entire TRIPS Agreement.[122] Because the term was adopted out of "a deliberate choice," it "must be given due interpretative weight."[123] Using the DSB's customary dictionary approach,[124] the panel explained that the term includes both

115. *Id.* ¶ 7.480.

116. *Id.* annex A–5, ¶ 2. As the United States noted in its second oral statement: "Could a single sale of an infringing product qualify as 'commercial scale' under this interpretation? That is a question that China repeatedly raises. The answer is that it is possible, but . . . it would depend on the circumstances . . . ." *Id.*

117. *Id.* ¶ 7.654.

118. *Id.* ¶ 7.481.

119. *Id.*

120. *Id.* ¶¶ 7.484–.493. The only third parties that did not submit a definition were India and Turkey, both of which failed to either provide a written submission or make an oral statement. *See id.* annex C.

121. *See id.* annex C–2, ¶ 11 (noting "the ordinary meaning of the word 'commercial' incorporates within its scope matters *affecting* a commercial activity in pursuit of a financial reward"); *see also* United States–Australia Free Trade Agreement, U.S.–Austl., art. 17.11.26(a), May 18, 2004, 43 I.L.M. 1248 [hereinafter USAFTA] (redefining "[w]ilful copyright piracy on a commercial scale"); Burrell & Weatherall, *supra* note 65 (critically examining the USAFTA).

122. *See* TRIPS Enforcement Panel Report, *supra* note 9, ¶ 7.539 (noting that the term is only found in the first and fourth sentences of Article 61).

123. *Id.* ¶ 7.543.

124. *See, e.g.*, CHRISTOPHER ARUP, THE WORLD TRADE ORGANIZATION KNOWLEDGE AGREEMENTS 95 (2d ed. 2008) (noting the "front-line use of standard dictionaries"); JAYASHREE WATAL, INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES 77 (2001) ("[T]he seven TRIPS dispute settlement reports published so far have relied largely on the dictionary meaning [of the text of the

qualitative and quantitative elements.[125] As the panel reasoned: "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."[126]

According to the panel, the term "commercial scale" is "a relative standard, which will vary when applied to different fact situations."[127] Because the standard "will vary by product and market,"[128] it responds well to changing market conditions. As the panel reasoned: "The specific forms of commerce are not static but adapt to changing forms of competition due to technological development and the evolution of marketing practices."[129] The Panel saw "no reason why those forms of commerce should be limited to the forms of commerce that existed at the time of negotiation of the TRIPS Agreement."[130] The panel also soundly rejected the United States' emphasis on de minimis use:

> If the negotiators had intended it to be the number of cases, they might have been expected to phrase the provision more in terms of "other than in a very limited number of cases" or "other than in a *de minimis*/insignificant number of cases".

TRIPS Agreement]."); Gervais, *China—IP Measures*, *supra* note 32, at 552 (noting "the 'dictionary approach' now common in WTO panel reports").

125. *See* TRIPS Enforcement Panel Report, *supra* note 9, ¶ 7.538. As the panel elaborated:

> [T]he combination of that definition of "commercial" with the definition of "scale" presents a problem in that scale is a quantitative concept whilst commercial is qualitative, in the sense that it refers to the nature of certain acts. Some acts are in fact commercial, whilst others are not. Any act of selling can be described as commercial in this primary sense, irrespective of its size or value. If "commercial" is simply read as a qualitative term, referring to all acts pertaining to, or bearing on commerce, this would read the word "scale" out of the text. Acts on a commercial scale would simply be commercial acts. The phrase "on a commercial scale" would simply mean "commercial". Such an interpretation fails to give meaning to all the terms used in the treaty and is inconsistent with the rule of effective treaty interpretation.
>
> There are no other uses of the word "scale" in the TRIPS Agreement, besides the first and fourth sentences of Article 61. However, the wider context shows that the TRIPS Agreement frequently uses the word "commercial" with many other nouns, although nowhere else with "scale". The other uses of the word "commercial" include "commercial rental," "commercial purposes," "commercial exploitation," "commercial terms," "public non-commercial use," "first commercial exploitation," "honest commercial practices," "commercial value," "unfair commercial use," "non-commercial nature," and "legitimate commercial interests".

Id. ¶¶ 7.538–.539 (footnotes omitted).

126. *Id.* ¶ 7.577.

127. *Id.* ¶ 7.600.

128. *Id.* ¶ 7.604.

129. *Id.* ¶ 7.657 (footnote omitted).

130. *Id.*

> . . . .
> . . . Had the negotiators wanted to exclude only *de minimis* infringement from the minimum standard of Article 61, they had a model in Article 60, or they could have used words such as "except for minor or personal use". However, they did not. Instead, Article 61 refers to size ("scale") qualified only by the word "commercial". This indicates that the negotiators intended something different from *de minimis*.[131]

To assess the consistency of China's criminal thresholds with this complex definition, the WTO panel looked to specific conditions in China's marketplace.[132] These conditions have been complicated by the fact that "the Chinese market, including the market for many copyright and trademark-bearing goods, is fragmented and characterized by a profusion of small manufacturers, middlemen, distributors, and small outlets at the retail level."[133] To some extent, the drafters of the TRIPS Agreement might not have this type of highly fragmented markets in mind when they adopted the provision.

Although the United States provided evidence in the form of press articles and industry and consultant reports,[134] the panel found the evidence insufficient to "demonstrate what constituted 'a commercial scale' in the specific situation of China's marketplace."[135] As the panel explained, the information the United States provided was "too little and too random."[136] Even though the submitted press articles were drawn from well-established and well-regarded sources, they

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131. *Id.* ¶¶ 7.387, 7.553 (footnote omitted).

132. *See id.* ¶ 7.604 ("The parties agree that the standard of 'a commercial scale' will vary by product and market and that the conformity of China's criminal thresholds with that standard must be assessed by reference to China's marketplace.").

133. *Id.* ¶ 7.615; *see also* U.S. Responses to the WTO Panel, *supra* note 77, ¶ 41 n.20 (quoting A.T. KEARNEY, 2005 GLOBAL RETAIL DEVELOPMENT INDEX: DESTINATION CHINA 2 (2005), *available at* http://www.atkearney.com/images/global/pdf/GRDI_2005_China.pdf) ("[A]lthough the Chinese retail market is huge, it is extremely fragmented, with no dominant organized players. The top 10 retailers hold less than 2 percent of the market, and the top 100 retailers have less than 6.4 percent."). As the United States elaborated in its first written submission:

> [A] single wholesale mall in Yiwu, China houses some 30,000 stores, many of them in small 10-by-15 foot stalls. Retail establishments come in many different sizes and are widely dispersed across China. Another shopping mall in Luohu Commercial City spans six floors of small stores and offers "counterfeit goods at bargain prices." In spite of the recent growth of large retailers in China, much retail commerce appears to still be conducted through small outlets, and consequently beyond the reach of criminal sanctions due to the criminal thresholds.

First Submission of the United States, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights* ¶ 122, WT/DS362/1 (Jan. 30, 2008) (footnote omitted), *available at* http://ustraderep.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file605_14436.pdf.

134. *See* TRIPS Enforcement Panel Report, *supra* note 9, ¶¶ 7.615–.616.

135. *Id.* ¶ 7.614.

136. *Id.* ¶ 7.617.

"[were] printed in US or other foreign English-language media that are not claimed to be authoritative sources of information on prices and markets in China."[137] They were also uncorroborated and did not "refer to events or statements that would not require corroboration."[138] Given the sources' lack of authority, the panel did not "ascribe any weight to the evidence in the press articles and [found] that, even if it did, the information that these press articles contain is inadequate to demonstrate what is typical or usual in China for the purposes of the relevant treaty obligation."[139]

In sum, without determining whether China had satisfied its TRIPS obligations, the WTO panel found that the United States had failed to substantiate its claim. China therefore prevailed on what many have considered the most important claim in the dispute.

B. Disposal of Infringing Goods

The second claim concerned the ability of the Chinese customs authorities to properly dispose of infringing goods seized at the border. Article 59 of the TRIPS Agreement provides:

> 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.[140]

Article 46 states further:

> In order to create an effective deterrent to infringement, the 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, or, unless this would be contrary to existing constitutional requirements, destroyed.[141]

Taken together, these two provisions require a WTO member to empower its judicial authorities to order the uncompensated destruction or disposal of infringing goods seized at the border. Because these provisions only lay out an empowerment obligation, as compared to mandating a specific action, the WTO member is not required to "exercise [the stipulated] authority in a particular way, unless otherwise specified."[142] Instead, the authorities retain a high degree of discre-

137. *Id.* ¶ 7.628.
138. *Id.*
139. *Id.* ¶ 7.629.
140. TRIPS Agreement art. 59.
141. *Id.* art. 46.
142. TRIPS Enforcement Panel Report, *supra* note 9, ¶ 7.238. As the panel recounted, "Previous drafts of the TRIPS Agreement had provided that the authorities shall 'provide for' certain remedies, but this phrasing was changed to read shall 'have the authority', as were a number of other draft provisions." *Id.*

tion to determine their preferred actions. As China contended, "[t]he obligation in Article 59 to grant 'authority' to order destruction does not mean that Members must make a grant of unfettered and unguided discretion and that domestic agencies must have the absolute power to order destruction of infringing goods in any circumstance whatsoever."[143]

Indeed, in many less developed countries, such destruction "may lead to significant economic waste and be socially questionable."[144] The push for destruction, therefore, may be inconsistent with the objective of sustainable development as stated in the first recital of the preamble of the Marrakesh Agreement Establishing the World Trade Organization.[145] Henning Grosse Ruse-Khan has gone even further to argue that the WTO should use this overarching objective to reconcile the different economic, social, and environmental interests within the WTO framework.[146]

Moreover, the destruction option in Article 46 is subject to constitutional constraints, which vary from member to member. The current language includes the phrase "unless this would be contrary to existing constitutional requirements" before the word "destroyed."[147] According to Daniel Gervais, this particular phrase "was introduced to reflect a rule in countries such as Brazil where destruction of otherwise useful goods is allegedly unconstitutional."[148]

In light of the limited obligation in Article 59, the United States could not argue that the Chinese customs authorities had failed to destroy infringing goods seized at the border—the action the U.S. administration and its supportive rights holders preferred. Instead, the United States advanced a much weaker, and rather academic, argument that China introduced a "compulsory scheme" that took away the authorities' "scope of authority to order the destruction or disposal of infringing goods."[149] Article 27 of the Regulations on Customs Pro-

143. *Id.* ¶ 7.198; *see also* CARLOS M. CORREA, TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS: A COMMENTARY ON THE TRIPS AGREEMENT 423 (2007) ("[T]he 'judicial authorities shall have the authority' formulation leaves Members broad room to determine how that objective will be reached.").

144. TRIPS RESOURCE BOOK, *supra* note 2, at 595.

145. Marrakesh Agreement Establishing the World Trade Organization pmbl., recital 1, Apr. 15, 1994, 1867 U.N.T.S. 154, 154.

146. *See* Henning Grosse Ruse-Khan, *A Comparative Analysis of Policy Space in WTO Law* (Max Planck Inst. for Intellectual Prop., Competition & Tax Law, Research Paper No. 08–02, 2008), *available at* http://ssrn.com/abstract=1309526 (suggesting the use of "the WTO-overarching objective of sustainable development as a principle for reconciling economic, social and environmental interests which applies to all WTO Agreements," including the TRIPS Agreement).

147. TRIPS Agreement art. 46.

148. Daniel Gervais, *Of Clusters and Assumptions: Innovation as Part of a Full TRIPS Implementation*, 77 FORDHAM L. REV. 2353, 2354 n.5 (2009).

149. TRIPS Enforcement Panel Report, *supra* note 9, ¶ 7.197.

tection of Intellectual Property Rights (Customs Regulations) provided:

> Where the confiscated goods infringing an intellectual property right can be used for public welfare projects, the Customs shall hand such goods over to the relevant public welfare bodies for use in public welfare projects; where the holder of the intellectual property right intends to purchase the goods, the Customs may have such goods assigned to the holder of the intellectual property right with compensation. Where either the confiscated goods infringing an intellectual property right cannot be used for public welfare project or the holder of the intellectual property right has no intention to purchase the goods, the Customs may have such goods auctioned according to law after removing their infringing features; where the infringing features cannot be removed, the Customs shall destroy the goods.[150]

As the United States argued, this provision, in conjunction with the relevant implementing measures and a public notice from the customs authorities, created a "compulsory scheme" that has taken away the ability of the authorities to exercise their discretion.[151] This scheme precluded the authorities from destroying the infringing goods unless they found it inappropriate to donate the goods to charities, sell them back to rights holders, or auction them off after eradicating the infringing features.

In response to the U.S. claims, China pointed out that the sequence merely expressed "an official preference" for disposition methods.[152] Under this flexible arrangement, China claimed, its customs authorities still had wide discretion to determine whether the stated criteria had been met. As the panel recognized, there were "circumstances in which Customs depart[ed] from the terms of the measures,"[153] and the measures were "not 'as mandatory' as they appear[ed] on their face."[154] China further reminded the panel that "[t]he United States affords its own Customs only *conditioned* authority . . . [but] has provided the Panel no arguments as to why its favored form of conditioning is appropriate, but China's sequencing guidelines are not."[155]

To the surprise of the United States and many intellectual property rights holders, the WTO panel began by praising China for providing "a level of protection *higher* than the minimum standard required" by the TRIPS Agreement.[156] For example, China has extended border measures not only to piracy and counterfeiting, but also

150. Regulations of the People's Republic of China on Customs Protection of Intellectual Property Rights (中华人民共和国知识产权海关保护条例) (promulgated by the State Council, Nov. 26, 2003, effective Mar. 1, 2004), art. 27, http://english.customs.gov.cn/publish/portal191/tab43987/info298867.htm.

151. TRIPS Enforcement Panel Report, *supra* note 9, ¶ 7.197.

152. *Id.* ¶ 7.198.

153. *Id.* ¶ 7.348.

154. *Id.*

155. *Id.* annex B–5, ¶ 20.

156. *Id.* ¶ 7.228.

to other forms of copyright, patent, and trademark infringements.[157] Thanks to U.S. pressure in the early-to-mid-1990s[158] and with strong influence from the European Union,[159] these border measures have been further extended to both imported and exported goods even though Article 59 covers only imported goods.[160] In fact, unlike those in other countries, the Chinese customs authorities have given "disproportionate weight to export monitoring."[161] "[While] most countries use Customs to protect themselves from the inflow of counterfeits[,] . . . China has used its Customs resources chiefly to protect *other* countries, by stopping the exportation of counterfeits."[162] Thus, it is understandable why Chinese officials were rather frustrated with this second claim. As Vice Premier Wu Yi declared: "The Chinese government is extremely dissatisfied about [the WTO dispute over TRIPS enforcement], but we will proactively respond according to the related WTO rules and see it through to the end."[163]

With respect to donations and sales to rights holders, the WTO panel noted that Article 59 "do[es] not indicate that the authority to order the specified types of remedies must be exclusive."[164] While donations may help meet public welfare needs and are suitable to conditions in less developed countries,[165] sales to rights holders can be justified by the fact that some rights holders may want to purchase unauthorized overruns that are qualitatively identical to the author-

157. *See id.* ¶ 7.226 ("It is apparent that the intellectual property right infringements covered by the Customs measures include not only counterfeit trademark goods and pirated copyright goods, but certain other infringements of intellectual property rights, namely other trademark-infringing goods, other copyright-infringing goods, and patent-infringing goods.").

158. *See* Action Plan for Effective Protection and Enforcement of Intellectual Property Rights, U.S.–China, § 1[G], Feb. 26, 1995, Agreement Regarding Intellectual Property Rights, Annex, 34 I.L.M. 881, 900–03 (1995) (requiring all Chinese customs offices to intensify border protection for all imports *and exports* of CDs, LDs, CD-ROMS, and trademarked goods).

159. *See* Xue, *supra* note 46, at 298 (noting that "Chinese Regulations on Customs Protection of Intellectual Property Rights follows Regulation 1383/2003 on customs actions against goods suspected of infringing intellectual property rights").

160. *See* TRIPS Enforcement Panel Report, *supra* note 9, ¶ 7.227.

161. MARTIN K. DIMITROV, PIRACY AND THE STATE: THE POLITICS OF INTELLECTUAL PROPERTY RIGHTS IN CHINA 79 (2009).

162. *Id.*

163. *Wu: US Piracy Case Will Harm Trade Ties*, CHINA DAILY, Apr. 24, 2007, http://www.chinadaily.com.cn/china/2007-04/24/content_858638.htm.

164. TRIPS Enforcement Panel Report, *supra* note 9, ¶ 7.240.

165. *See id.* ¶ 7.306 ("In one case, Customs donated infringing goods to the Red Cross that were allocated to people in areas struck by natural disasters such as typhoons, rainstorms and floods. The goods all infringed trademark rights and consisted of sport shoes, bags of rice noodles, washing powder, air-cooled chillers and kerosene heaters.").

ized manufactures.[166] The panel even accepted the use of auctions to dispose of infringing goods. As it explained, because "the remedies specified in Article 59 are not exhaustive . . . , the fact that authority to order auction of infringing goods is not required is not in itself inconsistent with Article 59."[167]

Nevertheless, the panel faulted China for the way its customs authorities auctioned off the seized goods. As clearly stated in Article 46 of the TRIPS Agreement—the provision that provides the principles incorporated into Article 59—"[i]n regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in exceptional cases, to permit release of the goods into the channels of commerce."[168] Whether the removal is considered "simple" will depend on whether "the state of the goods is altered sufficiently to deter further infringement."[169] The panel did not indicate what exactly needs to be done to avoid a violation of Article 59. It merely hinted that an exceptional case may arise when "an innocent importer . . . has been deceived into buying a shipment of counterfeit goods, . . . has no means of recourse against the exporter and . . . has no means of reaffixing counterfeit trademarks to the goods."[170] It also suggested that "[p]ractical requirements, such as removal of the trademark, affixation of a charitable endorsement or controls over the use of goods or distribution methods, may avoid confusion."[171]

Although China provided additional measures, such as the solicitation of comments from rights holders[172] and the introduction of an

166. *See id.* annex B–1, ¶ 38 ("Right-holders may choose to purchase infringing goods where, for example, these seized goods are determined to be overruns illicitly produced by a licensed manufacturer, and are therefore identical to the licensed goods."). *But see id.* annex A–1, ¶ 52 ("[A]nyone who has to pay for goods that violates his or her own patent, trademark or copyright is harmed in the amount of the payment.").

167. *Id.* ¶ 7.327.

168. TRIPS Agreement art. 46.

169. TRIPS Enforcement Panel Report, *supra* note 9, ¶ 7.375. As Professor Gervais explained:

> If simple removal of the mark is allowed, the (probably professional) infringer takes very little chance: he just waits for the next shipment of infringing logos, etc. and starts again. The major cost is the item to which a logo or fake label is applied. This is why the provision requires safe disposal of the item and often its destruction.

GERVAIS, *supra* note 2, at 457.

170. *Id.* ¶ 7.391.

171. *Id.* ¶ 7.284.

172. *See id.* annex B–1, ¶ 47 ("[R]ight-holders have a legal, formal right to comment prior to any public auction; this procedure helps Customs to determine that a good would be inappropriate for public auction, and thereby helps avoid harm to the right-holders."); *id.* annex B–1, ¶ 53 ("Formal comment . . . allows right-holders to identify specific concerns—such as any safety threats that the goods pose, or the presence of proprietary design features that cannot be removed—and al-

expertly-determined reserve price,[173] those measures, in the panel's view, did not "create an effective deterrent to infringement"—a key objective of Article 46.[174] As the panel noted with respect to the reserve price:

> [I]t remains economically viable for the importer or a third party to purchase the goods at auction and reaffix the trademarks in order to infringe again .... In any case, there is no evidence that the prices established by the method used by China Customs are so high that it is no longer economically viable to purchase the goods and reaffix the trademarks.[175]

Likewise, even though a small amount of the seized goods—only 0.87 percent by the number of shipments or 2.2 percent by the value of the seized goods—are subject to auctions,[176] the panel found that the provision was not "narrowly circumscribed" enough to be covered within the "exceptional cases" permissible under the TRIPS Agreement.[177] As the panel noted further, "[e]ven when [the provision was] narrowly circumscribed, application of the relevant provision must be rare, lest the so-called exception become the rule, or at least ordinary."[178]

In the end, China lost part of the second claim, even though the panel upheld as TRIPS-consistent the use of donations, sales to rights holders, and auctions. The panel also rejected the U.S. claim that customs actions in China were subject to "a compulsory sequence of steps" in violation of the TRIPS Agreement.

