

The Honeymoon is Over: Evaluating The
U.S.-China WTO Intellectual Property
Complaint

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Abstract

Over the last two decades, the United States and the People's Republic of China have engaged in extensive negotiations regarding China's protection of intellectual property rights. To date, the countries have entered into at least four substantive agreements detailing China's commitments and obligations to enforce intellectual property rights (IPRs). Unfortunately, these commitments have not led to significant improvement in China's enforcement of rampant piracy. When, in 2001, China finally acceded to the World Trade Organization, which included the Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS), many hoped that China would effectively finally fulfill its international obligations to protect intellectual property rights. Indeed, the United States initially refrained from taking any overt action against China for the next few years. The United States signaled this honeymoon period was over in April 2007 when it filed a controversial WTO complaint against China. The complaint charges China with violating its obligations under TRIPS to provide adequate protection for and deterrence against infringing intellectual property rights.

THE HONEYMOON IS OVER: THE U.S.-CHINA WTO INTELLECTUAL PROPERTY COMPLAINT

*Donald P. Harris**

INTRODUCTION

China's potential to become a major economic player was the source of extensive economic and political commentary during the 1980s and 1990s.¹ Today, China is well on its way to fulfilling—if it has not already fulfilled—that potential. Indeed, since acceding to the World Trade Organization (“WTO”) in 2001, China has by all measures become an economic juggernaut. It is one of the world's fastest growing economies—currently ranked as the world's fourth largest economy, the world's third largest trader, and the world's leading recipient of foreign direct investment. It is poised to continue this remarkable expansion into new areas and markets.² China's economic transformation has placed it at the center of world and U.S. attention—both wanted and unwanted. Whether it is China's economic prowess, the large-scale recall of unsafe products, the large trade surplus with the United States, or its controversial

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1. See, e.g., Michael H. Armacost, Under Secretary for Political Affairs, China and the United States: Present and Future, Address Before the National Council for U.S.-China Trade (June 1, 1988), in DEP'T ST. BULL., Aug. 1989 (expressing optimism for the inevitable reform toward the market-oriented economy, and China's increased global role through development of relations with the United States and Russia); William Perry, Sec'y of Defense, U.S. Strategy: Engage China, Not Contain It, Remarks at the Washington State China Relations Council (Oct. 30, 1995), available at <http://www.defenselink.mil/speeches/speech.aspx?speechid=1023> (discussing a comprehensive U.S. approach to China's role in becoming a major world power).

2. See generally United Nations Conference on Trade and Development (UNCTAD), Country Fact Sheet: China, *World Investment Report 2005: Transnational Corporations and the Internationalization of R&D*, U.N. Doc. UNCTAD/WIR/2005, available at http://www.unctad.org/sections/dite_dir/docs/wir05_fs_cn_en.pdf; see also Marcia Don Harpaz, *China and the WTO: New Kid on the Developing Bloc?*, 71 (Hebrew Univ. of Jerusalem Faculty of Law, Research Paper No. 2-07, 2007), available at www.ssrn.com/abstractid=961768.

record on human rights abuses, China is highly visible.³

One area of unwanted attention, from the Chinese perspective, concerns intellectual property rights (“IPRs”) protection. Internationally, China has entered into various intellectual property (“IP”) agreements and treaties, thus demonstrating its commitment to greater protection for intellectual property rights.⁴ These efforts have resulted in China adopting and implementing strong substantive intellectual property laws. But, despite the changes in legislation, China has failed miserably to enforce these laws.⁵

China’s failure to protect intellectual property rights has prompted the United States, after many failed negotiations, to file a WTO complaint against China. Among other things, the complaint targets China’s criminal intellectual property laws, alleging that these criminal laws do not provide a sufficient deterrent to trademark and copyright infringement, and fails to provide adequate remedies for willful trademark infringement and copyright piracy occurring “on a commercial scale,” thus violating obligations under the Trade-Related Aspects of Intellectual Property Rights Agreement (“TRIPS”).⁶ The deficiencies in China’s laws stem from the high thresholds that must be reached before criminal liability attaches. By way of example, China’s criminal copyright provision does not impose liability unless the infringer makes, sells, or distributes more than 500 infringing copies.⁷ The United States contends that these high thresholds are inconsistent with TRIPS’ required criminal penalties, which

3. Of course, these issues can also overlap, such as when counterfeit products kill people.

4. In many instances, China did so to avert trade wars, particularly with the United States. See *infra* Part II.B.4.

5. By some estimates, counterfeiters in China account for about eighty percent of all counterfeit and pirated goods in the world. See DANIEL C.K. CHOW & EDWARD LEE, INTERNATIONAL INTELLECTUAL PROPERTY: PROBLEMS, CASES, AND MATERIALS 762 (2006).

6. See 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; 33 I.L.M. 1197 (1994) [hereinafter TRIPS or TRIPS Agreement]; see also *infra* Part II.C. The complaint also claims (1) that China fails to provide protection (or inappropriately delays protection) for certain copyrighted works, as required by TRIPS and the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”) and (2) that China inappropriately allows confiscated infringing goods to be placed back in the channels of commerce, also violating TRIPS. See *infra* Part II.C.1.

7. See *infra* Part II.A.

were seen as a necessary component of international intellectual property reform as a means to punish and deter the more egregious acts of infringement.⁸

While the United States' complaint raises important legal and social issues, the difficulty of proving the allegations in the complaint cannot be understated. The United States must prove that China's laws are insufficient to deter infringement or capture large-scale piracy. In other words, the United States will have to demonstrate that "but for" the allegedly high thresholds, China's laws would criminally penalize a substantial portion of currently unreachable infringers. This will be a fact-intensive inquiry and it is not clear that the United States can marshal satisfactory factual data to support the claim. Moreover, in light of the vague language used in TRIPS' enforcement provisions, it is unclear how a panel will interpret key phrases in the relevant TRIPS provisions. A WTO panel is likely to grant China wide discretion in implementing its TRIPS obligations.

Beyond the legal merits of the dispute, the complaint may threaten already fragile U.S. relations with China, as evidenced by mounting domestic dissatisfaction with China's role in the global trading system and China's staunch resistance to U.S. pressure to reform its legal regime. The pursuit of the complaint has the potential to initiate trade wars with China, endorse China's enforcement efforts, and cause China to retaliate with its own protectionist policies. Such factors counsel against filing the complaint. Despite these strong countervailing factors, numerous reasons support the United States' decision.

China has reached a stage in its economic development and a position in the global trading regime where it is appropriate to evaluate the complaint from the perspective of China as a developed country. China has been the recipient of enormous amounts of foreign direct investment, has enjoyed tremendous growth in trade, and has benefited from generous currency valuation. As with other major developed countries, China must

8. See UNITED STATES DEPARTMENT OF JUSTICE, MANUAL ON PROSECUTING INTELLECTUAL PROPERTY CRIMES 5-6 (3d ed. 2006) [hereinafter DOJ IP MANUAL], available at <http://www.usdoj.gov/criminal/cybercrime/ipmanual/ipma2006.pdf> ("Although civil remedies may help compensate victimized intellectual property rights holders, criminal sanctions are often warranted to punish and deter the most egregious violators: repeat and large scale offenders, organized crime groups, and those whose criminal conduct threatens public health and safety.").

conform its IP regime, including enforcement, such that it complies with its international obligations.

This Article has two main aims. The first is to evaluate the principal claim in the United States' WTO complaint. As mentioned, in view of the discretion afforded WTO members in implementing their TRIPS obligations, particularly their enforcement obligations, the United States may have a difficult time prevailing. The second aim is to suggest that even if the United States does not prevail on its principal claim, it may nonetheless "win" the dispute simply by filing the complaint, as extra-judicial benefits may accrue that outweigh potential harms resulting from WTO adjudication. In particular, the mushrooming U.S. trade deficit with China, loud cries from Congress calling for protectionist measures, persistent fears of continued unfair currency valuation practices, calls for boycotts of the 2008 Olympics in Beijing, and numerous incidents of unsafe products being exported from China all impact the United States-China relationship. The complaint thus has far reaching implications and represents an important phase in the Sino-U.S. relationship. The United States will receive significant benefits if it can obtain concessions in any of these areas by leveraging the complaint against China's failings in these areas, regardless of the outcome of the complaint. At the very least, the complaint signals to China that the United States will no longer sit idly by waiting for China to take the necessary measures and make the necessary effort to protect U.S. intellectual property rights.

The Article proceeds as follows: Part I will provide the background for the United States' intellectual property dispute with China, tracing the detailed negotiations and agreements entered into between the two powers and the failed efforts to induce China to protect intellectual property rights. This Part will also discuss China's 2001 WTO Accession and adoption of TRIPS, wherein China agreed to implement and enforce more stringent intellectual property laws. During this period, the United States took a hands-off approach, allowing China time to implement its obligations and become part of the global trading system.⁹ This honeymoon period ended four years after China's accession. China's continued lack of enforcement motivated the United States to file its WTO complaint targeting China's ineffective in-

9. See *infra* Part II.

tellectual property enforcement.¹⁰

Part II offers an analysis of the complaint's merits, predicting how a WTO panel might rule by interpreting key TRIPS provisions and looking to other countries' criminal intellectual property laws for guidance. As the TRIPS Agreement provides countries with considerable flexibility in meeting their obligations and there is no international standard for evaluating effective criminal enforcement, a WTO panel may rule against the United States, even though the United States can rely on evidence of China's woeful enforcement practices.¹¹ The real value of the complaint, however, may lie in extra-judicial concessions that China may grant. In light of China's desire to appear to the international community compliant with its international obligations, China may be willing to address U.S. concerns without protracted litigation through the WTO dispute process, perhaps even foregoing an appeal of the panel decision. Part III will thus examine the reasons underlying the United States' action in filing the complaint and also the possible concessions the United States might extract.

