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

(WT/DS362)

EXECUTIVE SUMMARY OF THE CLOSING STATEMENT OF THE UNITED STATES OF AMERICA AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

JUNE 30, 2008

I. Introduction

1. We noted yesterday that the second panel meeting is an appropriate time to take stock of where we are. It is also an appropriate time to recall the context within which this dispute comes before you.

2. This dispute is about the legal regime that China has put into place for protecting and enforcing IPR. More precisely, it is about three specific aspects of that regime. In short, our claims are these: the negotiators of the TRIPS Agreement set out a structure of rules for WTO Members to follow with respect to the protection and enforcement of intellectual property rights. In each of the three claims that we have advanced in this dispute, we seek to ensure that such rules are in place in China, and that the rules are in accordance with the negotiated disciplines. In our submissions, we have shown that – unfortunately – they are not.

II. China's Criminal IPR Thresholds for Criminal Procedures and Penalties

3. Turning to the first aspect of China's legal regime that we have challenged, we would like to make one general observation at the outset: The fact that the measures at issue are criminal measures does not shield them from examination by this Panel. In that regard, we found surprising China's assertion in paragraph 28 of its Oral Statement yesterday. China asserted that this dispute "marks the first time that a WTO panel has been called upon to adjudicate a matter of domestic criminal law." As a responding party in at least two disputes that involved aspects of our criminal law – *i.e.*, the *US – Gambling* dispute (in which China participated as a Third Party) and the *US – 1916 Act* dispute – the United States can assure the Panel that this is indeed not the case.

4. Turning to the text of the pertinent TRIPS provision, Article 61, first sentence, we have provided a full explication of how the term "commercial scale" should be interpreted, using the customary rules of interpretation in the *Vienna Convention*, to assist the Panel in developing an analytical framework for interpreting and applying the term "commercial scale" in Article 61 of the TRIPS Agreement.

5. We request in particular that the Panel reject China's invitation to substitute the term "significant magnitude of activity" for "commercial scale." It would be misguided to substitute a different form of words for the term that was agreed upon by the TRIPS negotiators. As other WTO panels and the Appellate Body have done for so many other terms in the WTO Agreements, this Panel is called upon to develop a sound analytical framework by which to interpret and apply the "commercial scale" standard, not a substitute form of words.

6. As we have stated in our submissions, although "commercial scale" has a clear meaning, that does not imply that every act of counterfeiting or piracy will be analyzed in an identical fashion. As is often the case with such standards, the individual *circumstances* will make a difference. Indeed, we have provided in our submissions an analytical framework for interpreting and applying the term "commercial scale" that recognizes that what is "commercial scale" in any specific case will vary.

7. In our discussions with the Panel yesterday, we addressed how to determine whether a Member complies with this obligation. In this regard, the United States and Third Parties have mentioned a variety of factors that could be considered. But, the question arises, can we enumerate which factors are relevant to the interpretation and application by this Panel of the term "commercial scale"?

8. The answer is that all of the factors identified by the United States and Third Parties are *potentially* relevant. This would include factors such as the market for the infringed goods, the object of the infringement, the magnitude or extent of the infringement, the value of the infringed goods, whether the infringer is seeking financial gain, the means of producing the infringing goods, the means of distributing the infringing goods, the marketing and solicitation of business, the intended use of the infringing goods, the impact of the infringement on the right holder, and the involvement of organized crime.

9. Yet, it 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.

10. At the same time, it is important to point out that a Member's criminal law need not consist of a catalog of all the potential ways of measuring commercial scale. The TRIPS obligation requires a legal regime that criminalizes all wilful counterfeiting and piracy on a commercial scale, but it does not mandate specific forms of legislative drafting. The Panel must consider whether China's law results in a safe harbor that eliminates the possibility of criminal liability for acts that are objectively "on a commercial scale."

11. China's thresholds do not permit a consideration of these factors apart from the numerical thresholds themselves and thus, as the United States has demonstrated, they miss classes of "commercial scale" piracy and counterfeiting. We have carefully described China's thresholds for Articles 213, 214, 215, 217, and 218 in turn, pointing out exactly how they miss "commercial scale" activities. For example, we show how the "illegal business volume" threshold under Article 213 shields actual business activity – clearly an example of "commercial scale." Further, it is difficult to see how making or selling a little less than $6,900 worth of counterfeit personal care products or small electronics would not be "on a commercial scale."

12. Additionally, while China has rhetorically focused on a single sale of an infringing copy, we should turn our attention back to China's Article 217 copy threshold of 500 copies. The reality is that in China, a producer can make 499 copies, or a retailer can sell 499 copies, and escape prosecution thanks to the safe harbor created by the thresholds for Article 217. Again, an examination of the analytical framework and factors noted by the United States and many Third Parties demonstrates that this conduct is "on a commercial scale."