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lows Customs to determine that an auction would not be appropriate."). *But see id.* annex A–2, ¶ 23 (noting that the right to comment "is not a right to *prevent* the goods from being auctioned").

173. *See id.* ¶ 7.202 (noting that China Customs "uses a reserve price at auction to ensure that infringers do not have the opportunity to purchase the seized goods at an unreasonably low cost and reaffix counterfeit marks"). Article 18 of the Measures on Administration of Property Confiscated by Customs states:

> A reserve price shall be set for the confiscated property authorized to be auctioned off. Should appraisal be required in accordance with relevant provisions of laws and regulations, a price assessment entity lawfully established shall be authorized to complete such appraisal. In the case that several auction enterprises bid for the right to auction, the bid prices shall be compared with the appraisal price and the highest one taken as the reserve price. In the case that there were no multiple bids for the right to auction, the reserve price shall be reasonably determined based on the appraisal price given by the price assessment entity.

Id. ¶ 7.382 n.361.

174. *Id.* ¶ 7.373.

175. *Id.* ¶ 7.382.

176. *See id.* ¶ 7.349.

177. *Id.* ¶ 7.391–.393; *see also id.* ¶ 7.392 (noting that the phrase "exceptional cases" within the meaning of the TRIPS Agreement "is not assessed in terms of a proportion of all cases of infringing goods seized at the border").

178. *Id.* ¶ 7.391.

C. Copyright Protection for Censored Works

The final claim in the dispute concerned the first sentence of Article 4 of the Chinese Copyright Law, which states that "[w]orks the publication and/or dissemination of which are prohibited by law shall not be protected by this Law."[179] Under the statute, works can be banned by "Criminal Law, the Regulations on the Administration of Publishing Industry, the Regulations on the Administration of Broadcasting, the Regulations on the Administration of Audiovisual Products, the Regulations on the Administration of Films, and the Regulations on the Administration of Telecommunication."[180] Based on China's denial of protection to banned works, the United States claimed that China had failed to offer protection to copyright holders as required by the Berne Convention, which was incorporated by reference in Article 9.1 of the TRIPS Agreement.[181] Article 5(1) of the Berne Convention states:

> Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.[182]

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179. Copyright Law of the People's Republic of China (中华人民共和国著作权法) (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, amended Oct. 27, 2001, effective Oct. 27, 2001), art. 4, http://www.wipo.int/wipolex/en/text.jsp?file_id=125980 [hereinafter Chinese Copyright Law]. In lieu of "and/or," the conjunctive was used in the official English translation of the Chinese Copyright Law. In the WTO panel report, however, the phrase "and/or" was used in Mutually Agreed Translation No. 11. TRIPS Enforcement Panel Report, *supra* note 9, ¶ 7.1.

180. TRIPS Enforcement Panel Report, *supra* note 9, ¶ 7.73. For example, the Regulations on the Administration of Films, the Regulations on the Administration of Audiovisual Products, and the Regulations on the Administration of Publications prohibited the publication and distribution of ten identical categories of content that:

> (1) are against the fundamental principles established in the Constitution;
> (2) jeopardize the unification, sovereignty and territorial integrity of the State;
> (3) divulge State secrets, jeopardize security of the State, or impair the prestige and interests of the State;
> (4) incite hatred and discrimination among ethnic groups, harm their unity, or violate their customs and habits;
> (5) propagate cults and superstition;
> (6) disrupt public order and undermine social stability;
> (7) propagate obscenity, gambling, or violence, or abet to commit crimes;
> (8) insult or slander others, or infringe upon legitimate rights and interests of others;
> (9) jeopardize social ethics or fine national cultural traditions; [and]
> (10) other contents banned by laws, administrative regulations and provisions of the State.

Id. ¶ 7.79.

181. TRIPS Agreement art. 9.1.

182. Berne Convention, *supra* note 5, art. 5(1).

Article 5(2) further provides: "The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work."[183] By denying copyright holders the immediate and automatic enjoyment of their rights, and by subjecting copyright to the formalities of a successful conclusion of content review, the Chinese Copyright Law, in the United States' view, contravened the Berne Convention.[184]

The United States' demand for greater copyright protection in banned works is highly interesting in light of its constant and heavy criticism of the censorship and information control policy in China.[185] It is, indeed, ironic and somewhat self-defeating for the United States to claim that greater copyright protection is needed to compensate for the ineffectiveness of China's censorship policy when U.S. foreign policy actively and frequently paints a rather gloomy picture of heavy and effective censorship in China.

Nevertheless, the interests of the U.S. administration and rights holders in pushing for greater private copyright enforcement may be attributed to several causes. First, conscious of the negative implications of censorship for the protection of human rights and civil liberties, the U.S. administration and rights holders may be reluctant to use the censorship process to crack down on the release of infringing materials. Second, there may be a difference between works that are not yet approved and works that are prohibited. While the censorship and public security authorities actively remove the latter from public dissemination, they are less concerned about the former. Third, the remedies between public and private enforcement may be different. For example, courts, as opposed to administrative agencies, can grant damage compensation and pre-litigation remedies to those prevailing in copyright lawsuits.[186] Fourth, the U.S. administration and rights holders may be concerned about the potential exportation of infringing works to other potential markets. While exportation is less likely for written materials and customized software—which are usually in Chinese—understandable concerns exist with respect to music and movies (Chinese subtitles notwithstanding).

In addition to claims under the Berne Convention, the United States also raised arguments based on Article 41.1 of the TRIPS Agreement, which states: "Members shall ensure that enforcement

183. *Id.* art. 5(2).

184. *See* TRIPS Enforcement Panel Report, *supra* note 9, annex A–1, ¶¶ 57–58.

185. *See, e.g.*, Hillary Rodham Clinton, U.S. Sec'y of State, Remarks on Internet Freedom, Address Delivered at the Newseum in Washington, D.C. (Jan. 21, 2010), *available at* http://www.state.gov/secretary/rm/2010/01/135519.htm (criticizing internet censorship in China).

186. *See* PETER GANEA & THOMAS PATTLOCH, INTELLECTUAL PROPERTY LAW IN CHINA 290 (2005).

procedures . . . are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements."[187] According to the United States, Chinese law did not provide any effective action against infringement of those copyrighted works that had not passed the content review process or that were awaiting the results of the review.

In response to the U.S. claims, China made a number of counterarguments. First, China claimed that the first sentence of Article 4 of the Copyright Law was "extremely limited in scope."[188] Like other countries, China bans from publication or dissemination works that consist entirely of unconstitutional or immoral content.[189] With respect to works that had been edited to pass content review, however, the law protected "copyright in the edited version of the work, including against copies of the unedited version that infringed copyright in the edited, approved version."[190] It also protected works that had yet to be subject to content review or that were awaiting the results of the review.[191] The law only failed to protect the "unedited, prohibited copies of an unedited, prohibited work that failed content review."[192]

A case in point was *Shrek 2*, the copyright of which was protected even though the film itself had not completed the content review process.[193] As the panel observed, "administrative penalty documents citing Article 47 of the Copyright Law and Article 36 of the Copyright Implementing Regulations were issued in September 2004 to one audio-visual shop in Xiamen relating to the distribution of unauthorized DVD copies of *Shrek 2*."[194] To some extent, the U.S. claim in this area seemed to have been greatly weakened by the ad hoc "special actions" the U.S. administration and its supportive rights holders had elicited from China through constant pressure under the section 301 process, meetings with the U.S.–China Joint Committee on Commerce and Trade ("JCCT"), and other formal and informal mechanisms. Faced with this pressure and in response to a request made by the Motion Picture Association of America, China, in November 2001, adopted National Copyright Administration Circular No. 55, which "set up procedures to protect 700 US films, without inquiry as to whether the

187. TRIPS Agreement art. 41.1.

188. TRIPS Enforcement Panel Report, *supra* note 9, ¶ 7.17.

189. *See id.* ¶ 7.78. Such a ban also included "reactionary, pornographic, or superstitious contents." *Id.* ¶ 7.54.

190. *Id.* ¶ 7.19.

191. *See id.* ¶ 7.99.

192. *Id.* ¶ 7.20.

193. *See id.* annex B–5, ¶ 34.

194. *Id.* ¶ 7.99.

films were edited to pass content review."[195] Ironically, this circular and the resulting pre-release enforcement now serve as evidence to show that films that have yet to complete content review can still receive copyright protection.

In addition, China distinguished a denial of the authority to publish from a denial of copyright,[196] perhaps out of concern that copyright holders would insist on the positive right to publish regardless of whether their works have been censored. Making a weak, and rather bizarre, distinction between "copyright" and "copyright protection," China contended that Article 4 did not remove copyright, but denied the "particularized rights of private copyright enforcement."[197] According to China, authors would still have "access" to the enforcement process even if they did not have adequate evidence or a valid right to enforce[198]—a point that seems to have been influenced by *United States—Section 211 Omnibus Appropriations Act of 1998*, which "requires [WTO] Members to make certain civil judicial procedures 'available' to right holders."[199]

China further insisted that Article 17 of the Berne Convention recognize a country's sovereign right "to permit, to control, or to prohibit . . . the circulation, presentation, or exhibition of any work or production."[200] In China's view, Article 17 partially codified a country's "sovereign right to censor."[201] The provision therefore places limitations on all rights granted to authors under the Berne Convention. As

195. *Id.* annex B–5, ¶ 36. As the panel pointed out:

> [The circular was] issued in November 2001 to subsidiary copyright bureaux in order to enhance enforcement actions against a list of 788 foreign cinematographic works in response to a request from the Motion Picture Association of America. The introductory paragraph of the Circular indicates that this was also a special action. The Circular included works without enquiry as to whether they had all been edited to pass content review and . . . it applied *inter alia* to pirated DVDs coded for zones outside China, which may include unedited versions not approved during content review.

Id. ¶ 7.100.

196. *See id.* ¶ 7.17.

197. *Id.* ¶ 7.21.

198. *See id.* ¶ 7.178 ("China asserts that the enforcement procedures in Chapter V of the Copyright Law are 'available' in the sense that the authors of all works have 'access' to enforcement process irrespective of whether they have adequate evidence or a valid right to enforce.").

199. Section 211 Appellate Body Report, *supra* note 10, ¶ 215 ("The first sentence of Article 42 requires Members to make certain civil judicial procedures 'available' to right holders. Making something *available* means making it 'obtainable', putting it 'within one's reach' and 'at one's disposal' in a way that has sufficient force or efficacy.").

200. Berne Convention, *supra* note 5, art. 17.

201. TRIPS Enforcement Panel Report, *supra* note 9, ¶ 7.120.

China observed, Article 17 was "drafted using very expansive language 'that effectively denies WTO jurisdiction in this area.'"[202]

Finally, China pointed out that public regulations a priori preempt private economic rights. Because the copyright in banned works was considered a "legal and material nullity," enforcement of such a right would be meaningless.[203] China also stated that it "enforces prohibitions on content seriously, and . . . this removes banned content from the public domain more securely than would be possible through copyright enforcement."[204] Because the ban applies to both copyright holders and potential infringers, private enforcement is unnecessary.[205] In China's view, content regulatory measures have already provided "an alternative form of enforcement against infringement."[206] The country has therefore complied with the "effective action" obligation under Article 41.1 of the TRIPS Agreement.[207]

Despite this long list of defenses and counterclaims China had advanced, the WTO panel found Article 4 of the Chinese Copyright Law to be inconsistent with the TRIPS Agreement. In particular, the panel rejected China's distinction between copyright and copyright protection, pointing out that such a distinction would render copyright "no more than a phantom right."[208] The panel also noted that the enforcement procedures under Article 41.1 are "far more extensive" than mere access to the enforcement process.[209] In addition, the panel noted that, even though China had made a policy choice to make available other enforcement procedures, such as content regulatory measures, that particular choice "[did] not diminish the member's obligation under Article 41.1 of the TRIPS Agreement."[210]

To the major disappointment of human rights advocates, the panel openly recognized a country's sovereign right to prohibit the publica-

202. *Id.*

203. *Id.* ¶ 7.134; *see also id.* annex B–4, ¶ 103 ("When governments exercise their sovereign power to censor, the exercise of private rights is moot: unauthorized copying is not permitted. Copyright continues, but enforcement is not needed: the content is banned.").

204. *Id.* ¶ 7.137.

205. *See id.*

206. *Id.* ¶ 7.180.

207. *See* TRIPS Agreement art. 41.1 ("Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.").

208. TRIPS Enforcement Panel Report, *supra* note 9, ¶ 7.67; *see also id.* ¶ 7.66 ("It is difficult to conceive that copyright would continue to exist, undisturbed, after the competent authorities had denied copyright protection to a work on the basis of the nature of the work and the prohibition in the Copyright Law itself.").

209. *Id.* ¶ 7.179.

210. *Id.* ¶ 7.180.

tion or distribution of those works.[211] As the panel reasoned, "copyright and government censorship address different rights and interests."[212] While copyright protects private rights, government censorship addresses public interests.[213] Censorship regulations, according to the panel, therefore cannot eliminate rights that are inherent in a copyrighted work.[214] The panel also noted China's failure to "explain why censorship interferes with copyright owners' rights to prevent third parties from exploiting prohibited works."[215]

Throughout its report, the WTO panel seemed rather reluctant to take "judicial notice" of censorship in China, even though China's efforts to ban immoral and politically-sensitive works are well-known and have been widely documented.[216] Instead, the panel expected China to substantiate its assertion that rights holders will obtain greater protection through censorship regulations than copyright law.[217] Likewise, it is amusing that the United States opted for the term "content regulation" in lieu of "censorship," while China frankly admitted censorship within the country and pushed hard for the rec-

211. *See, e.g.*, Tomer Broude, *It's Easily Done: The China—Intellectual Property Rights Enforcement Dispute and the Freedom of Expression*, 13 J. WORLD INTELL. PROP. 660, 661 (2010) (arguing that "contrary to any prior expectations of spontaneous confluence between trade, intellectual property and human rights, the reasoning of [this panel report] is entirely oblivious to the human rights implications of the dispute, and that it could even have negative effects on the legal framework of the freedom of expression in China").

212. TRIPS Enforcement Panel Report, *supra* note 9, ¶ 7.135.

213. *See id.*

214. As the panel stated:

> A government's right to permit, to control, or to prohibit the circulation, presentation, or exhibition of a work may interfere with the exercise of certain rights with respect to a protected work by the copyright owner or a third party authorized by the copyright owner. However, there is no reason to suppose that censorship will eliminate those rights entirely with respect to a particular work.

Id. ¶ 7.132.

215. *Id.* ¶ 7.133.

216. The panel's approach contrasts strongly with the preference of some U.S. policymakers. *See, e.g.*, *U.S.C.C. Hearing*, *supra* note 31, at 73 (remarks of Commissioner Patrick Mulloy) ("Maybe [the United States] could ask the court at the WTO to take judicial notice because sometimes you can ask a court to do that, and based on what the WTO itself has said about China, I don't understand why there is this enormous rock to lift up this hill when everybody knows and will say it's going on.").

217. *See* TRIPS Enforcement Panel Report, *supra* note 9, ¶ 7.137 ("China maintains that public censorship renders private enforcement unnecessary, that it enforces prohibitions on content seriously, and that this removes banned content from the public domain more securely than would be possible through copyright enforcement. The Panel notes that these assertions, even if they were relevant, are not substantiated." (footnote omitted)).

ognition of its "sovereign right to censor."[218] To a large extent, the different word choice and posture suggest the very different views held by China and the United States over the appropriateness of using censorship to maintain public order and social stability.

Finally, in the interest of judicial economy, the panel did not address the claims under Article 5(2) of the Berne Convention and Article 61 of the TRIPS Agreement, the outcomes of which, the panel claimed, are likely to be similar to those of the decided claims.[219] Although the panel confirmed that its conclusion would not apply to works never submitted for or awaiting the results of content review in China as well as the unedited version of works for which an edited version has been approved for distribution,[220] it recognized the "uncertainty" created by the potential denial in the absence of a determination by the censorship authorities.[221] The United States therefore won the third claim decisively.

III. THE LIMITATIONS (AND PERHAPS MISTAKES)

Immediately following the release of the WTO panel report, both China and the United States quickly declared victory. As Acting USTR Peter Allgeier maintained:

> These findings are an important victory, because they confirm the importance of IPR protection and enforcement, and clarify key enforcement provisions of the TRIPS Agreement. Having achieved this significant legal ruling, we will

218. *Id.* ¶ 7.121; *see also* Broude, *supra* note 211, at 661 ("[T]he panel much preferred to use the somewhat euphemistic term 'content review', which was used literally 100 times in the report in comparison with only nine times that the 'explicit name' of censorship was used—the latter usually on the basis of the submissions made by the Chinese government itself.").

219. *See* TRIPS Enforcement Panel Report, *supra* note 9, ¶¶ 7.145–.153, 7.182–.185.

220. *See id.* ¶ 7.103 (considering that "the United States has not made a prima facie case with respect to works never submitted for content review in China, works awaiting the results of content review in China and the unedited versions of works for which an edited version has been approved for distribution in China").

221. As the panel declared:

> [T]he Panel recognizes that the potential denial of copyright protection, in the absence of a determination by the content review authorities, implies uncertainty with respect to works that do not satisfy the content criteria prior to a determination under Article 4(1) of the Copyright Law, with the consequent impact on enjoyment of rights described above. Therefore, the Panel reiterates for the record the firm position of China taken in these proceedings that:
>
> "Copyright vests at the time that a work is created, and is not contingent on publication. Unpublished works are protected, foreign works not yet released in the Chinese market are protected, and works never released in the Chinese market are protected."; and
>
> "Works that are unreviewed are decidedly not 'prohibited by law'."

Id. ¶ 7.118 (footnote omitted).

> engage vigorously with China on appropriate corrective actions to ensure that US rights holders obtain the benefits of this decision.[222]

The response by Yao Jian, the spokesperson of the Chinese Ministry of Commerce, by contrast, was more subdued. Although he "welcomed" the verdict on criminal thresholds, he expressed "regret" about the unfavorable aspects of the ruling and maintained that his government was "making a further assessment of the Dispute Settlement Body panel report."[223]

Given the fact that either party can interpret the dispute's outcome as a 2–1 victory, it is rather difficult to determine which statement is the more correct. Nevertheless, academic commentators seem to have aligned themselves with China's assessment. Michael Geist, for example, noted: "The U.S. did not win this case, but rather lost badly."[224] Frederick Abbott added, "It was foreseeable that WTO dispute settlement would be a problematic way for the United States to accomplish the enforcement objectives its industry groups laid out. There is doubtless some value that everybody thought about TRIPS enforcement rules a bit."[225] Xue Hong noted further, "If the WTO rulings are substantially sided with the United States' claims against China's intellectual property enforcement, it is surprising that China is seemingly calm and quiet in such a serious situation."[226]

Although it is tempting to declare winners and losers in a legal dispute, and government spokespeople often use their best efforts to capture the bright side of even the most undesirable outcomes, WTO panel reports do not lend themselves to victory proclamations. In fact, by "cutting the baby in half," the WTO panel successfully avoided picking a winner and a loser in this dispute. It is therefore no surprise that neither the United States nor China appealed the report to the Appellate Body. This outcome serves as an interesting contrast to the outcome of the U.S.–China market access dispute, which was quickly appealed by both parties.[227]

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222. Press Release, USTR, United States Wins WTO Dispute Over Deficiencies in China's Intellectual Property Rights Laws (Jan. 26, 2009), http://www.ustr.gov/about-us/press-office/press-releases/2009/january/united-states-wins-wto-dispute-over-deficiencies-c.

223. *Ruling in US–China Piracy Dispute Raises Controversy*, BRIDGES WKLY. TRADE NEWS DIG., Jan. 28, 2009, at 7 [hereinafter *Ruling in US–China Piracy Dispute*].

224. Michael Geist, *Why the U.S. Lost Its WTO IP Complaint Against China. Badly*, MICHAEL GEIST'S BLOG (Jan. 27, 2009), http://www.michaelgeist.ca/content/view/3645/125/; *see also* Rogier Creemers, *The Effects of World Trade Organisation Case DS362 on Audiovisual Media Piracy in China*, 31 EUR. INTELL. PROP. REV. 568, 575 (2009) (noting that "subsequent commentaries denoted the victory as being 'hollow', or 'totally meaningless'").

225. *Ruling in US–China Piracy Dispute*, *supra* note 223, at 9.