I. THE LEGAL AND POLITICAL BACKGROUND TO THE U.S.-CHINA DISPUTE

A. The United States Push for TRIPS

To better appreciate the United States' recent action, it is instructive to briefly explore the events leading up to the current dispute. This begins with the United States' efforts to increase intellectual property protection worldwide, beginning with TRIPS. The negotiations leading to the TRIPS Agreement have been fully detailed elsewhere.¹² By most accounts, TRIPS is a compromised bargain, a contract among its signatories, concern-

10. See *infra* note 79 and accompanying text.

11. See *infra* Part II.A.1.

12. See SUSAN K. SELL, *Intellectual Property Protection and Antitrust in the Developing World: Crisis, Coercion, and Choice*, in POWER AND IDEAS, NORTH-SOUTH POLITICS OF INTELLECTUAL PROPERTY AND ANTITRUST 175 (1998); see generally Assafa Endeshaw, *A Critical Assessment of the United States—China Conflict on Intellectual Property*, 6 ALB. L.J. SCI. & TECH. 295 (1996); Raj Bhala, *Enter the Dragon: An Essay on China's WTO Accession Saga*, 15 AM. U. INT'L L. REV. 1469 (2000); Donald P. Harris, *Carrying a Good Joke Too Far: TRIPS and Treaties of Adhesion*, 27 U. PA. J. INT'L ECON. L. 681 (2006); Brett Williams, *The Influence and Lack of Influence of Principles in the Negotiation for China's Accession to the World Trade Organization*, 33 GEO. WASH. INT'L L. REV. 791 (2001).

ing the appropriate standards for international intellectual property protection. It is perceived as a bargain that benefited all members. Developed countries benefited from the developing countries' new commitment to protect intellectual property rights, while developing countries benefited by gaining access to developed country markets, particularly for their agricultural and textile goods.¹³

A contrary perspective on the TRIPS negotiation identifies the developed countries, particularly the United States, as coercing developing countries to agree to minimum intellectual property standards. The United States used Section 301 and Special 301 of the U.S. Trade Act ("Section 301" and "Special 301"),¹⁴ which require the United States Trade Representative ("USTR") to identify countries that deny adequate and effective protection to intellectual property rights and then, branding them as "priority" countries, to initiate special investigations concerning them. This became the primary mechanism for threatening (and taking) retaliatory trade action against foreign countries failing to effectively protect U.S. IPRs.¹⁵ Moreover, in securing

13. See Frederick M. Abbott, *The WTO TRIPS Agreement and Global Economic Development*, 72 CHI-KENT L. REV. 385, 387, 391 (1996) (noting that developed countries agreed to cut agricultural subsidies to provide an advantage to developing nations in the open market in exchange for TRIPS protections).

14. Panel Report, *United States—Sections 301-310 of the Trade Act of 1974*, WT/DS152/R (Dec. 22, 1999) [hereinafter Section 301 Panel Report].

15. Section 301 provides that when a foreign country denies rights owed to the United States under a trade agreement, or when a foreign country is unfairly restricting United States' foreign commerce, or if foreign countries deny adequate and effective protection of United States' intellectual property, the United States can take various retaliatory actions. See *id.* § 2(c). These actions may be taken irrespective of any breach of an international agreement, such as TRIPS. See Ted L. McDorman, *United States-Thailand Trade Disputes: Applying Section 301 to Cigarettes and Intellectual Property*, 14 MICH. J. INT'L L. 90, 94 (1992). Congress amended the Trade Act three times, in 1979, 1984, and 1988, each time increasing the government's ability to retaliate against countries engaging in "unfair" trade practices, which included not protecting intellectual property rights. See JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS, AND TEXT* 818 (3d ed. 1995). These actions include withdrawing benefits the foreign country enjoys because of a trade agreement with the United States; entering into new agreements to eliminate the offending action; or imposing duties or other import restrictions against goods or an economic sector of the foreign country. See 19 U.S.C. § 2411(c)(1)(2000). Because many of the "target" countries were heavily dependent on access to the United States market, they were especially vulnerable to the U.S. threats. See SELL, *supra* note 12, at 182-88. The target countries include Argentina, Brazil, Chile, China, India, Mexico, South Korea, and Thailand. According to Sell, the percentage of trade conducted with the United States (as a percentage of total world trade) by these countries ranged from eight percent (China) to al-

intellectual property commitments in the WTO, developed countries were able to: (1) move intellectual property matters to a more favorable forum (from World Intellectual Property Organization (“WIPO”) to the WTO); (2) gain stronger and more effective enforcement mechanisms (prior intellectual property treaties contained no such enforcement provisions); and (3) use trade mechanisms, including agriculture, textiles and tariff rate quotas, to “swap” against stronger intellectual property protection, thus ensuring adoption of these measures.¹⁶ These terms proved extremely effective in convincing most developing countries to adopt more stringent intellectual property laws through joining the WTO. Once in the WTO, these countries were subject to the WTO dispute settlement mechanism, which the United States used extensively. China, not being a WTO member, was not subject to TRIPS and the United States’ coercive Special 301 tactics against China produced mixed results.

B. *China’s Lack of Enforcement of Intellectual Property Rights*

No country is more notorious and singled out for piracy and counterfeiting practices than China. According to some estimates, China is experiencing counterfeiting levels of over ninety percent for IP-based products such as computer software, sound recordings, and videos—with losses for intellectual property owners estimated at US\$1.4 billion annually.¹⁷ In 2006, copyright piracy in China resulted in losses estimated at US\$2.4 billion, and in 2007, the estimated loss increased to nearly US\$3 billion.¹⁸ Eighty-one percent of pirated and counterfeit goods seized by the U.S. Customs and Border Protection and Immigra-

most seventy percent (Mexico). Indeed, the United States is the biggest importer of each of the target countries’ goods (except China). Moreover, with the exceptions of China and Mexico, none of these countries were significant trading partners for the United States. Thus, the threats carried much weight. *See id.* In sum, this coercion theory emphasizes that the developing countries did not become members of TRIPS because of benefits accruing to them. Rather, they became members because the alternative left them in a worse position: without access to the United States market. *See id.*

16. *See* Doris E. Long, *Copyright and the Uruguay Round Agreements: A New Era of Protection or an Illusory Promise?*, 22 *AIPLA Q.J.* 531, 534 n.4 (1994).

17. *See* DORIS E. LONG & ANTHONY D’AMATO, *A COURSEBOOK IN INTERNATIONAL INTELLECTUAL PROPERTY* 578 (2000).

18. INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (“IIPA”), IIPA’s 2008 SPECIAL 301 RECOMMENDATIONS app. A, at 1 (2008), available at <http://www.iipa.com/pdf/2008SPEC301LOSSLEVEL.pdf> (table of estimated data losses due to piracy & piracy levels in 2006-07).

tion and Customs Enforcement agencies came from China, valued at US\$125.6 million.¹⁹ Beyond the sale of the counterfeit goods, losses extend to downstream markets, such as the cinematic and home-video industries.²⁰

Experts and commentators differ regarding the reasons for the lack of enforcement. In his seminal work, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION*, Professor William Alford contends that the primary reason for China's lack of enforcement is the Chinese Communist culture, combined with the cultural roots in Confucianism, which differ significantly from the U.S. Capitalist culture.²¹ Put in overly simplistic terms, the Chinese culture subordinates individual interests to group interests, in stark contrast to the protection of individual property rights. Therefore, protection of IPRs is not a primary concern. Corruption and the lack of will on the part of local authorities, those most responsible for IPR enforcement, also contribute to the lack of enforcement. Chinese counterfeiting accounts for an estimated ten to thirty percent of China's gross domestic product; accordingly, the economics of counterfeiting has an impact.²² Perhaps the most accurate statement to sum up the reasons for inadequate protection comes from Professors Long and D'Amato, who claim:

Lack of enforcement did not result from a single factor. Instead, absence of the rule of law, corruption, lack of efficient judicial enforcement mechanisms, fiscal concerns, and local culture and prejudices all contributed toward a global pirating problem that at times seemed insurmountable.²³

19. See SHAYERAH ILIAS & IAN F. FERGUSSON, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, *INTELLECTUAL PROPERTY RIGHTS AND INTERNATIONAL TRADE* 8 (2007).

20. See *id.* at 12. A consulting group's study (L.E.K. Consulting) for the Motion Picture Association of America ("MPAA") estimated that 141,030 jobs are lost in the United States due to piracy, resulting in losses of US\$2.7 billion in earnings and US\$422 million in tax revenue. See *id.*

21. See generally WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* (1995).

22. See ODED SHENKAR, *THE CHINESE CENTURY—THE RISING CHINESE ECONOMY AND ITS IMPACT ON THE GLOBAL ECONOMY, THE BALANCE OF POWER AND YOUR JOB* 86 (2005). Shenkar notes that "[i]n a speech to the National Association of Manufacturers, Thomas Boam, the minister counselor, estimated that between 10 and 30 percent of China's GDP comes from piracy and counterfeiting." See *id.* (quoting Thomas Boam, Minister Counselor for Commercial Affairs, Address to the National Association of Manufacturers (Mar. 23, 2003)).

23. LONG & D'AMATO, *supra* note 17, at 578.

Providing a contrary perspective, Professor Aaron Schwabach argues that the perception that intellectual property piracy is only or primarily a problem in China (or similar developing countries) is inaccurate.²⁴ Schwabach claims that “China-bashing” pervades discourse at every level, and describes the United States’ anti-Chinese sentiment on intellectual property as “Sinophobia.”²⁵ He argues that the United States’ widespread perception that China flagrantly disregards intellectual property protection more than other countries is fueled in large part by “cost minimizing behavior by [United States’] politicians” looking for convenient scapegoats:

Politicians in search of a safe, non-voting scapegoat often target foreigners It will always be safer for a senator from Michigan to blame Detroit’s economic woes on Japanese carmakers (for somehow competing unfairly) than on Detroit’s carmakers for making lousy cars. Lawyers and legal academics are not politicians, however, and have no such excuse. Indeed, it is our duty to counteract political hyperbole with facts and reason, rather than buying into it.²⁶

Schwabach argues that not only is the perception of China as a leader in copyright piracy inaccurate, but that such piracy is much less of a problem than piracy in developed countries.²⁷ Using the piracy levels per capita, he contends that China is near the bottom of countries that affect U.S. piracy losses. At the top of the list are developed countries with large established markets such as France, Great Britain, and Italy. He also highlights the uncertainties regarding piracy valuation, upon which the excessively high losses are based:

The record industry might like to believe that a single downloaded song (“Sci-Fi Wasabi,” by Cibo Matta) represents a lost US\$19 album sale. More realistically, it might represent a lost US99¢ iTunes sale, although even that may be too high: many who download music for free do so out of curiosity, and would not listen to the song if doing so cost even a small amount of money. These free riders benefit from the willing-

24. See generally Aaron Schwabach, *Intellectual Property Piracy: Perception and Reality in China, the United States, and Elsewhere*, 2 J. INT’L MEDIA & ENT. L. 65 (2008).