13. Likewise, "commercial scale" certainly extends to those who are genuinely engaged in commercial activities in order to make a financial return. The United States has provided a

number of concrete illustrations of "commercial scale" activities related to trademark counterfeiting and copyright piracy at various stages of the commercial supply chain in China – including manufacturing, wholesaling, and retailing. In this connection, we have shown that the Chinese marketplace is characterized by small manufacturers, middlemen, and distributors, and that retail commerce is conducted through small outlets. (Moreover, China now agrees that it is not just manufacturing that can occur "on a commercial scale.")

14. Indeed, the seizure data provided by the CCA Report in Exhibit US-41 reinforces these points, since they provide a specific snapshot of the "scale" of "commerce" in China for certain counterfeit or pirated products. Each page of the seizure data appended to the report lists businesses operating "on a commercial scale" and in many cases, raids conducted by China's own authorities netting seizures below the thresholds in effect at the time. Retail outlets – classic examples of commercial scale – can and do operate beneath the thresholds, and thus without the possibility of criminal prosecution and conviction under China's thresholds. (We would also note that the seizure data submitted by Nintendo confirms these points in many respects.)

15. Finally, China introduces a number of arguments that invite the Panel to focus on peripheral matters, such as the size, scope, or impact of the breach, rather than on whether there is a breach in the first place. (The same is true for our other two claims as well.) However, this approach does not provide a viable defense. Again, we only seek to have in place in China the rules required by the TRIPS Agreement.

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

16. We turn next to the second aspect of China's legal regime that we have challenged: China's customs measures. We have explained that, as the text of China's Customs Implementing Measures states, certain facts trigger certain mandatory outcomes. And we have further explained that a number of those outcomes are inconsistent with the TRIPS Agreement.

17. In paragraph 66 of its Oral Statement yesterday, China suggested an analogy between a finding of guilt in a criminal case and Chinese Customs authorities' purported "discretion" to make findings as to the existence or non-existence of the factual predicates triggering the mandatory disposal or destruction options under the China Customs Implementing Measures.

18. China's analogy actually illustrates the contrary point: Customs has no "discretion" to do other than what the facts and the text of its measures require, just as a Chinese court presumably has no "discretion" in determining the fact of guilt or innocence in a criminal case. By law, they are bound to pursue the step dictated by the facts.

19. If other laws constrain Chinese Customs officials' actions as well, they may shift what option is or is not operative under given facts, but they do not change the mandatory nature of the Chinese disposal/destruction hierarchy. Non-Customs laws, referred to nowhere in the Customs measures, cannot contradict the specific, mandatory directives of the regime outlined in the Customs measures. We respectfully request that the Panel reject any suggestion to the contrary.

IV. Article 4 of China's Copyright Law

20. We turn finally to the third aspect of China's legal regime for IPR protection and enforcement that we have challenged: the first sentence of Article 4 of the Copyright Law. Here, too, China's rules fail to meet the disciplines that have been negotiated. In this case, the failure arises out of China's outright denial of copyright protection to an entire class of works, contrary to the provisions of the Berne Convention (and thus contrary to the provisions of the TRIPS Agreement).

21. The text of Article 4.1 is clear, unambiguous, and undisputed. It denies copyright protection to any work that cannot lawfully be published or disseminated in China – not just the illegal content in a work. We note in passing that from time to time, China has appeared to suggest that Article 4.1 applies only to illegal "content" – but nothing in Article 4.1, or anywhere else, supports those suggestions. Indeed, the text of Article 4.1 – and for that matter the text of Article 2.2 – uses the word "works," not "content."

22. China's defense largely rests on creating an artificial distinction between copyright and copyright protection. But, as we have emphasized, the Berne Convention and the TRIPS Agreement do not countenance a distinction between "copyright" and "copyright protection" – rights holders are entitled to have their copyrights *protected*.

23. In addition, the evidence presented by both parties makes clear that, in some cases at least (including the situation considered by the Supreme People's Court in the *Zheng Haijin* matter), works are either subject to mandatory pre-publication review or must be reviewed by the relevant content review authority or the courts before a decision is made on whether or not copyright in that work is protected. Furthermore, China has acknowledged the close overlap between the standards for content review and the standard for what is "prohibited by law" for purposes of Article 4.1. Thus, in such circumstances, copyright protection in China is subject to the formality of content review (and to the uncertainty of the Chinese Government's current content preferences).

24. Finally, China argues that Article 17 of the Berne Convention authorizes the first sentence of Article 4. However, as we have emphasized in our rebuttal and during this meeting, censorship and copyright cannot be equated. In this dispute, we are challenging the *copyright consequences* of the choices that China has made. Article 17 does not permit China to eliminate copyright protection, and thus Article 17 does not shelter the first sentence of Article 4 of China's Copyright Law.