226. Xue, *supra* note 46, at 292.

227. *See* Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Prod-*

In retrospect, the outcome of this dispute is actually not hard to predict, notwithstanding the many inherent ambiguities built into the TRIPS Agreement.[228] A number of commentators have already gone on record to observe an even match between the two parties.[229] In past academic events, I also noted that China would prevail on the criminal threshold claim, while the United States would win the formalities claim, with the second one being a toss-up, due to its fact-intensive nature.[230]

While these predictions were not too far off, the importance of the WTO panel report is not in its conclusions, but rather in the reasoning behind those conclusions. For intellectual property rights holders, the most important question is not who wins or loses in the dispute, but whether the resolution of this dispute would lead to substantive improvements in intellectual property protection and enforcement in China. The answer, unfortunately, is mostly negative.

A. Thresholds for Criminal Procedures and Penalties

The first claim concerned the thresholds for criminal procedures and penalties. Because the United States failed to provide sufficient evidence to substantiate this claim, the thresholds in the Chinese Criminal Law remain intact. To some extent, the panel report showed how complex Chinese criminal laws are. The various submissions and oral statements also suggested that the U.S. position might have been hurt by the ongoing perpetuation of Western stereotypes about the shortcomings of the Chinese legal system—just like how these stereotypes have sometimes hurt foreign businesspeople in China.

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ucts, WT/DS363/AB/R (Dec. 21, 2009) [hereinafter Market Access Appellate Body Report].

228. *See* WATAL, *supra* note 124, at 7 (advancing the concept of "constructive ambiguities"); Peter K. Yu, *The Objectives and Principles of the TRIPS Agreement*, 46 HOUS. L. REV. 979, 1022–23 (2009) (discussing the ambiguities within the TRIPS Agreement).

229. *See, e.g.*, *U.S.C.C. Hearing*, *supra* note 31, at 226 (testimony of Daniel C.K. Chow, Professor of Law, Ohio State University) (noting that it was not "a clear-cut case that China [was] in violation of the WTO"); Harris, *supra* note 46, at 187 ("[T]he complaint will result in very little substantive intellectual property changes. The United States may prevail on some of its claims, but China should be able to successfully defend on the primary claim."); Liza Porteus Viana, *Industry Losing Faith in WIPO; Debates US WTO Cases Against China*, INTELL. PROP. WATCH (Mar. 28, 2008), http://www.ip-watch.org/weblog/2008/03/28/industry-losing-faith-in-wipo-debates-us-wto-cases-against-china/ (reporting about the debate on "whether the piracy complaints lodged against China at the World Trade Organization are going to be effective in compelling Beijing to enforce anti-counterfeiting and anti-piracy measures").

230. I made these predictions during my Distinguished Professor Presentation at John Marshall Law School in Chicago on November 6, 2007 and at the 16th Fordham Annual International Intellectual Property and Policy Conference at Fordham University School of Law in New York on March 28, 2008.

If one has to challenge Chinese law, it would be ill-advised to rest the challenge on the inadequate development of Chinese criminal law. Although China is still making progress toward a greater respect for the rule of law,[231] its criminal system is exceedingly well-developed. Criminal law has always been considered "a prominent branch of law in the Chinese legal system."[232] If there is any inadequacy in the Chinese criminal system, the inadequacy lies in a lack of procedural safeguards and judicial independence, problematic evidentiary standards, local protectionism, and corruption.[233] Under-enforcement, however, is rarely a problem.

In fact, criminal law is one of the most established branches of law not only in China but throughout the world. According to *Shang Shu* (*The Book of Documents*), "by about 2200 B.C. [during the Xia Dynasty], the words *crime* and *penalty* were [already] known in ancient China."[234] Dating back to at least a millennium before the time of Confucius[235] (who was given a nonhereditary post as a Minister of Crime at a young age)[236] and close to four millennia before the establishment of the American Republic, penal law in China was so dominant that some commentators have wondered whether ancient Chinese law was mostly, and unduly, penal.[237] Even in the intellec-

231. For rule-of-law developments in China, see generally JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION (Randall Peerenboom ed., 2009); RANDALL P. PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW (2002); THE LIMITS OF THE RULE OF LAW IN CHINA (Karen G. Turner et al. eds., 2000).

232. JIANFU CHEN, CHINESE LAW: CONTEXT AND TRANSFORMATION 261 (2008).

233. *See, e.g.*, JONATHAN HECHT, OPENING TO REFORM?: AN ANALYSIS OF CHINA'S REVISED CRIMINAL PROCEDURE LAW (1996) (exploring the limitations of the revised Chinese Criminal Procedure Law).

234. REN XIN, TRADITION OF THE LAW AND LAW OF THE TRADITION: LAW, STATE, AND SOCIAL CONTROL IN CHINA 37 (1997); *see also id.* ("Although there was no archaeological evidence of the existence of formally written law at the time of the Xia Dynasty, *Shang Shu* recorded the earliest forms of the 'five penalties'—tattooing, disfigurement, castration, mutilation, and death—that were believed to be the components of *Yü xing* in the Xia Dynasty (2100–1600 B.C.)."); *id.* at 127 ("According to ancient legal documents, China began to use penal facilities to confine those found guilty of crime as early as 770 B.C.").

235. *See* Yu, *From Pirates to Partners II*, *supra* note 25, at 969–74; Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 39, at 32–34.

236. *See* Marvin Wolfgang, *Foreword* to REN, *supra* note 234, at ix ("As a young man, Confucius (550–479 B.C.) was given the first nonhereditary post as Minister of Crime in the government of Lu.").

237. *See, e.g.*, DAN C.K. CHOW, THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA IN A NUTSHELL 50 (2003) ("As Confucianism viewed law primarily as a mechanism to maintain social control, the Tang Code and its successors were chiefly criminal in nature, which contributed to a general perception among the populace that law was something to be feared."). Noted Chinese legal historian Philip Huang, however, disagreed: "The conclusion [that the Qing legal system was predominantly penal and gave little attention to civil matters] . . . does not square with the documentary evidence. Archival case records have shown us that

tual property field, an area in which China had very limited experience, a criminal law provision (Article 127) appeared as early as the late 1970s—in the 1979 Criminal Law that was promulgated shortly after the Cultural Revolution and the country's reopening to foreign trade.[238]

Moreover, as William Alford reminded us, the problem with China is not a lack of laws, but the existence of too many.[239] To some extent, the United States seems to have been overwhelmed by not only the sophistication and complexity of the Chinese criminal system, but also the regulatory maze and abundant laws that can be implicated by intellectual property crimes. As one U.S. trade official told me in frustration, it is really difficult to litigate over a set of "infinitely manipulable" laws. Whether the laws are infinitely manipulable or just highly complex, of course, is in the eye of the beholder.

If these challenges are not enough, it is important to remember that the United States had made a conscious and calculated choice not to push hard for criminal enforcement in China in the early 1990s. As Joseph Massey, the former Assistant USTR for Japan and China, recalled, the United States made a decision not to press for criminal penalties for intellectual property piracy in China in the early-to-mid-1990s because of concern over political repression.[240] Although many in the first Bush and Clinton administrations considered this approach appropriate and politically palatable, it has now backfired on the United States by making enforcement problems more difficult to tackle.[241] To some extent, it may now be just too late for the United States to fight a battle that it intentionally gave up two decades ago.

Although the above discussion explained why the United States lost the first, and arguably its most important, claim, it is worth using

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the Qing legal system in fact dealt regularly and frequently with civil cases." PHILIP C. HUANG, CODE, CUSTOM, AND LEGAL PRACTICE IN CHINA: THE QING AND THE REPUBLIC COMPARED 23 (2001).

238. DIMITROV, *supra* note 161, at 148; *accord* NIE, *supra* note 60, at 214 ("Historically, the earliest provision on criminal penalties of infringement of intellectual property rights was Article 127 of the Criminal Law of the People's Republic of China (1979). It provided criminal penalties such as less than three years' imprisonment, detention and fine for acts of violation of trademark regulation and for passing off another person's trademark as one's own.").

239. *See* William P. Alford, *How Theory Does—and Does Not—Matter: American Approaches to Intellectual Property Law in East Asia*, 13 UCLA PAC. BASIN L.J. 8, 21 (1994) (noting that he was "tempted to write an article entitled 'Why China Has Too Much Law—And Too Little Legality'").

240. *See* 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, 234 (2006); *accord* DIMITROV, *supra* note 161, at 147 ("Since the 1989 Tiananmen Square protests, it has not been desirable or politically viable for the United States to encourage police involvement in any type of policy implementation.").

241. *See* Peter K. Yu, *International Enclosure, the Regime Complex, and Intellectual Property Schizophrenia*, 2007 MICH. ST. L. REV. 1, 30.

counterfactual reasoning to explore whether rights holders would have received stronger intellectual property protection had the United States prevailed. After all, the intellectual property industries continue to insist that they could have won the claim, because there was sufficient evidence to show China's non-compliance in the criminal enforcement area.[242]

The answer to this particular question, unfortunately, is "it depends." Ultimately, the answer depends on whether criminal (and most likely judicial) enforcement will provide a more effective deterrent than administrative enforcement. In China, administrative enforcement can be more effective than judicial enforcement under certain circumstances and outside Beijing, Shanghai, Guangzhou, and other major cities.[243] Administrative enforcement is also cheaper, quicker, more flexible, and less antagonistic.[244] Many rights holders, indeed, have found this form of enforcement effective in addressing the piracy and counterfeiting problems in China.

By comparison, judicial enforcement protects rights holders from corruption and local protectionism.[245] It also allows for damage compensation and pre-litigation remedies.[246] With the introduction since the 1990s of specialized courts with judges possessing intellectual property expertise, courts in major cities have greatly improved.[247] As a result, rights holders in these cities have increasingly resorted to

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242. The panel report was unclear on this point. For example, it stated:

> There is no indication that probative evidence on this point would be difficult to obtain. Indeed, it can be noted that more specific information on prices and markets in China is contained in various US exhibits, notably information on prices of products in a report on Cinema and Home Entertainment in China prepared by Screen Digest and Nielsen NRG (submitted in support of the claim regarding the Copyright Law) and in annexes to a letter from Nintendo of America to the United States Trade Representative.

TRIPS Enforcement Panel Report, *supra* note 9, ¶ 7.630 (footnote omitted). Nevertheless, the panel made clear that "[t]he information in the exhibits would not necessarily have been sufficient." *Id.* ¶ 7.631.

243. *See* Yu, *From Pirates to Partners II*, *supra* note 25, at 946–47.

244. *See id.* at 946. Likewise, Carlos Correa noted:

> It has been noted . . . that criminalization may entail some disadvantages for right holders as "the rights owner has no control over the case, has to submit to the slow pace of criminal cases, and does not as a rule receive any compensation." But this is not always the case, as in many instances the right holder can participate in criminal procedures, which may be faster than civil litigation, and judges are also authorized to determine damages. Instead, the main hurdle for right holders may be the need to produce clear and convincing evidence about the infringement, while a preponderance of evidence may suffice in civil litigation.

Correa, *supra* note 2, at 42 (footnote omitted).

245. *See* Yu, *From Pirates to Partners II*, *supra* note 25, at 946.

246. *See id.*

247. *See id.* at 946–47.

the use of courts.[248] In short, administrative enforcement has both strengths and weaknesses, and there is no one-size-fits-all solution for rights holders doing business in China.

Moreover, the presence of a parallel enforcement system may suggest limited improvements even if China has been found to have failed to provide the required criminal measures. Article 61 of the TRIPS Agreement explicitly demands criminal enforcement.[249] However, it does not define the term "criminal" for the purposes of the Agreement. Nor did the Agreement's drafters intend the obligation to encroach on each WTO member's ability to design its domestic criminal system. Thus, had the criminal thresholds been found to be inconsistent with the TRIPS Agreement, China could arguably re-label its administrative measures criminal or incorporate those measures into the Criminal Law. As Brazil rightly recognized in its third party submission, "[i]t seems to be overly formalistic to assume that because a domestic legal system qualifies monetary fines as administrative penalties, the core substantive issue of the deterrence capability of the remedy should be put aside."[250] Moreover, as Donald Harris pointed out, lowering the criminal thresholds would not necessarily "ensure a corresponding rise in criminal prosecutions or, for that matter, a reduction in infringement."[251]

Determining what is considered criminal for the purposes of the TRIPS Agreement is, indeed, rather difficult. Such a determination is also highly political—a task that WTO panels would prefer not to undertake, especially in view of its primary objective of resolving trade disputes. Different countries subscribe to different concepts, values, cultural and historical traditions, and underlying philosophies. Except for such heinous crimes as murder, what is criminal in one country may not be so in another.

Moreover, China has a longstanding penal law tradition, even though it did not have a Western-style criminal law system until the arrival of Westerners and their gunboats. A major cause of the Opium War in the mid-nineteenth century was, in fact, the differences between the Chinese and Western criminal law systems—in particular, the Chinese insistence on "guilty until proven innocent" and "a life for a life."[252] One therefore could aggressively debate whether some forms of administrative or penal enforcement could be classified as criminal for the purposes of the TRIPS Agreement.

248. *See id.* at 947; *see also* CATHERINE SUN, CHINA INTELLECTUAL PROPERTY FOR FOREIGN BUSINESS 12 (2004) (stating that, in 2002, the total numbers of patent and trademark cases adjudicated were 2080 (an increase of 30.24% over 2001) and 707 (an increase of 46.68%), respectively).

249. TRIPS Agreement art. 61.

250. TRIPS Enforcement Panel Report, *supra* note 9, ¶ 7.673.

251. Harris, *supra* note 46, at 186.

252. *See* IMMANUEL C.Y. HSÜ, THE RISE OF MODERN CHINA 152 (6th ed. 2000).

To be certain, criminal enforcement may require something to be done by "procedures initiated by or on behalf of the state to punish offences against the common well-being"—a definition Australia advanced in its third party submission.[253] However, ex officio administrative enforcement—including the so-called administrative detention,[254] which is widely used in China—arguably could satisfy this definition. Fortunately for the panel, neither the United States nor China argued whether administrative enforcement measures in China could satisfy Article 61 of the TRIPS Agreement.[255] The issue was, therefore, left for another day. Had China pushed harder on this particular issue, it would, indeed, be interesting to see how the panel would rule.

Moreover, for a country that went through the Cultural Revolution, numerous class struggles, and hundreds, if not thousands, of mass campaigns, it is fair to question whether the Chinese would view criminal law the same way as Americans—or, for that matter, other Westerners. Ted Fishman, for example, noted the cynical nature of the oft-conducted enforcement raids on piracy and counterfeiting:

> The purposes behind the publicized raids are always obscure, and the Chinese who read about them are skeptical about taking the raids at face value. Are they the result of turf wars among the government fiefdoms that are themselves knee-deep in counterfeiting? Did the raided factories push the Party's tolerance of violent and eroticized Western entertainment too far? Did they pirate a movie backed by the Chinese government? Or was that day's demonstration of will just a show for a foreign trade group coming to China to—yet again—express its grave concerns over intellectual-property theft?[256]

The key to deterrence in a criminal system is getting offenders to know what crime they have committed and what punishment such crimes exact. If they do not know why they are punished or assume cynically that their stated crime is just a pretext for other things they did—or worse, a large political ploy to please foreign government officials or trade groups—the law will not have a strong deterrent effect no matter how stiff the criminal penalties are. The increasing push for criminal measures also does not take into consideration the grow-

253. TRIPS Enforcement Panel Report, *supra* note 9, annex C–2, ¶ 4.

254. For discussions of administrative detention in China, see generally Sarah Biddulph, *The Production of Legal Norms: A Case Study of Administrative Detention in China*, 20 UCLA PAC. BASIN L.J. 217 (2003); Randall Peerenboom, *Out of the Pan and into the Fire: Well-Intentioned but Misguided Recommendations to Eliminate All Forms of Administrative Detention in China*, 98 NW. U. L. REV. 991 (2004).

255. *See* TRIPS Enforcement Panel Report, *supra* note 9, ¶ 7.478 ("[N]either party to the dispute argues that administrative enforcement may fulfil the obligations on criminal procedures and remedies set out in Article 61 of the TRIPS Agreement. Therefore, the Panel does not consider this issue further." (footnote omitted)).

256. TED C. FISHMAN, CHINA INC.: HOW THE RISE OF THE NEXT SUPERPOWER CHALLENGES AMERICA AND THE WORLD 236 (2005).

ing volume of literature questioning the deterrent effect of criminal penalties.[257]

From the standpoint of protecting human rights and civil liberties, "increased criminalization of counterfeiting could become a tool for repression."[258] Such penalties may also be disproportional to the offense in the intellectual property area, especially when the perpetrator is only a weak link within the chain of command in piracy and counterfeiting, such as street vendors.[259] As Professor Mertha reminded us, "[a] prison sentence often means losing one's livelihood, one's family, and any prospects for a decent job in the future. This is true all over Asia, but it is particularly true in China."[260] Indeed, given the strong antipathy toward crimes in Asian societies, criminal penalties may also carry a much higher penalty than is found in Western countries. As Professor Harris rightly questioned, "whether five years in a U.S. prison corresponds to five years in a Chinese prison is unknown."[261]

Finally, it is interesting to find the United States taking a strong position on criminal enforcement when U.S. rights holders—most notably American music and movie industries—have increasingly lobbied for the use of administrative mechanisms, as either a substitute or an institutional enhancement. As these industries have repeatedly

257. *See* Harris, *supra* note 46, at 158 ("Whether criminal penalties deter crime is questionable. While there are conflicting studies, countless studies have found that stronger criminal laws have no deterrent effect."). As Professor Harris observed:

> With regard to China, a recent article investigating the deterrent effect of China's stronger criminal penalties for robbery found that China's stringent penalties, including the death penalty, provided no deterrent effect despite the fact that penalties for robbery are enforced regularly with many arrests and quick prosecutions. The study found that during the period of stronger criminal penalties, rather than slow, economic property crimes nearly quadrupled. The study concluded that not only did China's strict system fail as an effective deterrent, but that it also diverted resources from preventative measures. There is thus an open question whether China's criminal penalties (or any country's, for that matter) can deter future infringement.

Id. at 160 (footnotes omitted).

258. Andrew C. Mertha, *Shifting Legal and Administrative Goalposts: Chinese Bureaucracies, Foreign Actors, and the Evolution of China's Anti-Counterfeiting Enforcement Regime*, *in* ENGAGING THE LAW IN CHINA: STATE, SOCIETY, AND POSSIBILITIES FOR JUSTICE 161, 180 (Neil J. Diamant et al. eds., 2005).

259. *See* TRIPS Agreement art. 61 ("Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity."); CORREA, *supra* note 143, at 449 ("[T]he *level* of penalties applied . . . must be consistent with that applied for crimes of 'a corresponding gravity'. Members have considerable discretion to determine how to apply these standards and, particularly, to establish which are the crimes of comparable gravity in the national context.").

260. Mertha, *supra* note 258, at 180.

261. Harris, *supra* note 46, at 146.

noted in the context of internet file sharing, criminal penalties are slow, intrusive, and highly unpopular.[262] In the United States, for example, the unpopular lawsuits the music industry has filed against individual file sharers have threatened to make the industry "the most hated industry since the tobacco industry."[263] From the U.S. standpoint, a preferable approach, therefore, is to develop a more streamlined administrative process[264] or to facilitate greater cooperation between rights holders and internet service providers.[265] Because the TRIPS Agreement was drafted with limited anticipation of developments in the digital environment,[266] a blind push for reforms based on provisions that were drafted in the early 1990s—such as those in the TRIPS Agreement[267]—may ultimately undermine the rights holders' interests, especially in an age of rapidly-changing technological and business conditions.

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262. *See* Peter K. Yu, *Digital Copyright Reform and Legal Transplants in Hong Kong*, 48 U. LOUISVILLE L. REV. 693, 701–09 (2010) [hereinafter Yu, *Digital Copyright Reform*].

263. *RIAA's Gaze Turns from Users to ISPs in Piracy Fight*, ROLLING STONE (Dec. 19, 2008), http://www.rollingstone.com/music/news/riaas-gaze-turns-from-users-to-isps-in-piracy-fight-20081219.

264. *See, e.g.*, Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1410–25 (2004) (proposing an efficient administrative dispute resolution system for peer-to-peer file sharing infringement cases); Jacqueline D. Lipton, *Solving the Digital Piracy Puzzle: Disaggregating Fair Use from the DMCA's Anti-Device Provisions*, 19 HARV. J.L. & TECH. 111, 149–55 (2005) (discussing "an administrative mechanism to determine when, and on what basis, a particular fair use should be enabled"); Yu, *Digital Copyright Reform*, *supra* note 262, at 766 ("It may . . . be useful to introduce a complaint-and-enforcement procedure to examine and respond to cases where the [online service provider] fails to put back materials on a timely basis following the receipt of a counter notice.").