25. See *id.* at 65-66.

26. *Id.* at 66.

27. See *id.* at 69-70 (noting that piracy in developed countries is less visible because it is online).

ness of someone, somewhere, to pay for the song and of someone (possibly not the same person) to make it available for download, but as the downloaders would not otherwise have bought the song, they do no direct economic harm.²⁸

In sum, he highlights the rhetoric, questions the claims regarding valuation and the amount of losses, and attacks the reliability of information concerning the amount of digital piracy that actually occurs, even while conceding that such information is difficult to obtain.²⁹

To be sure, Schwabach raises significant concerns. However, he relies too heavily on per capita statistics and does not fully take into account China's enormous population. China's sheer size, with over one billion people, will undoubtedly make any evaluation based on per capita piracy more favorable to China, placing it at or near the bottom. Not surprisingly, India is also at the bottom. As would be expected, the leading piracy countries per capita are developed countries with comparatively low populations. Thus, France, Great Britain, and Italy—all with less than sixty million people—top the chart on a per capita basis.

Schwabach may also underplay the direct economic harm caused by downloading. While he is on firm ground arguing that such economic data is often inaccurate and that some people certainly will download out of curiosity, there is no question that sales are lost and that the harm is substantial.

The truth of China's lack of intellectual property enforcement lies between both accounts; though, it seems more likely that it lies closer to the account of widespread piracy and significant harm to the U.S. economy and other interests.

28. *Id.* at 71. Schwabach makes the same argument regarding DVD piracy: Many who might have been willing to pay 60 cents for a pirated DVD of the mind-numbingly awful conclusion to the *Pirates of the Caribbean* trilogy would have been unwilling to pay US\$22 for a licensed copy, or US\$11 per person to see the movie in a theater—or would have demanded their money back if they had.

Id. at 72 (internal citations omitted).

29. *See id.*

C. *U.S. Efforts to Secure From China Stronger IPRs
Protection and Enforcement*

1. The 1992 Agreement

China was a constant target of Special 301 actions.³⁰ China's lack of pre-TRIPS enforcement moved the United States to threaten retaliation by designating China as a "Priority Foreign Country" under Special 301 on May 26, 1991.³¹ This designation empowered the USTR to act.³² As a consequence, in January 1992, the United States and China executed their first full bilateral IPR agreement.³³ The 1992 Agreement required China to: (1) adhere to certain levels of IP protection for patents, trade secrets, computer programs and sound recordings; (2) accede to a number of important international intellectual property treaties, such as the Berne Convention for the Protection of Literary and Artistic Works (then the leading international copyright treaty); and (3) provide effective border control procedures and remedies.³⁴ This required China to overhaul its IP legislation. In return, the United States agreed to terminate its Special 301 investigation and revoke China's designation as a priority foreign country.³⁵

While the 1992 Agreement resulted in changed legislation,

30. The Office of the United States Trade Representative ("USTR") placed China on the Priority Watch List from 1989-90 and 2005-07; the Watch List from 1992-93 and 1995; as a Priority Foreign Country in 1991, 1994, and 1996; and as part of Section 306 Monitoring from 1997-2004 and 2006. See INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE ("IIPA"), *supra* note 18, app. D, at 1 (2008) (chart of countries' special 301 placement), available at <http://www.iipa.com/rbc/2008/2008SPEC301HISTORICALPLACEMENT.pdf>.

31. See, e.g., 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, 235 (2006).

32. See *id.* China was one of the first countries the United States designated as a priority foreign country. See *id.* at 234. Those countries that have the most "egregious acts, policies, or practices" in relation to intellectual property protection and whose "acts, policies, or practices . . . have the greatest adverse impact" and that are not "entering into good faith negotiations" or "making significant progress in bilateral or multilateral negotiations." See 19 U.S.C. § 2242(b)(1) (2007).

33. See Massey, *supra* note 31, at 235.

34. Memorandum of Understanding Between the United States of America and the People's Republic of China on the Protection of Intellectual Property, United States-PRC, arts. 1-6, Jan. 17, 1992, T.I.A.S. No. 12036, 34 I.L.M. 676 (1995), available at http://untreaty.un.org/unts/144078_158780/4/4/12279.pdf [hereinafter 1992 Agreement].

35. See *id.* art. 7.

it did nothing to improve enforcement.³⁶ In some instances, the new legislation did not go far enough. For example, while China amended its copyright law, the law made copyright infringement only a civil, not a criminal, offense. It was not until July 1994—five days after the United States announced that it would again designate China as a priority foreign country—that China provided criminal penalties for copyright infringement.³⁷ Despite the new legislation, piracy levels still remained among the highest in the world. Dissatisfied, the United States again designated China a priority country under Special 301, initiated investigations, and threatened once more to impose substantial trade sanctions.³⁸ Further exhaustive and contentious talks led to the next major Sino-U.S. agreement, the 1995 Memorandum of Understanding.

2. The 1995 Memorandum of Understanding

The 1995 Memorandum of Understanding was far more detailed than the 1992 Agreement. Some have argued that the 1995 Agreement may have been “the most detailed bilateral agreement on the subject of IPRs protection entered into between two governments as of its date.”³⁹ The Agreement, among other things, required China to reduce piracy, improve enforcement, and open its markets for U.S. computer software, sound recordings, and movies.⁴⁰ Yet again, despite new promises, China’s enforcement efforts remained nonexistent or ineffective. The United States’ losses continued to total billions of dol-

36. During this time, China undertook other efforts to demonstrate its commitment to protect intellectual property rights. For example, China ratified the Convention on Biological Diversity on January 1, 1993. See United Nations Conference on Environment and Development: Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79, 143, 31 I.L.M. 818 (1992). Then, on Jan. 1, 1994, China became a member of the “Patent Cooperation Treaty.” See generally Patent Cooperation Treaty, June 19, 1970, 28 U.S.T. 7645, 1160 U.N.T.S. 231 (1970) [hereinafter Patent Cooperation Treaty]. For contracting party information, see World Intellectual Property Organization (WIPO) home page, <http://www.wipo.int/portal/index.html.en> (last visited Sept. 26, 2008).

37. See, e.g., Glenn R. Butterson, *Pirates, Dragons and U.S. Intellectual Property Rights in China: Problems and Prospects of Chinese Enforcement*, 38 ARIZ. L. REV. 1081, 1104-05 (1996).

38. The United States threatened US\$3 billion in punitive tariffs for China’s failure to enforce intellectual property. See Massey, *supra* note 31, at 235.

39. See, e.g., FREDERICK ABBOTT ET. AL., *THE INTERNATIONAL INTELLECTUAL PROPERTY SYSTEM: COMMENTARY AND MATERIALS* 1593 (1999).

40. Massey, *supra* note 31, at 232 n.6.

lars.⁴¹ Aggravating this situation was the realization that, unlike with other developing countries, the United States' coercive tactics against China were entirely ineffective. Abandoning its strong-arm tactics shortly after the 1995 Agreement,⁴² the Administration focused on exerting pressure through China's WTO accession process by extracting from China increased obligations (WTO-plus obligations) as a condition of accession and subjecting China to the WTO dispute settlement process in the event compliance and enforcement were not forthcoming.⁴³

D. *China's Accession to the WTO*

After fifteen years of exhaustive negotiations, on December 11, 2001, China acceded to the WTO.⁴⁴ China's accession was a monumental event.⁴⁵ As the world's largest economic power not then belonging to the WTO, China's inclusion in the global

41. *See id.* at 235 ("Despite the 1992 agreement, U.S. firms' losses to piracy continued to escalate alarmingly, particularly in the areas of software and recordings."); *see also* 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, 187 (Daniel J. Gervais ed., 2007) ("Notwithstanding these two agreements, piracy remained rampant in China in the mid-1990s, and the United States was estimated to have lost [US]\$2 billion of revenues annually due to copyright piracy.").

42. *See* Yu, *supra* note 41, at 220.

43. The United States' ability to exert pressure on China was further constrained, as Member Countries argued that any intellectual property rights violations should be addressed through the World Trade Organization ("WTO"), rather than unilateral action such as Section 301 actions. The European Union ("EU") filed a complaint against the United States claiming that the Trade Act imposed unilateral determinations and trade sanctions within strict time limits. This does not allow compliance with the Dispute Settlement Understanding (Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, art. 13, 33 I.L.M. 1125 (1994)) which requires either agreement among the parties to the dispute or multilateral finding before concessions can be suspended, and the timeframe for this process exceeded the timeframe required by the U.S. Act. Request for Consultations by the European Communities, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/1 (Nov. 30, 1998). The Panel concluded that in light of the Statement of Administrative Action approved by Congress in which the United States indicated it would base Section 301 determinations on findings of the Appellate Body, the United States would be in compliance. *See generally* Section 301 Panel Report, *supra* note 14.

44. *See generally* World Trade Organization, *Accession Protocol of the People's Republic of China to the WTO*, WT/L/432 (Nov. 10, 2001) [hereinafter *Accession Protocol*].

45. *See* Christopher Duncan, *Out of Conformity: China's Capacity to Implement World Trade Organization Dispute Settlement Body Decisions After Accession*, 18 *AM. U. INT'L L. REV.* 399, 405 (2002).

trade organization promised to provide huge benefits to all. Developed countries gained access to China's already vast and growing market, and China was duty-bound to obey WTO rules and commitments. In the meantime, China's economy was prepared to explode as China too gained access to new export markets. China's size, double-digit economic growth rates, and nearly unlimited reservoir of cheap labor resources left China poised to become an economic powerhouse. Threatened by China's political and economic potential and the expected intense competition from Chinese exports, the United States and the European Union demanded that China take on obligations beyond those of other WTO members (WTO-plus obligations) and also that China not be entitled to certain rights afforded other WTO members (WTO-minus provisions).⁴⁶

Developed countries' demands reflected protectionism, as they were concerned with cheap Chinese imports. The countries reasoned that extra obligations were appropriate "to level the playing field for their domestic industries in their home markets as well as improve their access to the Chinese market."⁴⁷ This led to extensive negotiations and disputes, as China fought against WTO-plus and WTO-minus commitments. A critical issue in this fight—perhaps the critical issue—was whether China could accede to the WTO as a developing country, taking advantage of the flexibilities and benefits available to developing countries, including benefits concerning the implementation of WTO obligations.

1. The Debate Concerning China's Developing Country Status

TRIPS grants special treatment to developing and least-developed countries. Most notably, the least-developed countries are granted a transition period before their TRIPS obligations are triggered.⁴⁸ Also, WTO judicial bodies arguably should interpret TRIPS provisions more favorably to developing countries and provide these countries more flexibility in implementing

46. See Harpaz, *supra* note 2, at 5, 17; see generally Julia Ya Qin, *WTO-Plus Obligations and Their Implications for the World Trade Organization Legal System: An Appraisal of the China Accession Protocol*, 37(3) J. WORLD TRADE 483 (2003).

47. Harpaz, *supra* note 2, at 68.

48. See TRIPS, *supra* note 6, art. 65(2) (granting an extension of four years over the default year for developing countries).

their obligations.⁴⁹ Given this grant of special treatment, a particular country's status has significant meaning.⁵⁰ The WTO does not define developing countries; rather, countries self-designate.⁵¹ In the end, the decision to self-designate is a political question. As a counterbalance to self-designation, other WTO members can object to a particular designation, thus denying favorable treatment to acceding members.⁵² This occurred with China. Throughout the entire accession process, China made enormous efforts to accede as a developing country, continually claiming its developing country status entitled it to treatment accorded other developing countries.⁵³ China encountered strenuous opposition from the European Union and the United States, which demanded that China accede as a developed country.

From the standpoint of per capita income, China is a developing country.⁵⁴ In every other economic sense, however, China is a developed country, clearly distinguishable from all other de-

49. See, e.g., Harris, *supra* note 12, at 687 (2006); see also James Thuo Gathii, *The High Stakes of WTO Reform*, 104 MICH. L. REV. 1361, 1374-75 (2006) ("The DSB [Dispute Settlement Body] favors the interests of its most powerful members through its interpretive role. It does so by applying or interpreting rules of the international trading regime in favor of developed countries while foreclosing equally plausible applications and interpretations that are favorable to developing countries and are entirely consistent with the rules of the international trading regime.").

50. See TRIPS, *supra* note 6, arts. 65-67. In addition to the Dispute Settlement mechanism, TRIPS affords developing countries special treatment as regards grace periods suspending these countries' obligations. See *id.* Additionally, Articles 66 and 67 impose obligations on developed countries to provide "technical assistance" to developing countries and requires that developed countries provide incentives to encourage the transfer of necessary technology to developing countries. See *id.* arts. 66-67.

51. See World Trade Organization, *Who Are the Developing Countries in the WTO?*, http://www.wto.org/english/tratop_e/devel_e/dlwho_e.htm (stating that WTO members decide for themselves to which group they belong). But see Marrakesh Agreement Establishing the World Trade Organization, Dec. 15, 1993, art. XI § 2, 33 I.L.M. 13, 20 (1994) (stating the WTO uses the United Nations' definition for least developed countries).

52. See Harpaz, *supra* note 2, at 5.

53. See *id.* at 10 (citing General Agreement on Tariffs and Trade ("GATT"), *China's Status as a Contracting Party: Communication from the People's Republic of China*, L/6017 (July 14, 1986)).

54. See Jide Nzelibe, *The Case Against Reforming the WTO's Enforcement Mechanism*, 32 (Northwestern Sch. of Law, Pub. Law & Legal Theory, Series No.07-12 2007), available at <http://ssrn.com/abstracts=9801002> (stating that two-thirds of the world's poor live in Brazil, China, and India, and arguing that populous developing countries' use of the WTO dispute settlement mechanism can play an important role in helping least developing countries).

veloping countries.⁵⁵ China is currently the recipient of more foreign direct investment than any other developing country and, indeed, more than developed countries. China represents the third largest trading nation and fourth largest economy in the world, and is continuing to expand.⁵⁶ As such, it is hard to argue, and will become increasingly harder to argue, that China is a developing country with interests similar to those of other developing countries.

In the end, China was not successful in gaining unequivocal developing country status; instead it accepted a more compromised position. In some areas, China was considered a developing country. However, in other key areas, such as subsidies, countervailing duties, and intellectual property, China acceded as a developed country.⁵⁷ China's chief negotiator summarized the final compromise as follows:

[W]e have taken a pragmatic attitude towards the various treatments for the developing countries as embodied in the WTO agreements and practices In some important areas, we insist on undertaking obligations in consistency with our own development level In some areas, however, where China has already had the capability to implement obligations as all WTO Members, we deem [it] not necessary for China to enjoy preferential treatments to the developing countries⁵⁸

2. China's WTO Obligations

Not only did China fail in its attempt to accede unqualifiedly as a developing country, but the international community's fear and recognition of China as a major economic power reinforced the view that China needed to satisfy certain additional conditions before acceding to the WTO.⁵⁹ These conditions exceeded those of other developing—and developed—

55. See Harpaz, *supra* note 2, at 12 (discussing economic statistics that favored China's categorization as a developed nation).

56. See *id.* at 71.

57. See *id.* at 9-44 (discussing in detail China's specific WTO-plus and WTO-minus commitments to its WTO membership).

58. See *id.* at 14 (quoting H.E. Vice Minister Long Yongtu, Head of the Chinese Delegation, Address at the Sixteenth Session of the Working Party on China (July 4, 2001), available at <http://www.china-un.ch/eng/qtzz/wtothsm/t85632.htm>).

59. See *Accession Protocol*, *supra* note 44 (providing specific conditions on China's entry to the WTO and specific country reservations to China's entry).

countries, particularly in the area of intellectual property. For example, China was required to immediately implement and enforce intellectual property laws, instead of being granted the five-year grace period granted developing countries.⁶⁰ China was also required to provide a six year period for the protection of data, distinct from other members' TRIPS obligations.⁶¹ Additionally, China took on WTO-plus commitments in industrial subsidies,⁶² agriculture,⁶³ investment,⁶⁴ national treatment,⁶⁵ and gave up WTO-minus right in key areas such as anti-dumping and countervailing duties.⁶⁶

Upon acceding to the WTO on December 11, 2001, China was required to conduct a major overhaul of its legislative system, resulting in significant changes in its foreign trade and investment and intellectual property regimes.⁶⁷ Despite these diffi-

60. *See id.* pt. I, § 2(A)(2), at 2.

61. *See* TRIPS, *supra* note 6, art. 39. The Article does not specify a time period for this protection. *See id.* This limits China's "access to cheaper, generic versions of brand name drugs." *See* Harpaz, *supra* note 2, at 24. While China appears to be the first country accepting this TRIPS-plus obligation, since then the United States has begun to require other trading partners to undertake similar obligations. *See id.* (noting that U.S. Free Trade Agreements with Jordan, Singapore, Chile, Morocco, Australia, and Bahrain contain such a provision).

62. *See Accession Protocol*, *supra* note 44, pt. I, sec. 10(3) ("China shall eliminate all subsidy programmes falling within the scope of Article 3 of the SCM Agreement [Agreement on Subsidies and Countervailing Measures] upon accession.").

63. *See id.* pt. I, § 12 ("China shall implement the provisions contained in China's Schedule of Concessions and Commitments on Goods and, as specifically provided in this Protocol, those of the Agreement on Agriculture. In this context, China shall not maintain or introduce any export subsidies on agricultural products.").

64. *See id.* pt. I, § 7(3) ("China shall, upon accession, comply with the TRIMs [Trade-Related Investment Measures] Agreement, *without recourse to the provisions of Article 5 of the TRIMs Agreement*. China shall eliminate and cease to enforce trade and foreign exchange balancing requirements, local content and export or performance requirements made effective through laws, regulations or other measures." (emphasis added)).

65. *See id.* pt. I, § 3 ("Except as otherwise provided for in this Protocol, foreign individuals and enterprises and foreign-funded enterprises shall be accorded treatment no less favourable than that accorded to other individuals and enterprises in respect of . . . the procurement of inputs and goods and services . . . [and] the prices and availability of goods and services . . .").

66. *See* Harpaz, *supra* note 2, at 36; *see also Accession Protocol*, *supra* note 44, pt. I, § 15.

67. *See* ANDREW MERTHA, *THE POLITICS OF PIRACY: INTELLECTUAL PROPERTY IN CONTEMPORARY CHINA* 229-30 (2005). In point of fact, many of the legislative changes to China's intellectual property laws came *before* its accession to the WTO. In answering whether there was a difference between China's pre- and post-TRIPS regimes, Mertha states that there was little, if any, difference. He explains that:

culties, once China joined the WTO, many were optimistic that enhanced and effective intellectual property enforcement efforts would follow. These optimists argued that WTO accession would lead to a more prosperous China (at least for some segments of Chinese society), and that the better economic conditions and living conditions would in turn result in greater demand for genuine products, luxury goods, and ultimately, better IPRs enforcement.⁶⁸ As we shall see, the optimism about IPRs enforcement was misplaced.