265. For discussions of the graduated response system, see generally Annemarie Bridy, *Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement*, 89 OR. L. REV. 81 (2010); Alain Strowel, *Internet Piracy as a Wake-up Call for Copyright Law Makers—Is the 'Graduated Response' a Good Reply?*, 1 WIPO J. 75 (2009); Peter K. Yu, *The Graduated Response*, 62 FLA. L. REV. 1374, 1379–94 (2010).

266. *See* Peter K. Yu, *Teaching International Intellectual Property Law*, 52 ST. LOUIS U. L.J. 923, 933–34 (2008) (citing the information revolution as an example of those technological changes that the drafters of the TRIPS Agreement failed to anticipate).

267. *See* Daniel J. Gervais, *The TRIPS Agreement and the Doha Round: History and Impact on Economic Development*, *in* 4 INTELLECTUAL PROPERTY AND INFORMATION WEALTH 23, 43 (Peter K. Yu ed., 2007) ("TRIPS adjusted the level of intellectual property protection to what was the highest common denominator among major industrialized countries as of 1991."); *see also id.* at 29 ("[T]he 1992 text was not extensively modified and became the basis for the TRIPS Agreement adopted at Marrakesh on April 15, 1994.").

B. Disposal of Infringing Goods

The second claim concerned the disposal of infringing goods seized at the border. On its face, the panel's determination of the failure of the Chinese customs authorities to properly handle seized goods in their auctions has greatly strengthened protection for intellectual property rights holders. In reality, however, the ruling has only minimal impact on U.S. intellectual property interests.

Of all the goods seized at the border, the Chinese customs authorities have already destroyed "over half of [these goods]" when measured against the value of all seized goods.[268] "[T]he number of shipments destroyed far exceeds the number of shipments auctioned, and . . . in three years Customs has only decided to auction goods twelve times."[269] Moreover, as the panel acknowledged, the present panel report covers only imports,[270] which represented a mere 0.15 percent by value of the infringing goods disposed of or destroyed in China between 2005 and 2007.[271] Even more problematic, although the use of auctions constituted a mere two percent of all disposition outcomes, *none* of the confiscated imports were auctioned off.[272] As far as effective intellectual property enforcement goes, one has to wonder how China could improve on zero.

In early 2010, China amended its Customs Regulations in an effort to comply with the panel report.[273] The amended Article 27 states that "the customs may lawfully auction them after the infringement features have been eliminated; *but the imported goods bearing counterfeit trademarks shall not be permitted to enter the commercial channels only by eliminating the trademarks on the goods, except for special circumstances*."[274] As indicated in italics, the new language was taken directly from Article 46 of the TRIPS Agreement (with translation into Chinese and then back to English for this translated version).[275]

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268. TRIPS Enforcement Panel Report, *supra* note 9, ¶ 7.250.

269. *Id.* ¶ 7.351.

270. *See id.* ¶¶ 7.230–.232.

271. *See id.* ¶ 7.232.

272. *See id.*

273. *See* Decision of the State Council on Amending the Regulation of the People's Republic of China on the Customs Protection of Intellectual Property Rights (国务院关于修改《中华人民共和国知识产权海关保护条例》的决定) (promulgated by the State Council, Mar. 24, 2010, effective Apr. 1, 2010), http://www.lawinfochina.com/NetLaw/display.aspx?db=1&id=8025.

274. *Id.* ¶ 4 (emphasis added).

275. *Compare id.* ("[T]he customs may lawfully auction them after the infringement features have been eliminated; but the imported goods bearing counterfeit trademarks shall not be permitted to enter the commercial channels only by eliminating the trademarks on the goods, except for special circumstances."), *with* TRIPS Agreement art. 46 ("In regard to counterfeit trademark goods, the simple removal

From the legislative standpoint, the direct transcription of the TRIPS language into local regulations is intriguing. Taken verbatim from the "A" text proposed by developed countries during the TRIPS negotiations,[276] the language in Article 46 differs significantly from the language used in other parts of the Chinese Customs Regulations. While the TRIPS Agreement and the panel report do not dictate how laws are to be drafted, China eventually transcribed the TRIPS language for two reasons. First, the use of such language protects China from future compliance challenges before the WTO with respect to this particular provision. The amendment therefore puts an end to the present dispute over the inconsistencies between the Chinese Customs Regulations and the TRIPS Agreement. Second, the adopted language shows the country's good faith effort in bringing its laws into conformity with the TRIPS Agreement. It sends a strong signal to the international community that China takes its WTO obligations seriously. It also allows the country to earn goodwill despite its continuous struggle to improve intellectual property protection.

From the enforcement standpoint, however, the transcribed language has raised some implementation challenges. Whether the adopted language will provide effective protection to rights holders will depend on how effective the Chinese authorities implement this language and whether those authorities can fully internalize the underlying values based on language that may be foreign to them and that may not have a standard interpretation in the Chinese legal or regulatory system.

Equally disturbing in the second claim is the United States' eagerness to challenge what it has called the "compulsory sequence of steps"[277] in Chinese customs procedures. While providing discretion is not bad per se, and the insistence on discretion is symbolically powerful when linked to the larger U.S. freedom agenda, firms and businesspeople in China—both local and foreign—have repeatedly complained about China's problems of corruption and local protectionism.[278] As Daniel Chow noted, local protectionism remains "wide-

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of the trademark unlawfully affixed shall not be sufficient, other than in exceptional cases, to permit the release of the goods into channels of commerce.").

276. *See* Daniel J. Gervais, *Intellectual Property, Trade & Development: The State of Play*, 74 FORDHAM L. REV. 505, 508 (2005) (noting that the GATT Secretariat "prepar[ed] a 'composite' text, which melded all industrialized countries' proposals into what became the 'A' proposal, while the developing countries' text became the 'B' text").

277. TRIPS Enforcement Panel Report, *supra* note 9, annex A–2, ¶ 17.

278. *See* Daniel C.K. Chow, *Counterfeiting in the People's Republic of China*, 78 WASH. U. L.Q. 1, 26–27 (2000) ("Local protectionism in China is widespread and poses probably the single most significant problem in enforcement against counterfeiting. The trade in counterfeit goods has now become a vital portion of some local economies, providing employment for otherwise unemployable workers and generating significant revenue for the local economy."); Li Yiqiang, *Evaluation of the*

spread and poses probably the single most significant problem in enforcement against counterfeiting."[279] The more discretion there is, the more likely local protectionism and corruption will occur.

After all, the Chinese proverb "the mountains are high, and the Emperor is far away"[280] (*shan gao huangdi yuan*) remains fairly accurate as far as intellectual property enforcement goes. That proverb is illustrated well by the experience of a senior USTR official who visited the Guangdong province shortly after the signing of the 1992 memorandum of understanding between China and the United States. As Joseph Massey recounted, that official "was [literally] told by a senior provincial government leader that 'Beijing's agreement' with the US was '*mei you guanxi*' (irrelevant) in that southern province."[281]

In fact, with the current central-local dynamics in China and the ongoing heavy decentralization of the central government,[282] measures that curtail local discretion might be in the interest of rights holders, even if these measures sound draconian by U.S. standards. Today, most government agencies, including the National Copyright Administration and the Administration for Industry and Commerce, have become either partially or fully decentralized.[283] Because the

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Sino-American Intellectual Property Agreements: A Judicial Approach to Solving the Local Protectionism Problem, 10 COLUM. J. ASIAN L. 391, 395–401 (1996) (discussing the problems of local protectionism in the context of intellectual property enforcement); Jingzhou Tao, *Problems and New Developments in the Enforcement of Intellectual Property Rights in China*, *in* INTELLECTUAL PROPERTY AND TRIPS COMPLIANCE IN CHINA: CHINESE AND EUROPEAN PERSPECTIVES 107, 109 (Paul Torremans et al. eds., 2007) (listing local protectionism as "the greatest barrier to intellectual property rights protection in the PRC"); Peter K. Yu, *Three Questions that Will Make You Rethink the U.S.–China Intellectual Property Debate*, 7 J. MARSHALL REV. INTEL. PROP. L. 412, 421–22 (2008) [hereinafter Yu, *Three Questions*] (discussing the problems of local protectionism in China).

279. Chow, *supra* note 278, at 26.

280. *See e.g.*, Yu, *Three Questions*, *supra* note 278, at 422.

281. Massey, *supra* note 240, at 235.

282. *See generally* C. FRED BERGSTEN ET AL., CHINA'S RISE: CHALLENGES AND OPPORTUNITIES 75–89 (2009) (discussing the central–local dynamics in China and the increasing decentralization of the central government) [hereinafter BERGSTEN ET AL., CHINA'S RISE].

283. *See* DIMITROV, *supra* note 161, at 50. As Professor Dimitrov observed:

> Currently, only two bureaucracies with IPR enforcement portfolios have a vertical (i.e., centralized) bureaucratic structure, the GAC [General Administration of Customs] and the STMA [State Tobacco Monopoly Administration]; both agencies serve as primary revenue generators for the consolidated national budget; centralization allows the central government to establish better control over the tax revenue it collects from these agencies. The SAIC [State Administration for Industry and Commerce], the AQSIQ [General Administration of Quality Supervision, Inspection, and Quarantine], and the SFDA [State Food and Drug Administration] are partially centralized. Other bureaucracies with an IPR enforcement portfolio are fully decentralized: the Ministry of Culture (MOC), the Ministry of Agriculture (MOA), the Ministry of Health

General Administration of Customs is one of the two rare government agencies involved in intellectual property enforcement that still have a centralized bureaucratic structure,[284] it may provide a plausible solution to decentralization-related problems in China. Had the United States succeeded in introducing more discretion in customs at both the local and provincial levels, it might have hurt rights holders without even realizing the potential harm.

To some extent, the demands to inject more discretion into the customs authorities will create the same unintended consequences as the opening up of China following its accession to the WTO. As Professor Chow observed in the early days of China's WTO accession, the commitments the country made in the run-up to the accession would lead to reduced restrictions on export privileges and the elimination of state monopoly over trading rights.[285] These outcomes, in turn, would allow pirates and counterfeiters to trade more aggressively with mar-

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(MOH), the General Administration of Press and Publications (GAPP), the National Copyright Administration of China (NCAC), and the MPS (known as the Public Security Bureau or PSB at the local level). The SIPO [State Intellectual Property Office], though formally decentralized, functions in practice as a quasi-centralized bureaucracy, since it only penetrates down to the provincial level, a structure that makes monitoring easier than for bureaucracies with deeper reach.

Id.

284. As Professor Dimitrov described:

> Chinese customs is a ministerial-level entity directly under the State Council. It is hierarchically organized, with the General Administration of Customs (*Haiguan zongshu*) (GAC) at the top, followed by a middle tier composed of the Guangdong Subadministration of the GAC (*Haiguan zongshu Guangdong fenshu*), two supervisory offices (in Tianjin and Shanghai), and forty-one Customs regions. At the lowest tier of the system, there are 562 Customs houses and offices. Although there are only 251 central-level staff, collectively the Customs Administration and its affiliated units employ over 48,000 people across China. Since the 1998 centralization, Customs regions no longer report to their respective local governments and instead have established direct vertical reporting relationships with the GAC in Beijing.

Id. at 76–77 (footnotes omitted).

285. *See* CHOW, A PRIMER, *supra* note 62, at 254. As Daniel Chow elaborated in his testimony before the U.S.–China Economic and Security Review Commission:

> To implement some of China's commitments when it entered the World Trade Organization, China amended its Foreign Trade Law on July 1, 2004, to eliminate the state monopoly on trading rights. Under the amended law, except for certain types of goods such as crude oil, cotton, and certain foodstuffs, which must be traded by state-owned companies, any business operator has the right to import or export goods after it has registered with the competent state authorities. The elimination of the state monopoly over trading rights means that any counterfeiter is now free to export on its own, without the need to find a complicit state trading company. As a result, many observers expect that counterfeits exported from China will rise sharply in the foreseeable future.

U.S.C.C. Hearing, *supra* note 31, at 221 (written testimony of Daniel C.K. Chow, Professor of Law, Ohio State University).

kets that have "a strong appetite for low-priced counterfeit goods," such as Southeast Asia and Eastern Europe.[286] As a result, piracy and counterfeiting were expected to increase, *not decrease*, following China's accession to the WTO. It is something that both U.S. policymakers and industries knew well in advance.[287] It is, therefore, rather disingenuous to consider surprising the increase in piracy and counterfeiting in the post-WTO environment.

If these criticisms are not enough, it is rather odd for the United States to claim that Chinese law is rigid—a non-starter for most Chinese law experts. While the application of Chinese law is sometimes rigid, due to a civil law tradition, a top-down political structure, and the legacy of a tightly controlled command economy, Chinese law has been known for its flexibility.[288] For example, discretion and informality have been built into the Chinese legal system. As Peter Corne explained:

> The Chinese have adopted a rationale that lends itself to the creation of laws that are inherently flexible so that they may be adjusted according to the vagaries of human behaviour. Such laws allow for wide variation in application as they are customarily expressed as general principles (*yuanze*). Chinese jurists . . . take this understanding of law to be consistent with socialism, which considers law as part of the superstructure of society. When economic relations change, law should change as well . . . .
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> This provides a rationale for vaguely written, broad laws that allow wide variation in application . . . .[289]

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286. CHOW, A PRIMER, *supra* note 62, at 254; *accord* Chow, *supra* note 278, at 21.

287. Justin Hughes, Written Statement Before the U.S.–China Economic & Security Commission 4 (June 8, 2006), *available at* http://www.uscc.gov/hearings/2006hearings/written_testimonies/06_06_08wrts/06_06_7_8_hughes_justin.pdf (written testimony of Justin Hughes, Director, Intellectual Property Law Program, Benjamin N. Cardozo School of Law, Yeshiva University) [hereinafter Justin Hughes' Written Testimony] ("There have always been substantial doubts that the Chinese Government could ramp up IP law and IP enforcement quickly enough following the country's admission to the WTO. Given the enforcement challenges faced daily in OECD countries, it is no surprise that we are in the situation we now face." (footnote omitted)).

288. For discussions of the built-in flexibilities in the Chinese legal system, see generally PETER HOWARD CORNE, FOREIGN INVESTMENT IN CHINA: THE ADMINISTRATIVE LEGAL SYSTEM 93–145 (1997); Glenn R. Butterton, *Pirates, Dragons and U.S. Intellectual Property Rights in China: Problems and Prospects of Chinese Enforcement*, 38 ARIZ. L. REV. 1081, 1113 (1996); Margaret Y.K. Woo, *Law and Discretion in Contemporary Chinese Courts*, *in* THE LIMITS OF THE RULE OF LAW IN CHINA, *supra* note 231, at 163; Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 39, at 36–37.

289. CORNE, *supra* note 288, at 93; *see also id.* at 94 (declaring that "law should not be too specific lest it tie our hands and feet in the face of the rapidly changing situation" (quoting the remarks made by Wang Hanbin, Director of the Judicial Committee of the National People's Congress, in 1985)); *id.* at 125 (discussing how flexibility is built into the Chinese legal system as "a deliberate effort to overcome the inherent limitations of a unitary system of law in a large and incredibly di-

Thus, in its early days, the Chinese legal system was "in essence as fluid and changeable as the economy and society which it [was] supposed to regulate [and] the informal aspects of regulatory rules change[d] as rapidly as the government's economic policy."[290]

In addition, because of rapidly-changing socio-economic conditions, legislation is often issued "on an interim or trial use basis."[291] Many foreign businesspeople and commentators, indeed, have found Chinese law too malleable to be fair and effective. Thus, for China observers, it is rather odd for the United States to advance the claim that Chinese law is inflexible—a claim that does not match the actual reality of the Chinese legal system well.

Moreover, if the United States and its supportive rights holders want to make sure that the Chinese customs authorities are obligated under the TRIPS Agreement to destroy the seized goods, asking for more discretion seems to defeat its intended purpose. As Brazil rightly recognized in its third party submission:

> [T]he United States' arguments with regard to [the "authority to destroy"] issue appear to be somewhat paradoxical. In general, the less discretion a public agent enjoys, the closer its authority will be to a legal obligation. Conversely, more discretion means the authority has more leeway to choose not to follow the prescribed conduct in light of specific circumstances.[292]

Until the United States can reconcile the paradoxical nature of this claim, it is unlikely to use the WTO process to successfully induce more destruction of infringing goods seized at the border.

C. Copyright Protection for Censored Works

The final claim concerned copyright protection for censored works. From the beginning, most commentators agreed that the United States would prevail on that claim. Many Chinese commentators have also acknowledged the provision's redundancy, raising questions about the actual importance of the claim.[293]

To a large extent, Article 4 was included as a political compromise in light of concerns over information control and the strong political leverage of the public security bureaucracy.[294] In the early 1990s, the

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verse country" and that the process of specification is used to "continually adjust [the law] to match the social exigencies of the locality in question").

290. *Id.* at 94. As Peter Corne noted, legal drafting, at that time and to a lesser extent today, was characterized by "principle-like pronouncements; vagueness and ambiguity; undefined terms; broadly worded discretions; omissions; general catch-all clauses." *Id.* at 95.

291. Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 39, at 36.

292. TRIPS Enforcement Panel Report, *supra* note 9, annex C–4, ¶ 28.

293. *Cf. id.* ¶ 7.129 ("[T]he *second* sentence of Article 4 of the Copyright Law (that is not the subject of the claim in this dispute) may already address China's public policy concerns with respect to some of these rights.").

294. As Professor Mertha recounted:

introduction of copyright law was one of the key conditions for the renewal of the U.S.–China Bilateral Trade Agreement.[295] China, at that time, had yet to join the WTO. Notwithstanding the Chinese leaders' wish to earn U.S. support in its entry to the WTO, introducing the Copyright Law was rather challenging in a highly politically-charged environment following the 1989 student protests in Tiananmen Square. Many conservative hardliners, understandably, were concerned about how the new statute would affect information control, not to mention the fact that the law would benefit mostly the intelligentsia, most of whom these hardliners "eyed with the most suspicion."[296] In the end, Article 4 was added to provide the needed compromise.

On February 26, 2010, exactly fifteen years after the signing of the 1995 Agreement Regarding Intellectual Property Rights with the United States,[297] China amended Article 4 of the Copyright Law to bring the law into conformity with the TRIPS Agreement.[298] Because the first sentence of Article 4 was found to be inconsistent with the TRIPS Agreement, it was removed.[299] The second sentence, which stated that "[c]opyright owners, in exercising their copyright, shall not violate the Constitution or laws or prejudice the public interests,"[300] remained intact and became the first sentence. This sentence is then followed by a newly added sentence, which stipulates: "The publication and dissemination of works shall be subject to the administration

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> In the post-June 4 period, many conservative elements in the government felt that the copyright debate involved issues of ideological "correctness" and that such issues should be explicitly included in the [Copyright Law]. By contrast, copyright proponents argued that ideological issues should not clutter up the Copyright Law—that the [Copyright Law] should not be used as a blunt instrument for meting out punishment for ideological crimes—and that such issues should be covered by the Criminal law. This debate was particularly protracted, and it resulted in the compromise that was enshrined in Article 4 . . . .
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> ANDREW C. MERTHA, THE POLITICS OF PIRACY: INTELLECTUAL PROPERTY IN CONTEMPORARY CHINA 125 (2005) (footnotes omitted).

295. *See id.* at 124 (noting that the United States "insisted that China establish a copyright law as a condition for renewing the U.S.–China Bilateral Trade Agreement").

296. *Id.* at 215.

297. Agreement Regarding Intellectual Property Rights, U.S.–China, Feb. 26, 1995, 34 I.L.M. 881 (1995).

298. Copyright Law of the People's Republic of China (中华人民共和国著作权法) (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 26, 2010, effective Apr. 1, 2010), art. 4, http://www.wipo.int/wipolex/en/text.jsp?file_id=186569 [hereinafter Amended Chinese Copyright Law].

299. *Compare* Chinese Copyright Law, *supra* note 179, art. 4 (including the first sentence of Article 4), *with* Amended Chinese Copyright Law, *supra* note 298, art 4 (removing the first sentence of the original Article 4).

300. Amended Chinese Copyright Law, *supra* note 298, art. 4 (author's translation).

and supervision of the state."[301] To many observers, the effect of the law stays the same, even though the first sentence in the original provision has now been deleted, a new sentence was added to replace the deleted provision, and copyright holders technically will have protection for works that cannot be published or disseminated. In short, the United States' victory seems to be rather symbolic, if not hollow and academic.