II. THE HONEYMOON IS OVER: THE WTO COMPLAINT

Beyond establishing substantive standards, the United States' advocacy efforts for the adoption of TRIPS was motivated by TRIPS enforcement provisions, generally considered one of the most important developments in international intellectual property protection.⁶⁹ Indeed, until TRIPS, no international standard for the enforcement of intellectual property rights had been the subject of an international treaty regime.⁷⁰ In remedying this, Part III of TRIPS established detailed enforcement obligations on all WTO members to, among other things, (1) create judicial means permitting owners to enforce their rights through private actions,⁷¹ (2) provide for criminal sanctions to deter infringing conduct,⁷² and (3) make available border enforcement

The 1992 MOU [Memorandum of Understanding] on intellectual property between the United States and China incorporated many of the TRIPS provisions even before TRIPS came into law. And these, in turn, found their way into China's revised IPR laws and regulations. In effect, what this means is that China adopted TRIPS long before other WTO members did.

Id. Nevertheless, there is little question that these changes were intimately associated with China's efforts to accede, and, indeed, that China "might still remain outside of the WTO had it not strengthened its protection of intellectual property rights." Yu, *supra* note 41, at 196.

68. See Yu, *supra* note 41, at 205.

69. See Robert C. Bird, *Defending Intellectual Property Rights in the BRIC Economies*, 43 AM. BUS. L.J. 317, 324-25 (2006). Bird continues, "TRIPS was 'without question the grandest event in commercial diplomatic history[.]'" *Id.* at 325 n.48 (citing ERNEST H. PREGG, *TRADERS IN A BRAVE NEW WORLD: THE URUGUAY ROUND AND THE FUTURE OF THE INTERNATIONAL TRADING SYSTEM* xi (1995)).

70. Of course, prior to TRIPS, national laws of WTO members contained provisions on the enforcement of intellectual property rights; however, these laws varied significantly. North American Free Trade Agreement ("NAFTA"), which was adopted at about the same time as TRIPS, also contained similar enforcement provisions.

71. TRIPS, *supra* note 6, art. 42.

72. *Id.* art. 61.

measures.⁷³

From China's accession in 2001, through 2005, the United States allowed China time to implement and enforce its WTO intellectual property obligations,⁷⁴ despite mounting U.S. domestic pressure. Once again, China was slow to embrace its obligations. Although China implemented numerous legislative changes, enforcement was deficient. In 2005, the USTR placed China on its Priority Watch List for inadequate intellectual property protection.⁷⁵ Additionally, in February 2006, the United States established the China Enforcement Task Force, whose main function was to prepare WTO cases against China.⁷⁶

In an effort to demonstrate its commitment to IPRs enforcement, on April 4, 2007, the Chinese Supreme People's Court and Supreme People's Procuratorate issued a judicial interpretation that would lower the threshold for IPRs prosecution and increase the penalties for violations.⁷⁷ The United States considered this a good but inadequate step, because it still left room for a "safe harbor."⁷⁸ Finally, on April 10, 2007, the United States filed a WTO complaint against China. This move was significant as it shifted the U.S.-China dispute from unilateral attempts to procure IPRs enforcement to a multilateral approach.

73. *Id.* art. 51.

74. See *Accession Protocol*, *supra* note 44, annex 1A, pt. VI(b) (stating that the conditions of China's entry to the WTO call for "enhanced IPR enforcement efforts through the application of more effective administrative sanctions.").

75. Press Release, Office of the United States Trade Representative (USTR), Special 301 Report Finds Progress and Need for Significant Improvements: Results of China OCR Released, China Elevated to Priority Watch List (Apr. 29, 2005), available at http://www.ustr.gov/Document_Library/Press_Releases/2005/April/Special_301_Report_Finds_Progress_Need_for_Significant_Improvements.html.

76. See OFFICE OF THE U.S. TRADE REPRESENTATIVE, TOP TO BOTTOM REVIEW, US-CHINA TRADE RELATIONS: ENTERING A NEW PHASE OF GREATER ACCOUNTABILITY AND ENFORCEMENT 5, 24, (2006), available at http://www.ustr.gov/assets/Document_Library/Reports_Publications/2006/asset_upload_file921_8938.pdf [hereinafter USTR]; see also Harpaz, *supra* note 2, at 57-58. During the TRIPS Council meeting in October 2007, countries split on enforcement, with the United States, the European Union ("EU") and other developed countries urging TRIPS enforcement to be handled through the TRIPS Council and China and other developing countries stating that other mechanisms should address enforcement. Martin Khor, *Clash in TRIPS Council on IPR Enforcement Issue*, THIRD WORLD NETWORK, Nov. 2, 2006, <http://www.twinside.org.sg/twninfo478.htm>.

77. See Office of the United States Trade Representative, *Fact Sheet: WTO Case Challenging Weaknesses in China's Legal Regime for Protection, Enforcement of Copyrights, Trademarks*, U.S. FED. NEWS, Apr. 9, 2007, available at 2007 WLNR 6947235.

78. See *id.*

It also introduced significant reputational costs to China's refusal to comply with its WTO obligations. In short, the complaint alleged that China's criminal laws (1) do not provide a sufficient deterrent to infringement, (2) do not provide remedies for trademark infringement and copyright piracy committed "on a commercial scale," (3) do not provide adequate protection for imported works awaiting approval to enter China's market, and (4) do not mandate the disposal of confiscated goods, instead allowing them back into commercial channels.⁷⁹

On August 21, 2007, the United States requested impaneling a WTO panel to rule on its complaint.⁸⁰ As required, the United States and China discussed the complaint in hopes of arriving at a mutually agreeable solution.⁸¹ They were unable to do so. On September 25, 2007, the United States made its second request for a panel. The second request resulted in the automatic establishment of a panel by the WTO Dispute Settlement Body on December 13, 2007.⁸²

A. Likely Outcome of WTO Complaint

TRIPS established minimum substantive standards for intellectual property. Beyond this, TRIPS' most significant accomplishment was to mandate that countries enforce these standards, breaking new ground and constituting a major achievement over the Paris and Berne Conventions. In fact, the primary thrust of the developed countries' efforts in shifting forums from WIPO to the WTO was the potential application of the WTO's dispute settlement system to IPRs.⁸³

79. See generally Requests for Consultations by the United States, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/1 (Apr. 10, 2007), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm [hereinafter Consultations].

80. See generally Dispute Settlement, *DSB Establishes a Panel on China's Protection of IPR and a Compliance Panel to Review US Implementation in "Zeroing" Case*, WT/DS362/7 (Aug. 21, 2007).

81. See Steven R. Weisman, *China Talks Don't Resolve Major Issues*, N.Y. TIMES, May 24, 2007, at C1 (describing talks between the United States and China as part of the larger Strategic Economic Dialogue and their failure to resolve major issues in the Sino-U.S. relationship).

82. See generally Consultations, *supra* note 79. Japan, Mexico, The European Communities, and Argentina all reserved their third party rights. On the establishment of the panel, it generally takes six months for a report to be issued.

83. These international enforcement standards were a first in international intellectual property protection. Indeed, until TRIPS, no international standard for the en-

But, while achieving harmonization with respect to the substantive standards was difficult, achieving harmonization with respect to the enforcement provisions was more so. Members rejected certain proposals such as universal recognition and execution of court judgments, because members realized that specific enforcement obligations would work only in “a relatively ‘homogenous’ environment.”⁸⁴ TRIPS membership was far from homogenous. Accordingly, members adopted an approach of formulating a minimal set of procedural regulations, which was to be guided by results-oriented criteria. For that reason, while Part III of TRIPS establishes detailed enforcement obligations on all WTO members, the provisions also contain vague phrases such as “effective,” “reasonable,” “undue,” “unwarranted,” “fair and equitable,” and “not . . . unnecessarily complicated or costly.”⁸⁵ These phrases afford countries considerable latitude in fashioning laws to meet their enforcement obligations.

In the enforcement context, TRIPS’ obligatory *criminal* sanctions are particularly relevant. Increased criminal sanctions represent the latest shift in intellectual property enforcement.⁸⁶ Such sanctions are unusual—even in the United States—and are usually reserved for only the more egregious acts of infringement.⁸⁷ The justifications for criminal sanctions are straightforward: deterrence and costs.

forcement of intellectual property rights had been the subject of an international treaty regime. Of course, prior to TRIPS, national laws of WTO members contained provisions on the enforcement of intellectual property rights; however, these laws varied significantly. NAFTA, which was adopted about the same time as TRIPS also contained similar enforcement provisions.

84. See Thomas Dreier, *TRIPS and the Enforcement of Intellectual Property Rights*, in *FROM GATT TO TRIPS—THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS* 254 (Friedrich-Karl Beier & Gerhard Schricker eds., 1996); see also, ABBOTT ET AL., *supra* note 39, at 631.

85. See, e.g., TRIPS, *supra* note 6, art. 47(2) (“Procedures concerning the enforcement of intellectual property rights shall be *fair and equitable*. They shall not be *unnecessarily complicated* or *costly*, or entail *unreasonable* time-limits or *unwarranted* delays” (emphasis added)).

86. See FREDERICK ABBOTT ET. AL, *INTERNATIONAL INTELLECTUAL PROPERTY IN AN INTEGRATED WORLD ECONOMY* 608 (2007) (“There is a marked trend in the enforcement of IPRs [intellectual property rights] toward increased criminalization of acts of infringement.”).

87. See TRIPS, *supra* note 6, art. 61. Even TRIPS does not provide for criminalization of all intellectual property rights (“IPRs”) infringement, instead mandating criminal penalties for copyright piracy and trademark infringement, while leaving open the possibility for countries to criminalize other forms of IP infringement; e.g., patent and trade secrets.