To begin with, the problematic sentence in Article 4 has a narrow scope[302] and has never been used in any previous case.[303] Many Chinese scholars also acknowledged that the provision was redundant.[304] The impact of the success in this claim on intellectual property rights holders, therefore, is likely to be minimal. In fact, the law has created confusion among judges and lawyers. For example, in the case concerning the work "Inside Story of the Surrender of the Japanese Armed Forces in China," cited by the United States in the WTO submissions, Article 4 has raised a question about whether the book should be banned if "the publication of [it] violated administrative regulations but the content of [it] did not violate any laws."[305]

Even more problematic, by asserting this claim, the United States has forced the WTO panel to openly admit that countries are free to censor content. As the panel declared, "[t]he right of a government 'to control, or to prohibit' the 'circulation, presentation, or exhibition' of any work or production clearly includes censorship for reasons of public order."[306] While it is good, from the United States' standpoint, to have the WTO panel find against China in a TRIPS-related dispute, it is rather unfortunate to have the WTO panel openly recognize a country's power to censor. It is one thing to be aware of this unpleasant reality, but another thing to have the WTO formally and openly recognize a WTO member's right to censor. Indeed, a growing number of commentators have lamented how U.S. foreign policy at times has misjudged its priorities by placing economic interests above free

301. *Id.* (author's translation).

302. *See* TRIPS Enforcement Panel Report, *supra* note 9, ¶ 7.134 (noting China's claim that "Article 4(1) of the Copyright Law is an exceedingly narrow provision of law with negligible implications in the marketplace and in terms of any nullification or impairment of benefits to [WTO] Members").

303. *See id.* annex B–1, ¶ 75 ("The United States has not provided to the Panel a single example of a case where a defendant in a copyright infringement action successfully has asserted a defence that the work did not enjoy copyright because it failed a content review process.").

304. *Cf. id.* ¶ 7.129 ("[T]he *second* sentence of Article 4 of the Copyright Law (that is not the subject of the claim in this dispute) may already address China's public policy concerns with respect to some of these rights.").

305. *Id.* ¶ 7.51.

306. *Id.* ¶ 7.126.

speech concerns.[307] The panel report also sends a misguided signal to other countries that continue to heavily restrict the free flow of information. As Daniel Gervais observed, "even if the report will have a limited legislative impact in China, it . . . may influence the course of events in other countries—for example in the Persian Gulf—that have censorship systems that include a denial of copyright protection."[308] The implications of this dispute therefore go beyond China.

Even worse, within China, the panel report has provided fodder for the conservative factions within the Chinese leadership to push for not only stronger censorship controls, but also more resources and power in the enforcement area. After all, it bears no reminder that provincial copyright authorities are often subordinated to the Press and Publications Administration, the agency in charge of propaganda and information control.[309] To some extent, the panel report provided an unintended opportunity for the public security bureaucracy to demand greater power and resources as a compromise for supporting a semantic change in the Copyright Law. From the human rights standpoint, the claim on Article 4 was shortsighted; it led to serious adverse consequences for the democratic reforms China has made over the past two decades.

Moreover, it is rather ironic that the United States argued the Berne Convention claims with such conviction and self-righteousness when the country itself had refused to join this important international copyright treaty for more than a century.[310] This point is certainly not lost on those less developed countries that joined the Berne Convention before the United States. This point also resonates well with the United Kingdom, France, Canada and those other countries that repeatedly complained about losses caused by the United States' failure to protect copyrighted works of foreign authors.[311] Many coun-

307. *See* Robert S. Rogoyski & Kenneth Basin, *The Bloody Case that Started from a Parody: American Intellectual Property Policy and the Pursuit of Democratic Ideals in Modern China*, 16 UCLA ENT. L. REV. 237, 254–59 (2009); Yu, *From Pirates to Partners*, *supra* note 25, at 173–74; *see also* KISHORE MAHBUBANI, THE NEW ASIAN HEMISPHERE: THE IRRESISTIBLE SHIFT OF GLOBAL POWER TO THE EAST 102 (2008) ("The tension between Western interests and Western values is vividly shown in the West's attitude to the rise of Asia.").

308. Gervais, *China—IP Measures*, *supra* note 32, at 553.

309. *See* MERTHA, *supra* note 294, at 136–40 (discussing the provincial politics involving the National Copyright Administration and the National Press and Publications Administration and the hierarchical difference between bureau (*ju*) and department (*chu*)).

310. *See* Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 349 n.139 (2003) [hereinafter Yu, *The Copyright Divide*].

311. For a discussion of the United State's failure to protect copyrighted works of foreign authors in the nineteenth century, see generally *id.* at 336–53. For a discussion of the worldwide dissatisfaction with the United States' failure to protect foreign authors, see SARA BANNERMAN, INTERNATIONAL COPYRIGHT: A CANADIAN HISTORY (forthcoming 2011) (discussing Canada's dissatisfaction with the United

tries, in fact, still question whether the United States is in full compliance with the Berne Convention in light of its limited protection of moral rights.[312]

It is equally ironic that the United States pushed for stronger protection of performers' rights under Article 14 of the TRIPS Agreement,[313] given the country's limited protection for audiovisual performers and its refusal to join the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (commonly known as the Rome Convention).[314] It is also troubling that the United States seemed to have forgotten its past history of denying protection to obscene or immoral works, which China was quick to remind the panel.[315] As Ann Bartow noted, until the United States Court of Appeals for the Fifth Circuit rejected the obscenity defense to copyright infringement in *Mitchell Brothers Film Group v. Cinema Adult Theater* in 1979,[316] "copyright protection was

States' failure to protect foreign authors); Burrell & Weatherall, *supra* note 65, at 285–86 (discussing Australia's frustration over the United States' historical refusal to comply with international copyright norms).

312. *See, e.g.*, ROBERTA ROSENTHAL KWALL, THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES 37 (2010) ("[T]here is the stark reality that we may not be in compliance with our obligations under the Berne Convention.").

313. *See* TRIPS Enforcement Panel Report, *supra* note 9, ¶¶ 7.154–.160.

314. *See* International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, Oct. 26, 1961, 496 U.N.T.S. 43; *see U.S.C.C. Hearing*, *supra* note 31, at 125 (testimony of John McGuire, Senior Advisor, Screen Actors Guild) (lamenting the lack of protection for audiovisual performers and noting in the testimony that "as relates to piracy, the U.S. too often is viewed as being hypocritical when it talks about stopping piracy on the grounds that the proceeds should properly be shared not only with the producers but the creative community, and then the producers and for that matter, . . . the U.S. government at times actually stops the types of treaties that would have created these rights for the performers").

315. *See* TRIPS Enforcement Panel Report, *supra* note 9, annex B–4, ¶ 104 ("The US law similarly subsumes protections for the rights of authors in obscene works, and in particular works of child pornography."). Nevertheless, China overstated its case. *See* Second Submission of the United States, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights* ¶ 195, WT/DS362/1 (May 27, 2008), *available at* http://ustraderep.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file631_14436.pdf (questioning China's misstatement of U.S. law that "through its obscenity laws, [the U.S.] similarly extinguishes the rights of authors" and noting that "[t]he U.S. Copyright Act does not extinguish copyright in any category or subject matter of otherwise copyrightable works"). Today, most U.S. courts grant copyright protection to all works, including even pornographic works. *See, e.g.*, *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852 (5th Cir. 1979).

316. 604 F.2d at 858.

effectively unavailable for pornography, though it was unambiguously available for other photographic and audiovisual works."[317]

To some extent, the present WTO dispute reminds one of how much the U.S. position has changed in its run-up to joining the Berne Convention and its growing active role in shaping the international intellectual property regime. It therefore underscores the need for countries, in particular those in the less developed world, to calibrate their intellectual property system based on local needs, interests, conditions, and priorities.

To be certain, it seems hypocritical for the United States to assume the position of the world's champion of the Berne Convention when it has refused to join the Convention for most of its life. As the late Barbara Ringer, the former U.S. Register of Copyrights, reminded us: "Until the Second World War the United States had little reason to take pride in its international copyright relations; in fact, it had a great deal to be ashamed of. With few exceptions its role in international copyright was marked by intellectual shortsightedness, political isolationism, and narrow economic self-interest."[318] More importantly, however, the dispute shows vividly the dynamic nature of changes in the international intellectual property system, the failure of the one-size-fits-all model, and the need for individualized paths for each WTO member. It also raises questions concerning the attempts by the United States—and, for that matter, other developed countries—to "kick[ ] away the ladder" that will help less developed countries succeed.[319]

D. Summary

In retrospect, the arguments the United States advanced throughout the WTO process and the outcome of the decision strongly reflect the common mistakes foreign businesses make when they conduct business in China. For example, some of these businesses have mistaken the lack of *rule-of-law developments* for the lack of *laws* in China. It is, indeed, rare to find Western policymakers or media dis-

317. Ann Bartow, *Copyright Law and Pornography: Reconsidering Incentives to Create and Distribute Pornography*, 39 U. BALT. L.F. 75, 80 (2008).

318. Barbara A. Ringer, *The Role of the United States in International Copyright—Past, Present, and Future*, 56 GEO. L.J. 1050, 1051 (1968).

319. FRIEDRICH LIST, THE NATIONAL SYSTEM OF POLITICAL ECONOMY (Sampson S. Lloyd trans., A. M. Kelley 1977) (1885); CHANG HA-JOON, KICKING AWAY THE LADDER: DEVELOPMENT STRATEGY IN HISTORICAL PERSPECTIVE (2002). In addition to "kicking away the ladder," developed countries, like the United States and members of the European Union, have also used bilateral, plurilateral, and regional trade and investment agreements to induce less developed countries to "trade away" their ladder. *See* Kevin P. Gallagher, *Trading away the Ladder? Trade Politics and Economic Development in the Americas*, 13 NEW POLITICAL ECONOMY 37 (2008).

cussing the abundance of laws, regulations, rules, and other normative documents within the system.

Many businesses have also underestimated the complexity of the Chinese legal system.[320] As Randall Peerenboom reminded us, the system includes "a bewildering and inconsistent array of laws, regulations, provisions, measures, directives, notices, decisions, and explanations."[321] Added to the laws (*falu*), regulations (*guizhang*), and rules (*guize*), which caught the most attention of foreign investors, are normative documents, such as *banfa* (measures), *guiding* (provisions), *xize* (detailed rules), *shishi xize* (detailed rules for implementation), *mingling* (orders), *ling* (decrees), *zhiling* (directives), *jueyi* (resolutions), *jueding* (decision), *zhishi* (instructions), *gongbao* (public announcement), and *tongzhi* (circulars).

In addition, by narrowly focusing on the business at hand—such as intellectual property enforcement in this case—businesses may have ignored the complicated spillover effects a non-intellectual property issue (such as decentralization of government, local protectionism, or corruption) will have on intellectual property protection and enforcement.[322]

In short, if U.S. intellectual property rights holders are to receive more meaningful protection of their intellectual assets, the United States' enforcement strategy will need to be revamped. A better and deeper understanding of the limitations of this panel report—and perhaps the mistakes the United States has made—may provide some clues to make the strategy more effective. Part V.B will utilize these clues to develop principles for a new U.S.–China intellectual property enforcement strategy. Such development is particularly important considering the growing economic strength of China and the strong likelihood that more bilateral trade disputes will surface now that the country has become the second largest economy in the world.[323]

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320. As Harold Chee noted in the business context:

> Another rule is not to underestimate the Chinese. Many Western firms do this; I've seen it happen time after time. The Chinese may not look sophisticated or slick when compared to their Armani-suited Western counterparts. But let me assure you they know your company and Western practices much better than you know China and its ways of doing things.

HAROLD CHEE WITH CHRIS WEST, MYTHS ABOUT DOING BUSINESS IN CHINA 98 (2004).

321. Randall Peerenboom, *Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People's Republic of China*, 19 BERKELEY J. INT'L L. 161, 205 (2001).

322. *See* Yu, *The International Enclosure Movement*, *supra* note 22, at 852–53 (discussing the trichotomy of "IP-relevant," "IP-related," and "IP-irrelevant" causes of the access-to-medicines problems in less developed countries).

323. *See* David Barboza, *China Overtakes Japan to Become No. 2 Global Economic Power*, N.Y. TIMES, Aug. 16, 2010, at B1.

Finally, as the panel made clear in the closing paragraph of its report, the dispute was not so much about whether China had offered adequate protection and enforcement of intellectual property rights. Rather, it focused narrowly on three discreet claims.[324] As the panel explained:

> [Its] task was not to ascertain the existence or the level of trademark counterfeiting and copyright piracy in China in general nor to review the desirability of strict IPR enforcement. The United States challenged three specific alleged deficiencies in China's IPR legal system in relation to certain specific provisions of the TRIPS Agreement. The Panel's mandate was limited to a review of whether those alleged deficiencies, based upon an objective assessment of the facts presented by the parties, are inconsistent with those specific provisions of the TRIPS Agreement.[325]

Both China and the United States are in agreement that the intellectual property piracy and counterfeiting problems are serious in China. What they disagree on, however, is whether they can resolve the problems quickly, whether there will be more costs than benefits to the country if China does so, and whether the TRIPS Agreement actually requires China to make those costly efforts to strengthen intellectual property protection and enforcement. Indeed, as the panel report has shown, some of the claims and arguments the United States advanced have gone beyond what the TRIPS Agreement requires.

IV. THE SILVER LININGS

The previous Part has shown that the United States' WTO challenge against China was rather misguided, especially when viewed from the standpoint of U.S. rights holders and in light of the country's longstanding interests in promoting human rights, civil liberties, and the rule of law. Not only does this challenge fail to provide sustained improvements in the area of intellectual property protection and enforcement, it also signals to other less developed countries that the TRIPS Agreement does not require the high TRIPS-plus standards of intellectual property protection and enforcement that are now being advanced through bilateral, plurilateral, and regional trade and investment agreements as well as the proposed ACTA. Nevertheless, the panel report has some silver linings.

A. United States

First, through the present dispute, the United States sent a strong signal to China about its willingness to use the WTO process to resolve disputes. This signal, in turn, may lead to further negotiations both within and without the intellectual property arena. To some ex-

324. *See* TRIPS Enforcement Panel Report, *supra* note 9, ¶ 8.5.
325. *Id.*

tent, it is important not to look at the WTO process in clinical isolation from other strategies deployed by the U.S. administration. The WTO process is part and parcel of a larger American intellectual property policy toward China, which includes meetings of the JCCT (in particular its IPR Working Group)[326] and the newly-established U.S.–China Strategic and Economic Dialogue.[327]

When viewed as an integrated effort to improve intellectual property protection and market access for intellectual property-based goods and services, the resolution of the dispute has helped advance bilateral discussions, even though some of these discussions and other cooperative efforts undoubtedly have been frozen during the WTO process. Part of the original intent of the WTO complaint was to bring pressure to bear on China, with the hope that some of the issues—whether specified in the complaint or elsewhere—will be resolved, with or without reaching the final stage of the WTO process.

Second, through the WTO process, the United States has learned a great deal about China's legal reasoning and WTO strategies. The panel report also reveals how the WTO panels will evaluate China's unique legal structure and measures (such as those judicial interpretations that have normative effects).[328] This information is useful not only for the U.S. administration, but also for American rights holders.

After all, both countries are likely to use the WTO process frequently as a means to resolve trade disputes, given the immense volume of trade between China and the United States. Since the United States filed complaints against China over intellectual property enforcement and market access of cultural and entertainment products, it has also filed complaints over financial information and electronic payment services, grants and loans, exportation of raw materials, and anti-dumping and countervailing duties.[329] In return, China has also

326. The JCCT was established in 1983. *See* Jon W. Dudas, Written Statement Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce, Hearing on Issues Before the U.S.–China Joint Commission on Commerce and Trade 2 (June 9, 2005), *available at* http://www.uspto.gov/web/offices/com/speeches/2005jun09.pdf (written testimony of Jon W. Dudas, Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office). Its IPR Working Group was formed two decades later in April 2004. *See id.*

327. The Strategic and Economic Dialogue was originally established by the Bush administration in 2006 as the U.S.–China Strategic Economic Dialogue. *See* JOHN NAISBITT & DORIS NAISBITT, CHINA'S MEGATRENDS: THE 8 PILLARS OF A NEW SOCIETY 157 (2010).

328. *See* TRIPS Enforcement Panel Report, *supra* note 9, ¶¶ 7.417–.424 (discussing the normative effects of judicial interpretations).

329. Request for Consultations by the United States, *China—Measures Concerning Wind Power Equipment*, WT/DS419/1 (Jan. 6, 2011); Request for Consultations by the United States, *China—Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/1 (Sept. 20, 2010); Request for Consultations by the United States, *China—Certain Mea-*

launched WTO challenges against the United States in the areas of anti-dumping and countervailing duties, and poultry and tire imports.[330] Out of the eight complaints China filed with the WTO, six of them were against the United States.

Third, through the various submissions and oral statements, the United States and its rights holders successfully obtained on record detailed information about how censorship regulations, customs procedures, and criminal thresholds operate in China. For example, they now understand that "[w]here no authorized edited version had been created, [China] would enforce copyright in the legal portion of the original work against copies of an unauthorized edited version."[331] They also learned the complex ways that the Chinese authorities calculate criminal thresholds and the fact that they count as "evidence of preparation and attempt" those inchoate goods and implements used to manufacture pirated or counterfeit goods.[332] They even found new information of which they were not fully aware, such as the Law on Donations for Public Welfare.[333]

In the future, all of this information will be very useful to protect the interests of rights holders. The United States will also be able to use this information as well as claims China made before the WTO panel to induce China not to change its position. The collected information therefore will create an estoppel effect, providing certainty, clarity, and predictability in the area.

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sures Affecting Electronic Payment Services, WT/DS413/1 (Sept. 20, 2010); Request for Consultations by the United States, *China—Measures Related to the Exportation of Various Raw Materials*, WT/DS394/1 (June 25, 2009); Request for Consultations by the United States, *China—Grants, Loans and Other Incentives*, WT/DS387/1 (Jan. 7, 2009); Request for Consultations by the United States, *China—Measures Affecting Financial Information Services and Foreign Financial Information Suppliers*, WT/DS373/1 (Mar. 5, 2008).

330. Request for Consultations by China, *United States—Anti-Dumping Measures on Certain Frozen Warmwater Shrimp from China*, WT/DS422/1 (Mar. 2, 2011); Request for Consultations by China, *United States—Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/1 (Sept. 16, 2009); Request for Consultations by China, *United States—Certain Measures Affecting Imports of Poultry from China*, WT/DS392/1 (Apr. 21, 2009); Request for Consultations by China, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/1 (Sept. 22, 2008); Request for Consultations by China, *United States—Preliminary Anti-Dumping and Countervailing Duty Determinations on Coated Free Sheet Paper from China*, WT/DS368/1 (Sept. 18, 2007).

331. TRIPS Enforcement Panel Report, *supra* note 9, ¶ 7.20.

332. *Id.* ¶ 7.483.

333. *See id.* ¶ 7.316 (stating that the United States "was unaware of the existence of [the Law on Donations for Public Welfare] at the time of its first written submission, stating that 'nothing appears to prevent public welfare organizations from selling the infringing goods they receive'").

To some extent, this panel report produces information that the United States worked hard but failed to obtain through an earlier request under Article 63.3 of the TRIPS Agreement.[334] That request partly failed as a result of the United States' broad interpretation of the permissible scope of inquiry and a WTO member's obligation to honor such an inquiry.

China's reluctance to comply with that request is understandable. While the production of information—such as the number of criminal cases brought, the disposition of those cases, and the type of criminal actions taken—could provide information to dissuade the United States from taking WTO action, it is more likely that the produced information will be used as evidence for a WTO challenge.

Finally, the report may provide the momentum needed to push at the international level for greater improvements in intellectual property protection and enforcement in China.[335] As a dispute of first impression before the DSB, this panel report will pave the way for future WTO challenges in the area of intellectual property enforcement against China and other countries. At the very least, the report signals to other WTO members the United States' willingness to push hard on intellectual property enforcement issues through the WTO process.[336]

Even if the USTR is reluctant to initiate another WTO challenge on intellectual property enforcement in the near future, the present report will help rally developed, emerging, and other like-minded countries to set a higher benchmark for intellectual property enforcement. A good example is the recent demands for a new definition of the term "commercial scale" through bilateral, plurilateral, and re-

334. *See* Yu, *From Pirates to Partners II*, *supra* note 25, at 926 (discussing the United States' Article 63.3 request to China, along with similar requests from Japan and Switzerland, which formally request "clarifications regarding specific cases of IPR enforcement that China has identified for the years 2001 through 2004, and other relevant cases").

335. As two practitioners have noted:

> [T]he fact that both sides won parts of their arguments may actually make future co-operation easier. For instance, . . . China's obligation to make changes to its IPR legislation may provide an occasion for the US to engage China in a broader discussion on other aspects of Chinese IPR legislation that the US considers inadequate. China did not lose face, but the panel did not clear China of all charges, either. Its findings may prove to be just the right mix: they give the Chinese government some scope for manoeuvre but at the same time emphasize the need for compliance with TRIPs.

Jan Bohanes & Adrian Emch, *WTO Panel Report on China IPR: A Mixed Result*, CHINA L. & PRAC., Mar. 2009, at 19, 20.

336. *See* Harris, *supra* note 46, at 186 ("[B]y filing the complaint, the United States is demonstrating its willingness to pursue WTO actions against China for intellectual property rights violations. This signals that future WTO actions are imminent if China does not honor its commitments.").

gional trade and investment agreements as well as the proposed ACTA[337]—a point China raised in the dispute.[338] By underscoring how the TRIPS Agreement has failed to address exported, in-transit, and re-exported goods, the United States, despite losing part of the claims on customs measures, may be able to use this panel report to its advantage to create a sense of urgency among its trading partners for strengthening intellectual property enforcement norms. As Henning Grosse Ruse-Khan insightfully observed, the panel's clarifications on the limited scope of the TRIPS Agreement have hinted at the "rationale for several TRIPS-plus initiatives in the field of border measures."[339]

B. China

The panel report enables China to understand better its TRIPS obligations through the eyes of a neutral third party. It provides both certainty and clarity to the country's TRIPS-related obligations. More importantly, the report provides the reformist factions within the Chinese leadership with an important push for stronger reforms within the country. In China, the reformists are constantly challenged by their more conservative counterparts, who are uncomfortable with the country's rapid socio-economic changes and the resulting social ills.[340] By providing the much-needed external push that helps reduce resistance from conservative leaders, the panel report has helped accelerate reforms in the area of intellectual property protection and enforcement.

In addition, China's participation in the WTO process has helped the country raise what I have called the "WTO game."[341] In addition

337. *See* Yu, *Six Secret Fears*, *supra* note 18.

338. *See* TRIPS Enforcement Panel Report, *supra* note 9, ¶ 7.581.

339. Henning Grosse Ruse-Khan, *China—Intellectual Property Rights: Implications for TRIPS-plus Border Measures*, 13 J. WORLD INTELL. PROP. 620, 626 (2010).

340. *See* Michael E. DeGolyer, *Western Exposure, China Orientation: The Effects of Foreign Ties and Experience on Hong Kong*, *in* THE OUTLOOK FOR U.S.–CHINA RELATIONS FOLLOWING THE 1997–1998 SUMMITS: CHINESE AND AMERICAN PERSPECTIVES ON SECURITY, TRADE AND CULTURAL EXCHANGE 299, 300 (Peter Koehn & Joseph Y.S. Cheng eds., 1999); Yu, *From Pirates to Partners*, *supra* note 25, at 195–96.

341. *See* Peter K. Yu, *The US–China WTO Cases Explained*, MANAGING INTELL. PROP., Oct. 2009, at 39; *see also* Han Liyu & Henry Gao, *China's Experience in Utilizing the WTO Dispute Settlement Mechanism*, *in* DISPUTE SETTLEMENT AT THE WTO: THE DEVELOPING COUNTRY EXPERIENCE 137, 148–53 (Gregory C. Shaffer & Ricardo Meléndez-Ortiz eds., 2010) [hereinafter DISPUTE SETTLEMENT AT THE WTO] (discussing the growing role of Chinese lawyers in both the WTO process and the proliferation of municipal government WTO centers); Peter K. Yu, *TRIPS and Its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369, 392–96 (2006) [hereinafter Yu, *TRIPS and Its Discontents*] (discussing the need for less developed countries to take advantage of the WTO dispute settlement process).

to human resources, litigation capital, and legal capacities, a successful player will need more finely-honed skills and a deeper knowledge of the different facets of this game. The more a country plays the WTO game, the more familiar and better it will become. To date, China has relied substantially on outside counsels to provide submissions to the DSB.[342] However, it is imperative that China can eventually play the game better with its own players.

Learning how to play this game well, indeed, has become increasingly important. The present dispute is likely to be the first of a long series of intellectual property-related challenges the United States will initiate against China in the near future. Any experience China earns in the intellectual property area can also spill over into other areas covered by the various WTO agreements.

Moreover, as this dispute has shown, many of the claims China needs to make require both the mastery of Chinese law and a deeper understanding of local conditions and cultural contexts. It is simply difficult for foreign counsels to get up-to-speed on all the nuances and complexities in Chinese law. It is even more difficult to get them to master the fine legal and administrative details in areas outside intellectual property and international trade—in this case, criminal law, customs procedures, and censorship regulations. In fact, some of the underlying concepts, values, and concerns in these laws may sound counterintuitive to counsels that were educated or trained abroad.

Finally, the gains in the panel report will put China in a better bargaining position in its ongoing intellectual property-related negotiations with the United States. As Gregory Shaffer reminded us:

> [P]articipation in WTO political and judicial processes are complementary. The shadow of WTO judicial processes shape bilateral negotiations, just as political processes and contexts inform judicial decisions. If developing countries can clarify their public goods priorities and coordinate their strategies, then they will more effectively advance their interests in bargaining conducted in WTO law's shadow, and in WTO legal complaints heard in the shadow of bargaining. They, in turn, will be better prepared to exploit the "flexibilities" of the TRIPS Agreement, tailoring their intellectual property

342. Such reliance, however, may change in the future. As Han Liyu and Henry Gao observed:

> In the cases in which China participated as a main party, whether as a complainant or respondent, it generally would retain a foreign law firm (mostly either US or European) to assume the main responsibilities for developing legal arguments. At the same time, the foreign law firm was asked to work with a domestic Chinese law firm which was assigned to the case. In this way, the government provided the domestic law firm with an opportunity to observe, practise and learn from the litigation experience. In cases in which China participated as a third party, the domestic Chinese law firms usually play a much bigger role. Indeed, one of the main reasons that China has participated actively as a third party in WTO cases . . . is to give domestic law firms an opportunity to learn the rules and practice of WTO dispute settlement through real cases.

Han & Gao, *supra* note 341, at 148.

> laws accordingly, and will gain confidence in their ability to ward off US and EC threats against their policy choices. In other words, developing countries' international legal strategies have implications for their leverage in international political negotiations and for the policy space in which they implement domestic intellectual property and public health regimes.[343]

In the shadow of this panel report, and the gains China has made in the criminal enforcement area, the country will now have a better negotiating position vis-à-vis the United States in future bilateral discussions. If China chooses to assert its newfound leverage at the multilateral level, the report may even help shape laws in the international intellectual property system. This panel report, therefore, may have serious implications not only for China and the United States, but also for other WTO members.

C. Other Less Developed Countries

Although the panel report covers only the dispute between China and the United States and technically has no clear precedential value for disputes involving other less developed countries,[344] the report benefits the developing and least developed countries in a number of ways.

First, the report underscores the importance of minimum standards. Mentioning the term "minimum standard" or its plural form fourteen times, the WTO panel reminded us that the TRIPS Agreement is primarily a minimum standards agreement. In so doing, the panel report recognizes the flexibilities retained in the TRIPS Agreement and explicitly affirmed in paragraph 5 of the Doha Declaration.[345] The report also underscores the autonomy and policy space reserved for less developed countries during the TRIPS negotiations. Particularly notable in this report is the panel's meticulous effort in discerning China's obligations in the criminal enforcement area and its willingness to openly "acknowledge[ ] the sensitive nature of criminal matters and attendant concerns regarding sovereignty."[346]

Second, the panel reminded us that "intellectual property rights are private rights," a key principle that is explicitly stated in the pre-

343. Gregory Shaffer, *Recognizing Public Goods in WTO Dispute Settlement: Who Participates? Who Decides? The Case of TRIPS and Pharmaceutical Patent Protection*, 7 J. INT'L ECON. L. 459, 476–77 (2004).

344. For discussions of the unsettled nature of this issue, see generally Raj Bhala, *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT'L. L. REV. 845 (1999); Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)*, 9 FLA. ST. J. TRANSNAT'L L. & POL'Y 1 (1999); Raj Bhala, *The Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy)*, 33 GEO. WASH. INT'L L. REV. 873 (2001).

345. Doha Declaration, *supra* note 21, ¶ 5.

346. TRIPS Enforcement Panel Report, *supra* note 9, ¶ 7.501.

amble of the TRIPS Agreement.[347] The panel also made it clear that "the phrase 'shall have the authority' does not require Members to take any action in the absence of an application or request."[348] Taken together, the report underscores the individual responsibility of intellectual property rights holders in protecting their own intellectual assets. Mindful of Article 41.5 of the TRIPS Agreement, the panel indicated its willingness to explore the unfairness of shifting the burdens and risks of protection to governments in less developed countries—a warning that is worth taking into account with respect to the highly controversial ACTA.[349] Indeed, the panel noted clearly, in the closing paragraph of the panel report, that its task was not "to review the desirability of strict IPR enforcement."[350]

Third, the panel carefully rejected the use of recently-negotiated bilateral, plurilateral, and regional trade and investment agreements as a relevant subsequent practice for determining the term "commercial scale."[351] Although China advanced the United States–Australia Free Trade Agreement as an indication of how the current U.S. definition of "commercial scale" had yet to be adopted at the time of the TRIPS negotiations,[352] the WTO panel rejected the use of such a document, taking note of the interpretive rules laid out in the Vienna Con-

347. *Id.* ¶ 7.530; *see also* Li Xuan, *Ten General Misconceptions About the Enforcement of Intellectual Property Rights*, *in* INTELLECTUAL PROPERTY ENFORCEMENT: INTERNATIONAL PERSPECTIVES 14, 27 (Li Xuan & Carlos Correa eds., 2009) ("As with any other kind of private rights, the enforcement of IP rights is primarily a matter concerning individual owners of these rights. It is the primary obligation of right-holders and not governments to enforce their claimed rights and take necessary legal actions for protecting their own IPRs.").

348. TRIPS Enforcement Panel Report, *supra* note 9, ¶ 7.247.

349. *See* Yu, *Six Secret Fears*, *supra* note 18 (criticizing ACTA for shifting the burdens and risks of protection to governments).

350. TRIPS Enforcement Panel Report, *supra* note 9, ¶ 8.5.

351. *See id.* ¶ 7.581.

352. For example, the United States–Australia Free Trade Agreement stated:

> Wilful copyright piracy on a commercial scale includes:
>
> (i) significant wilful infringements of copyright, that have no direct or indirect motivation of financial gain; and
>
> (ii) wilful infringements for the purposes of commercial advantage or financial gain.

USAFTA, *supra* note 121, art. 17.11.26(a). As China explained:

> There would be no reason to negotiate this definition with countries that already are subject to the TRIPS obligations, if the terms already had this meaning in TRIPS. On the contrary, the US insistence on developing a stricter definition in the bilateral context underscores that "commercial scale" as set forth in TRIPS is a broad concept that permits considerable national discretion. It is an acknowledgement that the United States failed to secure in the TRIPS Article 61 negotiations the obligation that it nonetheless seeks to impose here.

TRIPS Enforcement Panel Report, *supra* note 9, annex B–1, ¶ 25.

vention on the Law of Treaties.[353] Because U.S. free trade agreements are negotiated on a bilateral or plurilateral basis and China is not a party to any of these agreements, the documents would not constitute subsequent practice within the meaning of the Vienna Convention.

While the panel rejected China's argument that it should consider those agreements, the outcome actually benefited not only China, but also other less developed countries. For example, the panel pointed out: "In response to a question from the Panel, the United States confirmed that its own Copyright Law was only amended in 1997 to deal with the problem of massive infringement, such as via the Internet, even if the infringing activity is not necessarily pursued for financial gain."[354] The panel also "emphasize[d] that its findings should not be taken to indicate any view as to whether the obligation in the first sentence of Article 61 of the TRIPS Agreement applies to acts of counterfeiting and piracy committed without any purpose of financial gain."[355] To some extent, the panel concurred with China's position that, under the TRIPS Agreement, "criminal enforcement is required if the infringing activity is on a commercial scale, not if the *impact* of the infringing activity is on a commercial scale."[356]

Fourth, the panel was willing to look to local conditions to determine the term "commercial scale."[357] Even better, the panel demanded substantive evidence, finding it insufficient to rely on mere anecdotal evidence, such as allegations in nonauthoritative press articles or highly aggregated data in consultant and industry reports.[358] By focusing on the need to appreciate local conditions and by taking an evidence-based approach, the panel report helps slow down the ongoing push for one-size-fits-all—or more precisely, super-size-fits-all—standards through the TRIPS Agreement and other international agreements.

Finally, the report gives hope to less developed countries, which have become more frequent users of the WTO dispute settlement process in recent years.[359] It is important to remember that the present

353. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

354. TRIPS Enforcement Panel Report, *supra* note 9, ¶ 7.660; *see also* No Electronic Theft Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997) (amending the U.S. Copyright Act to extend criminal liability for copyright infringement to individuals who have not made any monetary profit through their infringing activities).

355. TRIPS Enforcement Panel Report, *supra* note 9, ¶ 7.662.

356. *Id.* annex B–1, ¶ 33 (emphasis added).

357. *See id.* ¶ 7.604.

358. *See id.* ¶ 7.629.

359. *See* Davey, *WTO Dispute Settlement System*, *supra* note 3, at 24 (noting that "the US and the EC no longer were as dominant as complainants in the system" and that "developing country use of the system increased dramatically" in the second half of the first decade of operation of the WTO dispute settlement process); *see*

dispute is only the second involving a developing country that focused primarily on the TRIPS Agreement and that resulted in the release of a WTO panel report. In the first dispute, the United States and later the European Communities successfully challenged, through parallel proceedings, the failure of India to establish a mailbox system in its patent law pursuant to Article 70.8 of the TRIPS Agreement.[360] The result was a clear-cut victory for the United States and the European Communities.

In this second dispute, however, the result is mixed. Even in an area where developed countries have historically dominated, such as intellectual property protection and enforcement, developing countries are now doing much better in the dispute settlement process than they did in the early days of the TRIPS Agreement. The benefits of the WTO dispute settlement process, indeed, have begun to trickle down to less developed countries.

Most recently, India and Brazil filed complaints against the European Union and the Netherlands over the repeated seizure of in-transit generic drugs.[361] Although it remains to be seen whether either of these two complaints will become the first complaint from a less developed country to result in the establishment of a WTO panel, the European Union's recent agreement with India[362] to amend its regulation on customs border measures[363] already suggests the growing ability of less developed countries to take advantage of the WTO dispute settlement process to influence bilateral discussions. Even if India ultimately settles with the European Union, the dispute between Brazil and the European Union could still remain.

Given the potential of this panel report to benefit less developed countries in future WTO disputes, it is rather disappointing that less developed countries—with the exception of Argentina, Brazil, Mexico,

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also David Evans & Gregory C. Shaffer, *Introduction* to DISPUTE SETTLEMENT AT THE WTO, *supra* note 341, at 1, 2 (noting that "no African country has ever initiated a [WTO] dispute" and that "only one Least Developed Country . . . initiated a dispute, and that dispute did not progress beyond the consultation phase (Bangladesh)").

360. Panel Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R (Sept. 5, 1997); Panel Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS79/R (Aug. 24, 1998).

361. Request for Consultations by India, *European Union and a Member State—Seizure of Generic Drugs in Transit*, WT/DS408/1 (May 19, 2010); Request for Consultations by Brazil, *European Union and a Member State—Seizure of Generic Drugs in Transit*, WT/DS409/1 (May 19, 2010).

362. *See India-EU Generic Drug Row 'Resolved' at Brussels Summit*, BBC NEWS (Dec. 10, 2010), http://www.bbc.co.uk/news/world-europe-11971568.

363. Council Regulation 1383/2003, Concerning Customs Action Against Goods Suspected of Infringing Certain Intellectual Property Rights and the Measures to Be Taken Against Goods Found to Have Infringed Such Rights, 2003 O.J. (L 196) 7 (EC).

and Thailand—did not participate in the process more actively and use third party submissions to provide a louder voice for the less developed world.[364] To some extent, the lack of participation from less developed countries represents a lost opportunity, especially when viewed in light of their growing success in establishing development agendas at the WTO and WIPO and in other international fora.[365]

V. THE ROAD AHEAD

A. Lessons for Intellectual Property Rights Holders

In addition to the United States, China, and other WTO members, the panel report has provided intellectual property rights holders with many valuable lessons. First, enforcement is controversial at both the domestic and international levels. It is no coincidence that a comprehensive set of minimum international enforcement standards were not introduced into any multilateral agreement until the signing of the TRIPS Agreement.[366] Although the United States, pushed by Levi Strauss, sought to introduce an anti-counterfeiting code toward the end of the Tokyo Round of Trade Negotiations, the proposal eventually failed.[367] Even during the TRIPS negotiations, the enforce-

364. It is worth contrasting the lack of such participation with China's active participation as a third party in the WTO dispute settlement process. As Professors Han and Gao observed:

> China has actively participated in WTO dispute settlement as a third party in almost every dispute filed after August 2003. As of November 2009, China has participated in a total of 62 WTO cases as a third party. This makes China the fifth most active participant as a third party following Japan (90); EC (82); US (73); and Canada (64), even though China only joined the WTO in December 2001. Of the cases where China has been a third party, four have been concluded between the parties with mutually satisfactory solutions.

Han & Gao, *supra* note 341, at 154 (footnotes omitted); *see also id.* at 159–60 (discussing China's participation in the WTO process as a third party).

365. *See* Yu, *A Tale of Two Development Agendas*, *supra* note 20, at 511–40.

366. Nevertheless, it is worth noting that the pre-TRIPS international intellectual property conventions contain some isolated enforcement provisions. As Professor Correa noted in the *ICTSD-UNCTAD Resource Book on the TRIPS Agreement*:

> [T]he Paris Convention includes Article 9 (seizure upon importation of goods bearing infringing trademarks and trade names), Article 10 (false designation of source or geographic origin), Article 10*bis* (protection against unfair competition), and Article 10*ter* (general requirement for "appropriate legal remedies effectively to repress" acts prohibited under Articles 9, 10, and 10*bis*).
>
> The Berne Convention also contains some provisions on enforcement (Articles 13(3) and 15), while they are absent in other important treaties such as the Rome Convention, the Geneva Phonograms Convention, the Universal Copyright Protection and the Washington Treaty.

TRIPS RESOURCE BOOK, *supra* note 2, at 629–30.

367. *See* DUNCAN MATTHEWS, GLOBALISING INTELLECTUAL PROPERTY RIGHTS: THE TRIPS AGREEMENT 9 (2002) (discussing the push for an anti-counterfeiting code during the Tokyo Round); SUSAN K. SELL, PRIVATE POWER, PUBLIC LAW: THE

ment issue was so controversial that developing countries demanded the inclusion of Article 41.5 in the TRIPS Agreement.[368] Until recently, less developed countries have remained reluctant to explore stronger enforcement standards at both the WTO and WIPO.[369]

To some extent, many of these countries are still dealing with what Bernard Hoekman and Petros Mavroidis have described as the "Uruguay Round 'hangover'"[370]—or more precisely, TRIPS veisalgia. On the one hand, these countries are concerned about the already high standards required by the TRIPS Agreement with which they had great difficulty in complying following the expiration of the transitional periods.[371] On the other hand, they are also very concerned about the growing TRIPS-plus obligations developed countries have imposed upon them through new bilateral, plurilateral, and regional trade and investment agreements.[372] Greater enforcement in excess of the TRIPS Agreement was a concern China and India recently raised in the TRIPS Council.[373]

Moreover, stronger intellectual property enforcement cannot be developed from intellectual property laws alone. It requires the development of what I have called an "enabling environment for effective intellectual property protection."[374] Such an environment includes

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GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS 40–41 (2003) (same); *see also* Agreement on Measures to Discourage the Importation of Counterfeit Goods, L/4817 (July 31, 1979), *available at* http://www.wto.org/gatt_docs/English/SULPDF/90960212.pdf (providing the text of the draft anti-counterfeiting code).

368. *See* CORREA, *supra* note 143, at 417 ("[Article 41.5] was introduced upon a proposal by the Indian delegation, and essentially reflects developing countries' concerns about the implications of Part III of the [TRIPS] Agreement."); TRIPS RESOURCE BOOK, *supra* note 2, at 585 (noting that Article 41.5 "was in fact one of the few provisions in Part III where developing countries' views made a difference"); *see also* TRIPS Enforcement Panel Report, *supra* note 9, annex B–4, ¶ 33 ("Articles 1.1 and 41.5 were key concessions to the developing world, which the United States and other developed third parties seek now to dismiss and disregard.").