Deterring future infringement has been “the most important and glaring shortcoming” in intellectual property rights enforcement.⁸⁸ While civil remedies compensate the IPRs holder, they provide little, if any, deterrent effect.⁸⁹ Criminal penalties are thought to provide the desired deterrent effect, overcoming the positive economic incentives to infringe.⁹⁰ Criminalization acts as a strong deterrent because, in theory, any term of imprisonment discourages counterfeiters. In many countries, particularly developing countries, prisons are unforgiving and prisoners have few, if any, rights. In China, for example, prisons are notoriously harsh, and a term of imprisonment carries great social stigma, making criminalization exceptionally effective. As Mertha notes:

[T]he cases that do result in prosecution often result in sentences that are considered severe. One foreign company report stated that it was able to secure thirty-four criminal prosecutions, with an average jail sentence of three years. Even though such a sentence might appear somewhat modest, three years in prison or in a labor camp can still act as a considerable deterrent. It is not simply that prison conditions can be terrible, but there is a tremendous social stigma associated with a stint in prison. A prison sentence often means losing one’s livelihood, one’s family, and prospects for a decent job in the future. This is true all over Asia, but it is particularly true in China.⁹¹

With regard to costs of enforcement, the government’s responsibility to criminally prosecute shifts the cost of enforcement away from private actors, saving private parties considerable expense.⁹²

Despite the noted difficulties in achieving consensus, TRIPS has successfully incorporated criminal law requirements into its broader enforcement provisions. The difficulty in ensuring that countries implement and enforce these measures, however, is

88. See MERTHA, *supra* note 67, at 202.

89. Fines are treated as overhead or a cost of doing business; even if fines are increased, Mertha explains that “[b]ecause of the diffusion in the manufacturing and distribution stages . . . the merchandise on hand is always kept in small quantities in order to ensure that fines stay low, and thus can be treated as overhead.” *Id.*

90. *See id.*

91. *Id.* at 203.

92. See ABBOTT ET AL., *supra* note 86, at 608; see also CHOW & LEE, *supra* note 5, at 798.

considerable. Nowhere is this more evident than in the United States' failed efforts to ensure that China protect U.S. intellectual property rights. These failed efforts have ultimately led the United States to file its complaint against China. The complaint represents the first opportunity for the WTO Dispute Settlement Body to interpret TRIPS' criminal enforcement provisions.

1. Allegations in the Complaint

The United States' complaint comprises three separate claims. First, the United States contends that under China's criminal laws, the thresholds that subject trademark counterfeiting and copyright piracy to criminal procedures and penalties are too high.⁹³ According to the United States, the thresholds permit an unacceptable "safe harbor" for infringement to occur outside the reach of criminal penalties. Second, the United States contends that rather than disposing of counterfeit goods that have been confiscated, Chinese Custom officials inappropriately allow these counterfeit goods back into the channels of commerce; for example, by auctioning seized goods (although officials do remove infringing features such as fake labels).⁹⁴ The United States' third claim involves delayed copyright protection for certain goods.⁹⁵ Here, the United States charges that China's copyright laws deny copyright protection to imported works that are awaiting approval to enter China's market. While these works are awaiting approval without protection, unauthorized persons are allowed to manufacture and distribute unauthorized copies.⁹⁶ The United States contends that all of these laws violate TRIPS. This Article addresses what I contend is the most significant claim in the United States' complaint, the

93. See generally Consultations, *supra* note 79.

94. See generally *id.*

95. See generally *id.* This arguably violates TRIPS national treatment principle, in which countries must treat foreign intellectual property owners no less favorably than domestic intellectual property owners. See also TRIPS, *supra* note 6, art. 3.

96. See generally *id.* The United States also considered a fourth claim concerning China's law regarding reproduction and distribution of infringing goods, which was alleged to provide for prosecution of unauthorized reproduction only when the reproduction is accompanied by unauthorized distribution. The United States chose not to pursue this claim, as the United States acknowledged that China's April 2007 Judicial Interpretation may satisfactorily address this claim. That Interpretation provides that for the purposes of Article 217 of the Criminal Code, the term "reproduction and distribution" means reproduction and/or distribution. See April 2007 Judicial Interpretation, *infra* note 99, art. 2; Criminal Law, *infra* note 98.

“threshold” claim, which directly involves TRIPS criminal intellectual property provisions. This claim involves an issue of widespread importance (TRIPS criminal sanctions for IPRs enforcement, an issue of first impression in the WTO), will have an enormous impact on U.S. interests (following a favorable ruling) and involves interpretation of critical TRIPS provisions.⁹⁷

2. TRIPS General Enforcement and Criminal Enforcement Requirements, Articles 41 and 61

In its threshold claim, the United States charges specifically that the Criminal Law of the People’s Republic of China,⁹⁸ as revised by two Supreme People’s Court Interpretations,⁹⁹ allows

97. Some support for the contention that this is the most significant claim comes from the United States’ First Submission, in which this claim is the first argued, and more than two-thirds of the brief is devoted to arguing the merits of this claim. See U.S. First Submission, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, ¶ 113, WT/DS362 (Jan. 30, 2008) [hereinafter U.S. First Submission], available at http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file605_14436.pdf. While I contend this is the most significant claim, I recognize that others may contend that the market access claim is more important, as it allows for automatic protection without the need to await review and approval. This, arguably could affect many more works. However, this claim involves less interpretative difficulties and is relatively straightforward. Both the Berne Convention and TRIPS prohibit countries from establishing formalities for granting copyright protection. Rather, protection arises automatically. See Berne Conv. art. 5(2). China’s laws do not grant automatic protection to a large category of works (those that are subject to content approval). Similarly, the seizure and disposal of the goods claim is rather straightforward. TRIPS requires that authorities “shall have the authority to order the destruction or disposal of infringing goods in accordance with [certain principles].” TRIPS, *supra* note 6, arts. 46, 59. China’s laws mandate that authorities can use seized goods for “public good” or auction the goods. Beyond this, authorities can return goods through channels of commerce after removing the infringing marks. In these instances, authorities do not have the authority to dispose of the goods. It should be noted that this claim does have some interpretative elements. For example, the WTO panel may have to decide whether the above activities “can cause harm to the right holder” or whether the removal of the infringing mark constitutes “alteration” justifying re-exportation. *Id.* art. 59.

98. See Criminal Law, arts. 213-20 (P.R.C.) (adopted by the Second Sess. of the Fifth Nat’l People’s Cong. on July 1, 1979 and revised at the Fifth Sess. of the Eighth Nat’l People’s Cong. on Mar. 14, 1997), available at <http://www.com-law.net/findlaw/crime/criminalaw1.html> [hereinafter Criminal Law].

99. Interpretation by the Supreme People’s Ct. and the Supreme People’s Procuratorate on Several Issues of Concrete Application of Laws in Handling Criminal Cases of Infringing Intellectual Property (adopted at the 1331st Sess. of the Judicial Comm. of the Supreme People’s Ct. on Nov. 2, 2004 and the 28th Sess. of the Tenth Procuratorial Comm. of the Supreme People’s Procuratorate on Nov. 11, 2004 and promulgated Dec. 22, 2004), available at http://www.ipr.gov.cn/ipr/en/info/Article.jsp?a_no=2038&col_no=121&dir=200603 [hereinafter December 2004 Judicial Inter-

infringers to operate on a “commercial scale,” therefore failing to provide an available remedy for commercial scale trademark counterfeiting and copyright piracy, and that the law is inadequate to serve as a deterrent to further infringement, thus violating TRIPS Articles 41 and 61.

Article 41(1) sets forth China’s general obligations regarding enforcement. That section provides, in relevant part:

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.¹⁰⁰

This section thus mandates that: (1) members make enforcement procedures available and (2) remedies constitute a deterrent to further infringements.

China’s obligations regarding *criminal* enforcement procedures are set forth in Article 61. There, TRIPS obligates governments to establish and enforce criminal penalties for specific types of infringement, to also serve as a deterrent. More specifically, Article 61 provides, in relevant part:

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. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of

pretation]; Interpretation by the Supreme People’s Ct. and the Supreme People’s Procuratorate on Several Issues of Concrete Application of Law in Handling Criminal Cases of Infringing Intellectual Property (II) (adopted at the 1422nd Sess. of the Judicial Comm. of the Supreme People’s Ct. on Apr. 4, 2007, and the 75th Sess. of the Tenth Procuratorial Comm. of the Supreme People’s Procuratorate, and promulgated on Apr. 5, 2007), available at <http://aoyun.bjipo.gov.cn/web/english/public/articleDetail.jsp?cmArticleID=12090961350001> [hereinafter April 2007 Judicial Interpretation]. The Judicial Interpretations were issued to help courts interpret the new intellectual property laws. The April 2007 Judicial Interpretation closed a significant loophole that allowed manufacturers to avoid criminal prosecution by asserting that they were involved in the manufacture, not the sale, of counterfeit goods and that the criminal threshold related only to sales. See MERTHA, *supra* note 67, at 209.

100. TRIPS, *supra* note 6, art. 41(1). Article 41 further requires that the “[p]rocedures concerning the enforcement of intellectual property rights shall be fair and equitable [and] shall not be unnecessarily complicated or costly” *Id.* art. 41(2).

penalties applied for crimes of a corresponding gravity.¹⁰¹

3. China's Criminal Intellectual Property Laws

a. China's Criminal Trademark Laws

The United States contends that China's Criminal Trademark Laws, i.e., Articles 213, 214, and 215, do not conform to TRIPS Articles 41 and 61.¹⁰² China's Criminal Trademark Laws describe certain acts of trademark counterfeiting that may be subject to criminal procedures and penalties. However, all of the criminal provisions require monetary or quantity thresholds before triggering liability. Under Article 213, criminal procedures and penalties are available for trademark infringement only "if the circumstances are *serious*" or "if the circumstances are *especially serious*," imposing a maximum prison sentence of less than three years, and a prison term of from three to seven years, respectively.¹⁰³ Article 214 imposes a maximum prison sentence of less than three years for trademark counterfeiting "if the amount of sales [of commodities bearing counterfeit registered trademarks] is *relatively large*" and a prison sentence of three to seven years "if the amount of sales is *huge*."¹⁰⁴ Under

101. *Id.* art. 61. While criminal penalties are not explicitly required for patent infringement, TRIPS does allow that "[m]embers may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully and on a commercial scale." *Id.*

102. It is interesting to note that China's criminal copyright provisions are not attached to the copyright law itself. China's copyright law provides only for civil remedies, including ceasing the act, making an apology, and compensation for damages, "depending on the circumstances." Copyright Law (Revised), art. 46 (P.R.C.) (promulgated by the Standing Comm. Of the Nat'l People's Cong., Oct. 27, 2001, effective June 1, 1991) [hereinafter Copyright Law]. Under certain "serious" circumstances the Copyright Administration may confiscate tools and materials used in the act of infringement. *See id.* art. 47. China's civil remedies to copyright infringement further do not allow for punitive damages. *See id.* art. 48 (stating that "the infringer shall compensate for the actually [sic] injury suffered by the rights holder.")