369. *See* Yu, *Six Secret Fears*, *supra* note 18.

370. BERNARD M. HOEKMAN & PETROS C. MAVROIDIS, THE WORLD TRADE ORGANIZATION: LAW, ECONOMICS, AND POLITICS 111 (2007).

371. *See* Yu, *TRIPS and Its Discontents*, *supra* note 341, at 379–86 (discussing the impact of the TRIPS Agreement on less developed countries).

372. *See* Yu, *Currents and Crosscurrents*, *supra* note 2, at 392–400.

373. *See* Catherine Saez, *Health Waiver, IP Enforcement Discussed at Lively WTO TRIPS Council Meeting*, INTELL. PROP. WATCH (June 10, 2010, 5:48 PM), http://www.ip-watch.org/weblog/2010/06/10/health-waiver-ip-enforcement-discussed-at-lively-wto-trips-council-meeting/ (reporting that China and India "voiced concerns about efforts by developed countries to introduce provisions into trade agreements that reach beyond the TRIPS agreement, referred to as 'TRIPS-plus' measures"); *see also* Yu, *TRIPS and Its Achilles' Heel*, *supra* note 8 (discussing China and India's criticism in the TRIPS Council of TRIPS-plus enforcement trends).

374. *See* Yu, *The China Puzzle*, *supra* note 25, at 213–16.

such key preconditions for successful intellectual property reforms as a consciousness of legal rights, a respect for the rule of law, an effective and independent judiciary, a well-functioning innovation and competition system, sufficiently-developed basic infrastructure, a critical mass of local stakeholders, and established business practices.

As Robert Sherwood reminded us in an aptly titled article, *Some Things Cannot Be Legislated*, "until judicial systems in developing and transition countries are upgraded, it will matter little what intellectual property laws and treaties provide."[375] Likewise, Keith Maskus, Sean Dougherty, and Andrew Mertha wrote:

> Upgrading protection for IPRs alone is a necessary but not sufficient condition for [the purpose of maximizing the competitive gains from additional innovation and technology acquisition over time, with particular emphasis on raising innovative activity by domestic entrepreneurs and enterprises]. Rather, the system needs to be strengthened within a comprehensive and coherent set of policy initiatives that optimize the effectiveness of IPRs. Among such initiatives are further structural reform of enterprises, trade and investment liberalization, promotion of financial and innovation systems to commercialize new technologies, expansion of educational opportunities to build human capital for absorbing and developing technology, and specification of rules for maintaining effective competition in Chinese markets.[376]

To some extent, enforcement facilitation—that is, the provision of measures to help facilitate enforcement—is just as important as enforcement. While countries have explored the need for greater trade facilitation to support trade, they have yet to fully appreciate the importance of enforcement facilitation. Nor have they the political will to push for measures to make such facilitation possible.[377]

Fortunately, the need for such an "enabling environment" has begun to receive greater attention in the international policy arena. The November 2009 session of the WIPO Advisory Committee on Enforcement, for example, underscored the need to "[i]dentify[ ] elements for creating an enabling environment for promoting respect for intellectual property in a sustainable manner and future work."[378] As noted in Pakistan's submission to the advisory committee, entitled "Creating an Enabling Environment to Build Respect for IP":

> [A] very limited approach to combating infringement of IP rights, in which, in essence, stricter laws and capacity building of enforcement agencies is seen as

375. Robert M. Sherwood, *Some Things Cannot Be Legislated*, 10 CARDOZO J. INT'L & COMP. L. 37, 42 (2002).

376. Keith E. Maskus et al., *Intellectual Property Rights and Economic Development in China*, *in* INTELLECTUAL PROPERTY AND DEVELOPMENT: LESSONS FROM RECENT ECONOMIC RESEARCH 295, 297 (Carsten Fink & Keith E. Maskus eds., 2005).

377. *See* MOISÉS NAÍM, ILLICIT: HOW SMUGGLERS, TRAFFICKERS, AND COPYCATS ARE HIJACKING THE GLOBAL ECONOMY 257–58 (2005); Yu, *Three Questions*, *supra* note 278.

378. WIPO, Advisory Committee on Enforcement [ACE], *Draft Agenda*, WIPO/ACE/5/1 Prov. Rev (Sept. 28, 2009), *available at* http://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_5/wipo_ace_5_1_prov_rev.pdf.

> the primary means to ensure enforcement . . . can temporarily reduce IPR infringements levels, but cannot address the challenge in a sustainable manner. A broader strategy is urgently needed to allow the establishment of conditions in which all countries would have shared understanding of the socio-economic implications of enforcement measures, and direct economic interest in taking such measures. In such an environment, countries' choice to enforce IPRs will be derived from their internal rather than external factors.[379]

Likewise, Brazil pointed out in its paper: "Violations of intellectual property rights do not take place in the void. They are not disconnected from concrete political and social variables."[380] That paper also heavily criticized the one-size-fits-all model of intellectual property enforcement while at the same time calling for a change in the committee's focus from enforcement of intellectual property rights to respect for intellectual property itself.[381]

Third, the WTO dispute settlement process has its limits. Although U.S. industries have high hopes for this mandatory process to provide the much-needed antidote to the decades-old piracy and counterfeiting problems in China, WTO panel reports are lengthy, complex, and detailed. As a result, each party in the dispute is likely to score some important points, regardless of whether it has an overall win or loss in the dispute.[382] A better and more reliable solution, therefore, seems to be one that focuses on bottom-up developments in the country[383] while facilitating greater collaboration between U.S.

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379. *Creating an Enabling Environment to Build Respect for IP: Concept Paper by Pakistan* ¶ 2, *in* ACE, *Conclusions by the Chair*, annex 1, WIPO/ACE/5/11 (Nov. 4, 2009), *available at* http://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_5/wipo_ace_5_11-annex1.pdf.

380. *Future Work Proposal by Brazil*, pt. C, *in* ACE, *Conclusions by the Chair*, annex 2, WIPO/ACE/5/11 (Nov. 4, 2009), *available at* http://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_5/wipo_ace_5_11-annex2.pdf.

381. *See id.*

382. *See* Yu, *From Pirates to Partners II*, *supra* note 25, at 942; *see also* Bohanes & Emch, *supra* note 335, at 19 (noting that having both sides claim victory is "a frequent phenomenon in the world of WTO litigation between sovereign governments").

383. *See* MERTHA, *supra* note 294, at 215 (noting in the case of copyrights that "top-down pressure did little to alter the incentives of local enforcement agencies or the local governments that had personnel and budgetary jurisdiction over them"); *id.* at 225 ("Top-down pressure can result in dramatic, substantive changes in China's legislative, regulatory, and policymaking processes, but this same form of pressure has little, if any, sustained effect on the implementation and enforcement stages."); Carsten Fink, *Enforcing Intellectual Property Rights: An Economic Perspective*, *in* GLOBAL DEBATE ON THE ENFORCEMENT, *supra* note 2, at xiii, 19 ("Historical evidence and contemporary research suggests that institutional change occurs only gradually and is more frequently brought about by bottom-up evolution rather than top-down planning."); Yu, *The China Puzzle*, *supra* note 25, at 216–19 (discussing the importance of developing an analytical focus on micro-level, qualitative developments).

industries and Chinese stakeholders.[384] After all, as Martin Dimitrov has shown recently, while "enforcement volume is sensitive to both domestic and foreign pressure, . . . domestic considerations have a primary impact on the overall volume of enforcement."[385]

Finally, intellectual property rights holders need to be proactive if intellectual property protection in China is to be strengthened.[386] There is only so much a government can do on behalf of private rights holders. For all the complaints they have made about a lack of intellectual property protection and enforcement in China, the USTR obtained only thirty-four submissions pursuant to its initial request for comments on China's compliance with WTO commitments.[387] It is no wonder that the United States was unable to muster up sufficient evidence to challenge the thresholds for criminal procedures and penalties in China.

Likewise, it is not uncommon to find intellectual property rights holders failing to make proactive effort to protect intellectual assets.[388] Researchers from McKinsey & Company, for example, have found that many executives in the Chinese operations of multinational corporations in intellectual property-sensitive industries "think of protecting IP solely in legal terms—and sometimes only after property has been stolen."[389] Experienced attorneys in China have also been troubled by the limited budget foreign businesses have allocated to intellectual property enforcement in the country. As Catherine Sun, a leading intellectual property attorney in China, noted in frustration, "in the U.S., companies spend millions of dollars in patent litigation. But, they are not willing to allocate adequate budgets to China IP enforcement, instead hoping miracles will occur."[390]

B. A New Intellectual Property Enforcement Strategy

Given the lessons the panel report has provided and the need for the United States to revamp its intellectual property enforcement

384. For a series of articles articulating the need to transform China from a pirate to a partner, see generally Yu, *From Pirates to Partners*, *supra* note 25; Yu, *From Pirates to Partners II*, *supra* note 25. *See also* BERGSTEN ET AL., CHINA'S RISE, *supra* note 282, at 85 ("The United States . . . will have to build interest coalitions in China that are not just top down but also offer a broader national consensus, including at the local level, in favor of US positions. Such interest coalition building may require more nuance, patience, and effort than most Americans are used to exercising.").

385. DIMITROV, *supra* note 161, at 93.

386. *See* Yu, *From Pirates to Partners II*, *supra* note 25, at 949–51.

387. *Id.* at 929.

388. *See id.* at 949–51.

389. Meagan C. Dietz et al., *Protecting Intellectual Property in China*, MCKINSEY Q., Aug. 2005, at 6.

390. SUN, *supra* note 248, at 16.

strategy vis-à-vis China, one has to wonder what strategy the United States and its rights holders should adopt. Although there has yet to be any easy or quick solution to providing dramatic improvements on intellectual property protection and enforcement in China, and commentators have repeatedly noted the lack of a "magic bullet," this Part outlines five principles that policymakers can use to revamp their intellectual property enforcement strategy. These principles take into account not only the unique and rapidly-changing local conditions in China, but also the past challenges to U.S. efforts in strengthening intellectual property protection and enforcement on the ground.

1. Understand Provincial and Local Differences

The first principle was developed as a direct response to the significant regional differences within China. As I pointed out in the past, China is "a country of countries."[391] The country is large, complex, diverse, and "sometimes internally contradictory."[392] The Chinese speak different languages, enjoy different cuisines, grow up with different cultures, and subscribe to different historical and philosophical traditions. Conditions in Beijing are often very different from those in Guangzhou, intellectual property strategies that are effective in Shanghai are likely to fail in a village in Guizhou, and the trade patterns found near the coasts are very different from those found inland.

To some extent, the need for a regional approach in China reminds one of the approach Charles Dickens' publisher, Ticknor and Fields, used more than a century ago. At that time, the United States was still at the stage of formative development—not that different from China a decade ago. As Zorina Khan recounted, "[i]n 1856, the [publisher] sold over $10,000 worth of books in Cincinnati, an amount that was equal to its sales in the entire South. The company spent more on advertising in the city of New York in 1856 than it did for all the states in the South."[393] If Ticknor and Fields planned its marketing strategy without treating the developing American market as homogenous, one has to wonder why the U.S. government and many of its rights holders continue to ignore the many significant regional differences within China.

Of all the strategies the USTR employed to evaluate the regional impediments to obtaining dramatic improvements in intellectual property protection and enforcement in China, the most promising is the push for a special provincial review. In June 2006, the USTR

391. Yu, *From Pirates to Partners II*, *supra* note 25, at 963.

392. John J. Hamre & C. Fred Bergsten, *Preface* to C. FRED BERGSTEN ET AL., CHINA: THE BALANCE SHEET: WHAT THE WORLD NEEDS TO KNOW NOW ABOUT THE EMERGING SUPERPOWER ix (2006).

393. B. ZORINA KHAN, THE DEMOCRATIZATION OF INVENTION: PATENTS AND COPYRIGHTS IN AMERICAN ECONOMIC DEVELOPMENT, 1790–1920, at 239 (2005).

steered its focus away from country-level assessment, which it has used for more than a decade. For the first time, it requested information concerning provincial developments in China. As stated in the announcement in the *Federal Register*, "the goal of this review is to spotlight strengths, weaknesses, and inconsistencies in and among specific jurisdictions."[394]

The use of a provincial approach is important, for several reasons. First, such an approach will help enhance the understanding of the divergent protections offered in different parts of the country. Given the sometimes drastically different socio-economic conditions within China, a nationwide assessment of intellectual property enforcement tends to be misleading, if not meaningless. As a representative of the U.S. Chamber of Commerce noted in his testimony before the U.S.–China Economic and Security Review Commission: "[T]he root of China's IP problem resides in the provinces. It is . . . absolutely critical that we cultivate the support of the provincial/local officials, as well as local industry, if IP enforcement is to be addressed in a truly meaningful way."[395]

Second, by identifying the "hot spots" of piracy and counterfeiting, a provincial approach will help give credit where credit is due. It will also help reduce the frustration of many Chinese—policymakers and otherwise—especially those in regions that have undertaken successful intellectual property reforms or that have made considerable sacrifices in making a transition to a regime that is more respectful of intellectual property rights. While intellectual property protection continues to be a problem for foreign rights holders throughout China, one cannot deny the many important developments in the major cities and coastal areas in the past two decades.

Moreover, a blind insistence on greater enforcement throughout the country without acknowledging the important success some provincial and local governments have achieved would create resentment among a large portion of the Chinese population, which continue to regard the USTR's repeated threats and demands as "American excesses."[396] Such insistence would also foster a misimpression among local Chinese leaders that the U.S. government and foreign businesses will never be satisfied no matter what they do. This misimpression would not only erect further barriers to future cooperation, but also

394. Special Provincial Review of Intellectual Property Rights Protection in China: Request for Public Comment, 71 Fed. Reg. 34,969, 34,970 (June 16, 2006).

395. *U.S.C.C. Hearing*, *supra* note 31, at 88 (written testimony of Myron Brilliant, Vice President, East Asia, U.S. Chamber of Commerce, Washington, D.C.).

396. *See* N. MARK LAM & JOHN L. GRAHAM, CHINA NOW 321 (2007) (noting that foreign countries sometimes consider repeated threats and demands for stronger enforcement of intellectual property rights from the United States to be "American excesses").

make it difficult for the administration and rights holders to cultivate useful local allies.

Third, a continued insistence on significant overall improvement in the country is simply unrealistic, ineffective, and counterproductive. An intellectual property enforcement strategy that insists on the complete eradication of piracy and counterfeiting in China would be as futile as the hope to achieve zero leakage in the digital environment.[397] Although some commentators have predicted, in the run-up to China's accession to the WTO, that "pirates and counterfeiters [in China] will . . . gradually move into legitimate businesses[,] and the focus of counterfeiting and piracy will shift away from [the country] to lesser developing countries, such as Vietnam,"[398] close observers of regional developments in China will quickly point out that piracy and counterfeiting problems are likely to stay in China in the near future. To be certain, the intellectual property protection and enforcement in Beijing, Shanghai, Guangzhou, and other major cities and coastal areas have greatly improved, in part due to the emergence of local intellectual property-based industries. Piracy and counterfeiting, however, have not migrated out of the country.[399] Instead, they have now spread to other parts of the country, whose conditions are no different from those of the big cities a decade ago when intellectual property protection began to strengthen.

Finally, a better and deeper understanding of China's regional differences could provide useful information to help U.S. industries make better investment decisions. As Harold Chee, a noted Chinese business expert, reminded us, "[i]f anyone tells you grandly, 'I'm going into the China market!', your immediate reply should be, 'Where, exactly?'"[400] Today, many rights holders are likely to be satisfied if they obtain secured markets in the metropolitan areas. Thus, improving intellectual property protection and enforcement in the major cities and the coastal areas is still important, even if piracy and counterfeiting continue in the poorer parts of the country.

In fact, as regional and local governments fight hard to attract foreign direct investment, the picture in China will become more complicated in the near future.[401] Because gains in one region may result in

397. *See* Peter K. Yu, *Anticircumvention and Anti-anticircumvention*, 84 DENV. U. L. REV. 13, 72 (2006) (discussing the unrealistic expectation of having perfect intellectual property protection and zero leakage).

398. CHOW, A PRIMER, *supra* note 62, at 254.

399. *See* Yu, *The China Puzzle*, *supra* note 25, at 206.

400. CHEE WITH WEST, *supra* note 320, at 9.

401. As Former Assistant USTR Timothy Stratford explained:

> [The special provincial review] will create a sense amongst provincial governors and other leaders that they would rather have a reputation as a province for being one that upholds intellectual property rather than for one that disregards it or fails to enforce it.

losses in another, many local authorities have been particularly concerned about the unemployment and labor displacement problems created by the closure of pirate and counterfeit factories.[402] After all, greater intellectual property enforcement will lead some regions to suffer more job losses and unemployment than others, due in large part to a lack of skilled labor, education, technological infrastructure, and training facilities in the suffering regions.[403] The closures induced by intellectual property reforms will also shift production out of a region or a locality. Thus, if problems are likely to linger for a significant period of time, rights holders may encounter severe local resistance and lax enforcement. The divergent protection may even lead to "interregional disputes over intellectual property infringement and enforcement."[404]

Unfortunately, for all its many benefits, the USTR's provincial approach has been discontinued.[405] While some policymakers and commentators blamed the discontinuation on the initiation of the present WTO dispute, others noted the high costs of and challenges in collecting data outside the major Chinese cities. As experts familiar with

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> So we very much hope that by generating this information and making it public, that it will help inform decision-makers in ways that will naturally reward those who are doing a good job and penalize those who are not.

U.S.C.C. Hearing, *supra* note 31, at 59–60 (testimony of Timothy P. Stratford, Assistant United States Trade Rep.); *id.* at 58 (remarks of Michael R. Wessel, Comm'r, United States–China Economic and Security Review Commission) ("It appears to me that we could have additional leverage here if we would urge our companies to reward those provinces that do the right thing, which [sic] ultimately their investment, of course, could aid in job creation, economic growth, and be a model for those other provinces that are not doing the right thing, and potentially accelerate the movement towards implementation of the rule of law at the provincial and local level."); *see also* BERGSTEN ET AL., CHINA'S RISE, *supra* note 282, at 76 ("A more successful US strategy [in managing trade disputes with China] may require Americans to build longer-term benchmarks and a process to verify implementation at all layers of government. That, in turn, may require the US government to deepen its reach into Chinese provinces and spend time cultivating political relationships outside China's bigger cities."); NAISBITT & NAISBITT, *supra* note 327, at 167 ("In March 2009, China officially authorized its provinces—effective immediately—to approve proposals for foreign direct investment . . . up to $100 million. The result is that today the vast majority of new international deals are handled at the provincial level.").

402. *See* Yu, *From Pirates to Partners II*, *supra* note 25, at 954.

403. *See* Keith E. Maskus, *The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer*, 9 DUKE J. COMP. & INT'L L. 109, 112 (1998).

404. Maskus et al., *supra* note 376, at 298.

405. *Compare* USTR, 2007 SPECIAL 301 REPORT 42–52 (2007), *available at* http://www.ustr.gov/sites/default/files/asset_upload_file230_11122.pdf (including a section titled "Special Provincial Review of China"), *with* USTR, 2008 SPECIAL 301 REPORT (2008), *available at* http://www.ustr.gov/sites/default/files/asset_upload_file553_14869.pdf (lacking a provincial review).

raids and enforcement have repeatedly pointed out, fighting piracy and counterfeiting in some areas can be as dangerous as fighting drugs.[406] Some of the strongholds of piracy and counterfeiting also benefit from local protectionism and corruption.[407]

2. Take the Long View

The second principle draws on the Chinese emphasis on taking the long view. Such emphasis is understandable given China's more than four millennia of history. The Chinese perspective is well-captured by the reported response of Zhou Enlai, the former premier of China, when he was asked what he thought of the French Revolution: it was too soon to tell![408]

In June 2008, the Chinese State Council promulgated the *Outline of the National Intellectual Property Strategy*.[409] Since then, China has undertaken many initiatives to promote domestic innovation, which quickly attracted criticisms from the U.S. administration and rights holders. As the USTR noted in the *2010 National Trade Estimate Report on Foreign Trade Barriers*:

> A troubling trend that has emerged . . . is China's willingness to encourage domestic or "indigenous" innovation at the cost of foreign innovation and technologies. For example, . . . in November 2009, China issued the Circular on Launching the 2009 National Indigenous Innovation Product Accreditation Work with the aim of improving "indigenous" innovation in computer and other technology equipment. In order to qualify as "indigenous" innovation under the accreditation system, and therefore be entitled to procurement preferences, a product's intellectual property must originally be registered in China.[410]

While it is understandable that the U.S. administration and rights holders are concerned about the adoption of policies that discriminate against foreign companies, it is also important to appreciate the long-term benefits of a policy that calls for greater domestic innovation in China.