103. *See* Criminal Law, *supra* note 98, art. 213 (emphasis added). Art. 213 states:

Using an identical trademark on the same merchandise without permission of its registered owner shall, if the case is of a serious nature, be punished with imprisonment or criminal detention of less than three years, with a fine, or a separately imposed fine; for cases of a more serious nature, with imprisonment of over three years and less than seven years, and with fine.

Id. art. 213.

104. *See id.* art. 214 (emphasis added). Art. 214 states:

Knowingly selling merchandise under a faked trademark with a relatively large sales volume shall be punished with imprisonment or criminal detention of less than three years, with a fine or a separately imposed fine; in cases involv-

Article 215, for “cases of a *serious nature*,” fines and a prison sentence of less than three years are imposed, while “cases of *a[n] especially serious nature*” mandate imprisonment of between three and seven years.¹⁰⁵

b. China’s Criminal Copyright Laws

China’s Criminal Laws Articles 217 and 218 concern copyright infringement. These provisions similarly use indefinite language. Under Article 217, certain acts of copyright piracy are subject to criminal procedures and penalties if (1) the infringer’s purpose was to reap profits; and either (2) the amount of illicit income is “*a fairly large amount*” or “when there are *other serious circumstances*.” The maximum sentence is less than three years. Under Article 217, an infringer is subject to between three and seven years if the illicit income is *huge* or when there are “*other particularly serious circumstances*.”¹⁰⁶ Finally, Article 218 subjects an infringer to a fine and a three year prison sentence if the infringer “gains a *huge amount* of illicit income.”¹⁰⁷ Notably,

ing a large sales volume, with imprisonment of more than three years but less than seven years, and with fine.

Id. art. 214.

105. *See id.* art. 215 (emphasis added). Art. 215 states:

Forging or manufacturing without authority or selling or manufacturing without authority other’s registered trademarks or identifications shall, for cases of a serious nature, be punished with imprisonment or criminal detention, or restriction for less than three years, with a fine or a separately imposed fine; for cases of a[n] especially serious nature, with imprisonment of over three years and less than seven years, and with fine.

Id. art. 215 (emphasis added).

106. *See id.* art. 217. Art. 217 states:

Whoever, for the purpose of reaping profits, has committed one of the following acts of copyright infringement and gains a fairly large amount of illicit income, or when there are other serious circumstances, is to be sentenced to not more than three years of fixed-term imprisonment, criminal detention, and may in addition or exclusively be sentenced to a fine; when the amount of the illicit income is huge or when there are other particularly serious circumstances, he is to be sentenced to not less than three years and not more than seven years of fixed-term imprisonment and a fine: (1) copy and distribute written, musical, movie, televised, and video works; computer software; and other works without the permission of their copyrighters; (2) publish books whose copyrights are exclusively owned by others; (3) duplicate and distribute audiovisual works without the permission of their producers; (4) produce and sell artistic works bearing fake signatures of others.

Id. art. 217.

107. *See id.* art. 218 (emphasis added). Art. 218 states:

Whoever, for the purpose of reaping profits, knowingly sells the duplicate

Articles 217 and 218 impose criminal liability based on the amount of the infringer's profits (i.e., the amount of the "illicit income").¹⁰⁸

c. The December 22, 2004 and April 5, 2007
Judicial Interpretations

The Chinese Criminal Law itself does not define the terms "serious," "especially serious," "relatively large," or "huge" as used in the above-referenced Articles. Judicial Interpretations remedy this. More particularly, the December 2004 Judicial Interpretation and the April 2007 Judicial Interpretation specifically define each of these terms. The Supreme People's Court and the Supreme People's Procuratorate issued these Judicial Interpretations to help courts interpret the new intellectual property laws. The December 2004 Judicial Interpretation defines the terms by reference to "illegal business volume," "illegal gains," and "illegal copies." For example, the Interpretation states that when the amount of "illegal business volume" is more than RMB¹⁰⁹ 50,000 (US\$7092), or when "illegal gains" are more than RMB 30,000 (US\$4255), then such activities fall under the definition of "the circumstances are serious," as used in Article 213.¹¹⁰

Similarly, for purposes of Article 214, the December 2004 Judicial Interpretation defines "relatively large" and "huge" as sales over RMB 50,000 (US\$7092) and RMB 250,000 (US\$35,461), respectively, and defines "especially serious" as volume of more than RMB 250,000 or illegal gains of more than

works described in Article 217 of this Law, and gains a huge amount of illicit income, is to be sentenced to not more than three years of fixed-term imprisonment, criminal detention, and may in addition or exclusively be sentenced to a fine.

Id. art. 218.

108. *See id.* art. 220. Article 220 of the Criminal Law provides for different standards when the crimes described in Articles 213 through 219 are committed by a "unit," as opposed to individuals. Article 220 provides:

When a unit commits the crimes stated in Article 213 through Article 219, it is to be sentenced to a fine; its directly responsible person in charge and other personnel of direct responsibility should be punished in accordance with the stipulations respectively stated in these Articles of this section.

Id.

109. Renminbi ("RMB") is the currency of the People's Republic of China.

110. *See* December 2004 Judicial Interpretation, *supra* note 99, art. 1.

RMB 150,000 (US\$21,277).¹¹¹ “Circumstances are serious” (Article 215) is defined as being over 20,000 copies, having illegal business volume of more than RMB 50,000, or having illegal gains more than RMB 30,000.¹¹² Finally, the December 2004 Judicial Interpretation defines Article 215’s “circumstances of especially serious nature” as either (1) an amount more than 100,000 copies, (2) illegal business volume over RMB 250,000, or (3) illegal gains over RMB 150,000.¹¹³

For criminal copyright liability under Article 217, the December 2004 Judicial Interpretation provides that “huge” means illegal gains of more than RMB 150,000.¹¹⁴ Illegal gains of more than RMB 30,000 define “the amount of illegal gains is relatively large”; “there are other serious circumstances” is defined as illegal business volume of more than RMB 50,000 or reproducing and distributing more than 1000 illegal copies of a copyrighted work.¹¹⁵ “There are other especially serious circumstances” includes activities where the amount of illegal business volume is more than RMB 250,000 or the infringer reproduces and distributes more than 5000 illegal copies of a copyrighted work.¹¹⁶ Finally, under the December 2004 Judicial Interpretation, Article 218’s “huge” means illegal gains of more than RMB 100,000.¹¹⁷

The April 2007 Judicial Interpretation modified the December 2004 Judicial Interpretation in several important respects, only one of which is currently relevant: the Interpretation reduced the unit amounts that trigger criminal copyright liability. Instead of 1000 copies for “relatively large” and “other serious circumstance,” the April 2007 Judicial Interpretation imposes liability for reproducing or distributing more than 500 copies. And, for “huge” and “other especially serious circumstances” (Article 217), the threshold amount is reduced from 5000 copies to 2500 copies.¹¹⁸

Both the 2004 and 2007 Judicial Interpretations contain definitions sharing the term “illegal business volume.” Where the

111. *See id.* arts. 1-2.

112. *See id.* art. 3.

113. *See id.*

114. *See id.* art. 5.

115. *See id.*

116. *See id.*

117. *See id.* art. 6.

118. *See* April 2007 Judicial Interpretation, *supra* note 99, art. 1.

thresholds are defined using this term, the December 2004 Judicial Interpretation provides that this value ordinarily should be calculated according to “the prices at which such products are actually sold.”¹¹⁹ In other words, it is the price of the *infringing* good as opposed to the price of the corresponding *legitimate* good that determines illegal business volume. Accordingly, the lower the price of the infringing good, the more an infringer can sell without triggering criminal liability.

The United States attacks these laws on two fronts. On one front, the United States contends that China does not make available remedies for specific cases of commercial scale trademark infringement and copyright piracy, consistent with TRIPS Article 61. In other words, infringers who fall below the particular threshold, e.g., the 500 copy limit, RMB 50,000, etc., are not subject to liability. Yet, the sale of 499 infringing copies or the sale of goods under RMB 50,000, may very well constitute piracy “on a commercial scale.” Thus, under this safe harbor, China does not provide for criminal procedures and penalties for an entire class of infringers: those who structure their operations to fit below these thresholds.¹²⁰ Additionally, by basing calculations on the value of the infringing product rather than the legitimate product, counterfeiters can lower the infringing product price until inventory is below the “legal” level; again escaping liability.¹²¹

The second line of attack is that in view of the thresholds, China’s laws do not provide an effective criminal deterrent.¹²²

119. If the products are not sold, then the value is determined based on the label prices; if there are no label prices, the value is determined by the “middle market prices.” See December 2004 Judicial Interpretation, *supra* note 99, art. 12.

120. See TRIPS, *supra* note 6, art. 61 (“Members shall provide for criminal procedures and penalties to be applied at least in cases of willfull trademark counterfeiting or copyright piracy on a commercial scale.”).

121. The United States also argues that by basing criminal liability solely on various thresholds that are tied to finished goods, China’s criminal laws do not consider other appropriate indicia of commercial scale piracy and counterfeiting, such as the presence of unfinished products and fake packaging. According to the United States, “the breadth of the term ‘on a commercial scale’ presumes that a wide range of considerations should be probative of ‘commercial scale,’ but China’s rigid criminal thresholds preclude their use.” See U.S. First Submission, *supra* note 97, ¶ 113.

122. See TRIPS, *supra* note 6, art. 41 (stating that Members are required to provide “remedies which constitute a deterrent to further infringements”); see also *id.* art. 61 (“Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent”); see generally Consultations, *supra* note 79.

By permitting excessively high infringing copy thresholds before imposing liability and by basing damages on the infringing product's value, the laws do not provide remedies for classes of infringing conduct and thus do not provide remedies sufficient to deter future infringers.