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406. Policymakers and commentators have increasingly linked piracy and counterfeiting to organized crime and terrorism. *See, e.g.*, *A Growing Problem with Links to Organized Crime and Terrorism: Hearing on Int'l Copyright Piracy Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 108th Cong. (2003); NAÍM, *supra* note 377, at 126–28; TIM PHILLIPS, KNOCKOFF: THE DEADLY TRADE IN COUNTERFEIT GOODS 137–44 (2005); Maureen Walterbach, Comment, *International Illicit Convergence: The Growing Problem of Transnational Organized Crime Groups' Involvement in Intellectual Property Rights Violations*, 34 FLA. ST. U. L. REV. 591 (2007).

407. *See* sources cited *supra* note 278.

408. CHEE WITH WEST, *supra* note 320, at 5.

409. STATE COUNCIL, OUTLINE OF THE NATIONAL INTELLECTUAL PROPERTY STRATEGY (2008), *available at* http://www.gov.cn/english/2008-06/21/content_1023471.htm.

410. USTR, 2010 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 69 (2010).

For more than a decade, commentators, myself included, have argued for the need to develop a critical mass of local stakeholders in China to help push for stronger intellectual property protection from the inside.[411] It is therefore highly encouraging that many Chinese leaders and nationals now finally understand the importance of domestic innovation. The more innovation there is, the more likely the Chinese will support greater intellectual property reforms in the future.

Indeed, the presence of a critical mass of local stakeholders is the key to successful intellectual property law reforms.[412] By locating support from the inside, these reforms often result in more sustainable protection that is well-tailored to local needs, interests, conditions, and priorities.[413] It is therefore no surprise that the American Chamber of Commerce–China recommended in its 2006 White Paper that "[s]uccessful realization of [China's] innovation priorities is the upside inducement for the Chinese to implement the fundamental reforms necessary to guarantee protection of IPR."[414]

Nevertheless, as I recently testified before the United States International Trade Commission, there are good domestic innovation policies and bad domestic innovation policies—just like any other type of policies.[415] The good ones will help develop a critical mass of local stakeholders to support the intellectual property system. The bad ones, by contrast, discriminate against foreign companies. They may also violate China's international obligations under the WTO or other international agreements. There is an important distinction between the two, and it is important that U.S. policymakers and rights holder do not throw away the good domestic innovation baby with the discriminatory policy bathwater.

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411. *See* Timothy Trainer, Testimony Before the U.S.–China Economic and Security Commission, Hearing on Intellectual Property Rights Issues and Dangers of Counterfeited Goods Imported into the United States 11 (June 8, 2006), *available at* http://www.uscc.gov/hearings/2006hearings/written_testimonies/06_06_08wrts/06_06_7_8_trainer_tim.pdf (written testimony of Timothy Trainer, President, Global Intellectual Property Strategy Center) (noting the need "to address the true local interested parties—the local entrepreneurs and how they can be commercially and economically empowered to benefit from IP"); Yu, *The Copyright Divide*, *supra* note 310, at 431–33.

412. *See* Yu, *From Pirates to Partners II*, *supra* note 25, at 958–59.

413. *See* Yu, *The International Enclosure Movement*, *supra* note 22, at 890–91.

414. AM. CHAMBER OF COMMERCE–CHINA, AMERICAN BUSINESS IN CHINA 42 (2006), *available at* http://www.amcham-china.org.cn/amcham/upload/wysiwyg/20060516094503.pdf.

415. U.S. INT'L TRADE COMM'N, PUBLICATION NO. 4199, CHINA: INTELLECTUAL PROPERTY INFRINGEMENT, INDIGENOUS INNOVATION POLICIES, AND FRAMEWORKS FOR MEASURING THE EFFECTS ON THE U.S. ECONOMY, at D–20 (2010), *available at* http://www.usitc.gov/publications/332/pub4199.pdf (summarizing the Author's testimony).

While we certainly hope that Chinese policymakers will be able to develop a right mix of policies that promote good domestic innovation policies, as compared to discriminatory ones, it is very rare for policymakers to get their policies right from the get-go without trial and error. This is particularly true when the Chinese policymakers are only beginning to understand the importance of domestic innovation; they are actually learning what it means to have more domestic innovation and how to do so. From the standpoint of greater intellectual property protection and enforcement, the most important and urgent thing is that the Chinese leaders and people understand the importance and benefits of innovation. Such an understanding is likely to provide long-term benefits for both the United States and its rights holders.

Moreover, many of the indigenous innovation policies, including those criticized by the USTR in the *National Trade Estimate Report*, are still at the drafting stage.[416] Given the fact that many policies in the gray areas are likely to undergo further adjustment, and that the Chinese regulatory system is highly flexible and at times incomplete, it is rather shortsighted to quickly criticize China's eagerness to push for discriminatory measures to promote domestic innovation. Such criticisms are likely to be counterproductive; they will fuel avoidable nationalist claims that the United States prefers China to stay weak.

Thus, instead of making such criticisms, more energy and resources should be devoted to help Chinese policymakers separate good domestic innovation policies from bad domestic innovation policies. Such separation will help policymakers acquire a better understanding of the policy constraints that emerged as a result of China's commitments at the WTO or under other international agreements.

3. Appreciate Local Solutions on Their Own Terms

The third principle calls for a greater appreciation of local Chinese rules and customs. Put differently, it can be beneficial to think like the Chinese when assessing the strengths and weaknesses of these rules and customs. As shown in the present WTO dispute, there is a tendency for the U.S. administration and rights holders to push for greater criminal enforcement, as compared to what they call "toothless administrative enforcement."[417] However, as Part III.A has

416. *See* 2011 NTE REPORT, *supra* note 63, at 72 (citing as possible concerns the draft Regulations for the Administration of the Formulation and Revision of Patent-Involving National Standards, which the Standardization Administration of China released for public comment in November 2009, and the draft measure issued by the China National Institute for Standards in February 2010).

417. *U.S.C.C. Hearing*, *supra* note 31, at 51 (testimony of Timothy P. Stratford, Assistant United States Trade Rep.); *see also* Letter from Larry M. Wortzel, Chairman, U.S.–China Econ. & Sec. Review Comm'n, & Carolyn Bartholomew, Vice Chair-

shown, the effectiveness of administrative enforcement, when compared with criminal enforcement, varies according to local conditions. While judicial and criminal enforcement may be better in major cities and for rights holders that focus primarily on exports, administrative enforcement may work well in other areas (where local knowledge and linguistic skills are more important). It may also work better for those who are on the ground and have a long-term relationship with the region.

The lack of discretion in customs authorities—the second claim in the present dispute—provides another good example. Although discretion has many benefits, it could have unintended consequences in places that are confronted with problems of local protectionism and corruption. Before one makes a hasty judgment toward a certain policy or regulatory approach, one needs to embrace a holistic perspective and inquire about the reasons behind such a policy or approach, including those that arguably fall outside the intellectual property area.

In fact, as foreigners quickly found out in China, what works at home does not always work well in China. Although some of the adjustments these foreigners made sounded counterintuitive in the beginning, they made sense and paid off in the end. Today, many of the highly popular seminars on doing business in China are filled with tips on how to deploy these seemingly counterintuitive strategies to increase profit margin.

4. Don't Hide the Ball

The fourth principle induces people to reveal the concern as it is, rather than mask it as something else (in part to earn sympathy in the public debate at home). In many intellectual property discussions that the United States initiated in the past two decades, the main concern was not primarily about intellectual property protection and enforcement. Rather, it was about the need for greater market access of intellectual property-based content.[418] It is therefore no surprise that many policymakers, commentators, and the mass media have frequently misclassified the market access dispute as the second intellectual property dispute.

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man, U.S.–China Econ. & Sec. Review Comm'n, to Ted Stevens, Senator, & J. Dennis Hastert, Speaker of the House (Oct. 5, 2006) [hereinafter U.S.C.C. Letter], *in U.S.C.C. Hearing*, *supra* note 31, at 3, 5 (noting that administrative enforcement in China "is riddled with local foot-dragging and token penalties").

418. *See, e.g.*, ZHENG CHENGSI, INTELLECTUAL PROPERTY ENFORCEMENT IN CHINA: LEADING CASES AND COMMENTARY xxvi (1997) ("In the 1996 Sino-U.S. negotiations, what the USTR really wanted was not the impossible short term elimination of pirate copies, but access to the Chinese markets for its cultural products.").

Consider the movie industry, for example. The industry has repeatedly complained about the quota China employed to limit the distribution of foreign movies, including those from the United States, Europe, and other parts of the world. Following its accession to the WTO, China allowed the importation of slightly more than twenty movies.[419] Thus far, the failure of the U.S. rights holders in exporting movies has led to their inability to meet the growing demand for Western movies in China.[420] As a result, local consumers have no choice but to turn to other channels, which range from purchasing pirated optical disks from street vendors to downloading movies from illegal internet websites.[421]

The frustration of the U.S. movie industry is understandable. It is indeed hard to defend many of the content regulations that China has retained despite its many WTO commitments.[422] Nevertheless, when market access disputes are framed as intellectual property violations, the claims in the disputes are significantly weakened. For the Chinese, it becomes just another round of foreign bullying in an area that is of limited domestic priority. For others, it is a stretch that borders on a reinterpretation of commitments China made in the TRIPS Agreement.

To some extent, the eagerness to mask a market access dispute as a TRIPS enforcement dispute may explain why the United States did well in the market access dispute, but not so well in the TRIPS enforcement dispute. While the United States lost its major claim on criminal enforcement and had only limited success on the customs claim in the TRIPS enforcement dispute, it largely prevailed on the

419. *See US-China Piracy Skirmish Could Prevent Trade War*, STRAITS TIMES (Sing.), Apr. 14, 2007, *available at* 2007 WLNR 7078845 ("The Chinese government also imposes draconian restrictions on the number of foreign films which are publicly screened—typically not more than 20 to 30 a year."); *see also* Heiberg, *supra* note 40, at 234 (noting the pre-WTO annual film importation quota at "a maximum of twenty films").

420. *See* Heiberg, *supra* note 40, at 236–37; Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 39, at 31–32.

421. *See* Heiberg, *supra* note 40, at 236–37; Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 39, at 31–32.

422. For an excellent discussion on China's restrictions on cultural products in relation to its WTO commitments, see generally Henry S. Gao, *The Mighty Pen, the Almighty Dollar, and the Holy Hammer and Sickle: An Examination of the Conflict Between Trade Liberalization and Domestic Cultural Policy with Special Regard to the Recent Dispute Between the United States and China on Restrictions on Certain Cultural Products*, 2 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 313 (2007).

market access dispute—before both the WTO panel[423] and the Appellate Body.[424]

Moreover, the fact that policymakers—and for that matter, commentators—find it ill-advised for the United States to launch a WTO challenge against China on intellectual property enforcement grounds does not mean that these same people will always find objectionable a challenge on market access grounds. Indeed, it is not unusual to find Chinese policymakers and commentators bitterly divided over these two issues. Their disagreements are further exacerbated by bureaucratic rivalries, institutional fragmentation, raging turf wars, ideological disagreements, and differences in policy preferences.[425] Thus, even though both intellectual property and market access issues go hand in hand and may be equally important to intellectual property rights holders, it is a bad strategy to lump the two issues together—or worse, mask market access issues as TRIPS violations.

When the TRIPS enforcement dispute was compared with the market access dispute, there is no denying that the highly politically sensitive issues in the latter have created considerable tension between the U.S. and Chinese governments. However, the panel report on that dispute may ultimately be more important than the panel report on the TRIPS enforcement dispute. In fact, the report on the market access dispute may become an important driving force in opening up the Chinese market for publications, sound recordings, and audiovisual entertainment products.

5. *Beware of Difference Engineers*

The final principle highlights the danger precipitated by those whom I will call "difference engineers." In *When Cooperation Fails*,[426] Mark Pollack and Gregory Shaffer recounted how some interest groups have successfully captured the debate on genetically modified foods and crops by enlarging the differences between the United

423. *Compare* TRIPS Enforcement Panel Report, *supra* note 9 (ruling partially in favor of the United States and partially in favor of China), *with* Panel Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R (Aug. 12, 2009) (ruling mostly in favor of the United States).

424. *See* Market Access Appellate Body Report, *supra* note 227.

425. *See* CHOW, A PRIMER, *supra* note 62, at 217 ("Concurrent and overlapping enforcement authority has created bureaucratic and political interests that discourage cooperation and coordination among various government entities. . . . A number of [government] entities [such as AIC, TSB, and Customs] continue to upgrade their enforcement tools against counterfeiting in an effort to increase their capabilities vis-à-vis their bureaucratic competitors in order to corner the market on intellectual property enforcement.").

426. MARK A. POLLACK & GREGORY C. SHAFFER, WHEN COOPERATION FAILS: THE INTERNATIONAL LAW AND POLITICS OF GENETICALLY MODIFIED FOODS (2009).

States and the European Union over their treatment of these products for regulatory approval and marketing purposes. As they noted:

> [T]he best explanation for the differences lies neither in innate or "essentialist" forms of culture (such as US and European attitudes toward food, risk or technology) nor in institutions alone (such as US specialized agencies compared to European political processes), but in the ability of interest groups to capitalize on preexisting cultural and institutional differences, with an important role played by contingent events such as the European food-safety scandals of the 1990s.[427]

As a result of the efforts by these interest groups, or what I will call "difference engineers," the trans-Atlantic divide between the U.S. and EU regulatory approaches has become more significant than it actually was on close inspection. As Professors Pollack and Shaffer observed, "[i]t was *not* inevitable that US regulators would adopt a product-based approach to GMO [genetic modified organism] regulation, nor was it obvious from the outset that the EU would adopt the strict, politicized, and highly precautionary system that emerged over the course of the 1990s."[428]

Like the differences between the European Union and the United States over GMO regulation, the differences between China and the United States in the intellectual property area may not be as significant as the U.S. media or trade groups have reported. In fact, there are a lot of similarities between the two countries, especially when one compares the two countries cross-temporally based on their respective stage of development.[429] For example, both China and the United States are large and diverse, and their nationals can be easily isolated from other countries. Despite continuous globalization, a large number of both Americans and Chinese have not traveled abroad. To many of them, it would already have been an eye-opening experience to visit New York from Montana or to travel from Guilin to Shanghai. Likewise, the two countries harbor significant differences at the regional and local levels. The policies that New Yorkers support may be unpopular in South Carolina or Texas. What works perfectly for Beijing may also not work well in the Sichuan province.

Nevertheless, there exist a large and growing number of players that will benefit from an environment where China and the United States harbor significant differences. The more differences there are, the more valuable their expertise will become, and the more they can influence the policy and business debates. Given the immense benefits differences may bring about, some of these players unavoidably will seek to exploit the differences to their advantage. When these differences are enlarged and sharpened, and at times even fabricated,

427. *Id.* at 5.
428. *Id.* at 11.
429. *See* Peter K. Yu, *Remember that China, U.S. Need Each Other*, DES MOINES REGISTER, Feb. 22, 2009, at 4OP.

important areas of potential cooperation—including those in the area of intellectual property protection and enforcement—may be ignored.

Even worse, the enlarged differences may help escalate tension into conflicts that would require a considerable amount of resources and political capital to resolve. The two countries will be worse off as a result. Even if conflicts do not arise, an undue focus on the differences will distract policymakers from finding the much-needed solutions to target the crux of the enforcement problems.

The existence of these differences may even create an illusion about a country's enforcement priorities. As Justin Hughes, the current senior advisor to the director of the U.S. Patent and Trademark Office, rightly pointed out in his written testimony before the U.S.–China Economic and Security Review Commission, "the profligacy of the American trade deficit with China means that even if every iota of IP infringement in China stopped, [the United States] would still have a long-term, intolerable trade imbalance."[430] Likewise, two World Bank economists noted that "[t]he U.S. current account deficit . . . largely is due to the lack of domestic savings and not to China's barriers to imports (which, in fact, have come down dramatically in recent years) or to an undervalued Chinese exchange rate (which is a real but fairly recent problem)."[431] Given these expert opinions, one has to wonder why the discussion of piracy and counterfeiting problems in China remain tied to that of the U.S. trade deficit. After all, most policymakers and commentators know full well that greater improvements in intellectual property protection and enforcement in China would only have a limited effect on the U.S. trade deficit.

6. Summary

The five principles outlined in this Article seek to provide guidance on how the U.S. intellectual property enforcement strategy can be revamped to ensure stronger intellectual property protection and enforcement in China. Whether a more effective strategy will emerge ultimately depends on whether U.S. policymakers and industries have the needed political will to understand intellectual property developments in China on their own terms. It also depends on whether the United States interacts with China based on what it is, as opposed to what policymakers assume the country to be or hope it will become.

While the Chinese leaders were repeatedly criticized for their lack of political will in dramatically improving intellectual property protec-

430. Justin Hughes' Written Testimony, *supra* note 287, at 16.

431. L. Alan Winters & Shahid Yusuf, *Introduction* to DANCING WITH GIANTS: CHINA, INDIA, AND THE GLOBAL ECONOMY 1, 34 (L. Alan Winters & Shahid Yusuf eds., 2007).

tion in China, it is high time that we pay attention to the equal lack of political will on the part of the U.S. administration and transnational businesses to push for greater intellectual property enforcement in China. The limited political will to move intellectual property protection and enforcement to the top of the U.S.–China bilateral agenda is understandable, given the large variety of issues on the agenda and the fact that intellectual property does not compare favorably with other important issues, such as nuclear nonproliferation or currency exchange.[432] Nevertheless, until there is a political will to revamp the existing U.S.–China intellectual property enforcement strategy, it is unrealistic to expect significant improvements in intellectual property protection and enforcement in China.

VI. CONCLUSION

The WTO provided the United States and other members with a new weapon to induce China to offer stronger intellectual property protection. However, the international trading body has significant structural limitations. Even worse, the U.S. strategies for challenging China's intellectual property laws before the DSB were seriously flawed. To a large extent, these flaws resemble those common mistakes foreign investors make when conducting business in China.[433]

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432. *See* Yu, *Three Questions*, *supra* note 278, at 414 (stating that the author has "yet to meet a U.S. policymaker who picks 'intellectual property protection' over" nuclear nonproliferation and currency exchange as the most important issue in the U.S.–China bilateral agenda); *see also* U.S.C.C. Letter, *supra* note 417, at 6 (observing that "the Department of Homeland Security (DHS) has not placed the seizure of counterfeit goods among its top enforcement priorities").

433. As commentators elaborated:

> Many in the United States believe that China's one-party system gives Beijing total power and control over all levels of government. The image, perhaps left over from the Maoist cult of personality era, of a single leader or core group of leaders responsible for and in command of all aspects of Chinese society still pervades the American imagination. This perception of absolute authority has led US policymakers and industry groups to focus on securing top-down commitments from Chinese leaders to resolve bilateral economic and other issues. That the leaders sometimes do not fulfill these commitments endlessly frustrates the Americans who have sought them, who view this as negligence on the part of Chinese leaders, lack of political will, or even outright malfeasance.
>
> Beijing's ability to unilaterally impose its will throughout China is, however, highly limited. For a variety of reasons . . . , China's authoritarian regime lacks the capacity to implement many of its decisions throughout the polity, a limitation that has important implications for policymaking in Beijing. The leadership has to gauge carefully what it can and cannot get away with vis-à-vis local authorities; how much political capital will be required to enact controversial policies at local levels; and how much discretion to allow local authorities in policies set at the national level—recognizing that the center has no capacity to enforce absolute obedience to its edicts. The policy process can frequently result

For example, the United States' complaint and subsequent submissions demonstrate the administration's unwillingness to take note of China's internal challenges in undertaking greater intellectual property reforms. They also reflect an oversimplified, yet politically convenient view taken by U.S. policymakers that often attributes China's piracy and counterfeiting problems solely to a lack of political will on the part of Chinese leaders.

Sadly, despite the considerable amount of time, effort, and resources that have been put into addressing this particular dispute, the intellectual property enforcement landscape in China remains virtually unchanged. If intellectual property protection and enforcement in China are to be dramatically improved, it needs more than a single WTO challenge in the intellectual property area. A complete overhaul of the U.S. intellectual property enforcement strategy based on lessons from the present dispute is badly needed.

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in vague national policy pronouncements that look less like hard and fast rules than abstract guiding principles—exhortations to local authorities to "do the right thing" that leave considerable latitude for local recalcitrance. Even when Beijing issues more categorical commands, local compliance is far from certain.

BERGSTEN ET AL., CHINA'S RISE, *supra* note 282, at 75.