4. Arguments Supporting the Allegations

In support of its allegations, the United States argues that the first sentence of TRIPS Article 61 requires China to "provide for" criminal penalties to be applied "at least" in cases of willful trademark counterfeiting and copyright piracy on a commercial scale.¹²³ This requires China to provide protection for *all* cases of willful commercial scale piracy and trademark counterfeiting, not protection for *some* such cases. By excluding an entire class of commercial scale infringement, China's criminal laws fail to satisfy TRIPS.

In interpreting Article 61, the United States identifies a number of key terms, including "willful," "trademark counterfeiting," and "copyright piracy." However, the United States concedes that none of these terms are at issue.¹²⁴ The United States' argument thus hinges on interpreting "commercial scale." The United States interprets "commercial scale" to include copyright piracy and trademark counterfeiting that fall below the various thresholds contained in China's criminal laws. It is only by interpreting commercial scale in this manner that the United States can successfully contend that China is failing to honor its TRIPS obligations.

Relying on the ordinary meaning of the terms "commercial" ("pertaining to, or bearing on commerce," "interested in financial return," "likely to make a profit," or "regarded as a mere matter of business") and "scale" ("relative magnitude or extent" or "degree; proportion"),¹²⁵ the United States interprets "com-

123. See U.S. First Submission, *supra* note 97, ¶¶ 89-91.

124. See *id.* ¶ 101 (stating that the United States does not claim that China's laws fail to cover the full extent of the term "trademark counterfeiting"); *id.* ¶ 106 (stating that the United States does not claim that China's laws fail to cover the full extent of the term "copyright piracy"); *id.* ¶ 107 (stating that the United States does not claim that any state of mind requirements in China's laws are inconsistent with China's WTO obligations).

125. See *id.* ¶ 109 (citing THE NEW SHORTER OXFORD DICTIONARY 451 (4th ed. 1993)).

mercial scale” to extend both (1) to those who engage in commercial activities in order to make a financial return in the marketplace, 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.¹²⁶ While the United States argues that both of these must be criminalized under Article 61, it focuses on the first of these interpretations and argues that China’s criminal laws do not reach all infringers who engage in commercial activities. With respect to the first set of activities, the United States argues that “commercial scale” should be interpreted in a way that imposes criminal liability against any infringer who engages in commercial activity, regardless of the extent or magnitude of that commercial activity.¹²⁷

Having so defined “commercial scale,” the United States attacks China’s thresholds by noting that many Chinese infringers structure their commercial operations to ensure that they operate below the relevant thresholds.¹²⁸ According to the United States “[a]t any given inspection, an enterprise can ensure that it has insufficient inventory or has insufficient recorded turnover (by, for example, keeping no records) to meet any of China’s criminal thresholds for trademark counterfeiting or copyright piracy.”¹²⁹ Thus, despite being below the criminal thresholds, these enterprises are nonetheless engaged in commercial activities and are operating on a commercial scale.

The United States demonstrates China’s failings and the inadequacy of China’s criminal laws with reference to a report prepared by the China Copyright Alliance (“CCA”), a coalition of six trade associations that represent major intellectual property industries, including the Motion Picture Association of America, the Recording Industry Association of America, the Association of American Publishers, the Independent Film & Television Alliance, the International Federation of the Phonographic Industry, and the Art Copyright Coalition.¹³⁰ The CCA Report, enti-

126. *See id.*

127. *See id.* (“[I]t is the former activity that forms the focus of this submission.”); *id.* ¶ 110. While the United States claims that activity that is “of a significant extent or magnitude to qualify as commercial scale” is not an issue, it is nevertheless relevant, as it demonstrates the United States’ interpretation of Article 61 and, in turn, of China’s responsibilities.

128. *See id.* ¶ 114.

129. *Id.*

130. *See id.* ¶ 154 n.108.

tled the *Report on Copyright Complaints, Raids and Resulting Criminal Actions in China*, purportedly covers several hundred enforcement actions in four major Chinese cities (Beijing, Shanghai, Shenzhen, and Guangzhou) over a two-year period (January 2006–November 2007).¹³¹ During this time, both the December 2004 Judicial Interpretation and the April 2007 Judicial Interpretation were in effect.

According to the United States, the CCA Report demonstrates that commercial enterprises adjusted their operations to ensure that they did not run afoul of the criminal thresholds. In 2006, for example, when the criminal threshold for copyright piracy was 1000 infringing copies, there were 633 administrative enforcement raid cases, 521 of which involved infringing copies of less than 1000. In other words, 82.31% of the cases fell below the stated threshold.¹³² In 2007, when the threshold was reduced to 500 infringing copies, the numbers remained the same: of 477 cases, 396 (83.02%) fell below the threshold.¹³³ The data purportedly suggests that infringers adapt quickly; making certain that they keep inventory below the relevant thresholds. The United States thus claims that the CCA Report illustrates the weakness of China's threshold-based system. In effect, the thresholds function as a "safe harbor" and afford businesses a "convenient reference point for structuring their business to minimize the likelihood that any of them could ever be associated with enough inventory or turnover to face criminal prosecution or conviction."¹³⁴ Importantly, in terms of Article 61's standard, the United States contends that these enforcement actions demonstrate that infringers commit copyright piracy and trademark counterfeiting on a commercial scale by engaging in commercial activities in order to make a financial return, yet escap-

131. *See id.* ¶ 154.

132. Of the 633 cases, 521 fell between 0-999 infringing copies, forty-four cases (6.95%) fell between 1000-2999 infringing copies, and sixty-eight cases (10.74%) were above 3000 infringing copies. *See id.* ¶¶ 156-57.

133. Of the 477 cases, 396 (83.02%) fell between 0-499 infringing copies, thirty-nine (8.18%) fell between 500-999 infringing copies, and forty-two (8.81%) were above 1000 infringing copies. *See id.* ¶ 158.

134. *Id.* The United States argues that enterprises can avoid prosecution in a number of ways, e.g., by "selling their goods by means of a catalogue that features only the sleeves of DVD that are available for sale, keeping available inventory low, or by simply not keeping quantified sales records—to ensure no one can prove they meet the volume and value thresholds." *Id.*

ing liability. China's laws thus allegedly fail to comply with Article 61.¹³⁵

Moreover, the United States argues that not only do the thresholds exclude whole classes of commercial scale counterfeiting and piracy, but that the situation is exacerbated because of "restrictive calculations" of the thresholds. For instance, for criminal liability to attach for trademark counterfeiting, an "illegal business volume" threshold of more than RMB 50,000 must be met. The threshold is restrictively calculated because the "illegal business volume" is calculated based on the price of the infringing good, rather than the legitimate good. Because the price of the infringing product is almost always far less than the price of the legitimate good, this calculation "adds an additional margin of comfort" for infringers.¹³⁶ The United States highlights a news report that found that legitimate copies of "Spider Man 2" sold at US\$4.68, while pirated copies of the newer "Spider Man 3" sold for US\$2. At these price points, the illegal business volume threshold for copyright piracy would not be reached until almost 1470 pirated copies were sold.¹³⁷ This, the United States argues, would certainly constitute commercial scale copyright piracy, although China's laws would shield the counterfeiters from prosecution.¹³⁸

To support its second line of attack that China's criminal laws fail to deter future infringers, the United States again relies on the CCA Report. The fact that more than eighty percent of the administrative enforcement raid cases fall below the quantity threshold illustrates that the thresholds have no deterrent effect. Even the reduced threshold (i.e., from the 1000 infringing copy threshold to the 500 infringing copy threshold) has no deterrent effect, as the same percentage of copyright piracy continued after the reduced thresholds. Indeed, rather than having a deterrent effect, the thresholds provided "clear guideposts" to avoid prosecution and allow counterfeiters and pirates to effectively and quickly respond to the arbitrary thresholds.¹³⁹

With respect to Article 41, the United States argues that because China has failed to provide for criminal penalties and pro-

135. *See id.*

136. *See id.* ¶ 119.

137. *See id.* ¶ 136.

138. *See id.* ¶¶ 136-37.

139. *See id.* ¶¶ 153, 159.

cedures under Article 61 for an entire class of commercial scale piracy and counterfeiting, China has failed to “ensure that enforcement procedures . . . are available” under Article 41.¹⁴⁰ Thus, the United States’ Article 41 complaint stands or falls with Article 61. Consequently, the remainder of this discussion will focus on Article 61.

5. China’s Defenses

a. China has Wide Discretion in Implementing its TRIPS Obligations

China will defend its laws on a number of grounds, some general and others specific. In terms of general objections, China will argue that it has wide discretion in implementing its obligations, relying on TRIPS Article 1.1. That Article states that:

Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. *Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.*¹⁴¹

Article 1 recognizes that each country, in its sovereignty, should be afforded appropriate discretion in implementing its TRIPS obligations. Moreover, China will underscore that during its WTO accession it rejected efforts by the United States and others to amend these very thresholds, indicating that such amendments were unnecessary. Finally, China may note that during its accession process, it steadfastly maintained that it acceded as a developing country and, as such, is entitled to wider discretion in implementing its enforcement obligations.

b. TRIPS does not Require Special Attention be Paid to IP

China may also generally rely on the discretion contained in Article 41. Article 41 permits a country to allocate resources for IPRs enforcement as it deems appropriate. It provides:

It is understood that this Part does not create any obligation

140. *See id.* ¶¶ 167-69.

141. TRIPS, *supra* note 6, art. 1(1) (emphasis added).

to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. *Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.*¹⁴²

Article 41(5) thus does not require that China pay special attention to IPRs. Instead, it recognizes that other areas can be more important than intellectual property. China can point to enforcement efforts and resources diverted to other areas such as labor, human rights, the environment, and taxes, for example. By placing IPRs enforcement in the broader context of its civil and criminal legal systems, China can credibly argue that its nascent intellectual property laws are, under the current situation, adequate, even if not ideal.¹⁴³ Along these lines, China will contend that to suggest that it enforce intellectual property laws in the same manner as it does its other laws is unrealistic. A more challenging contention might be that neither China nor any other WTO Member need protect the interests of private parties, particularly foreign parties, with the same urgency with which it protects its own interests.¹⁴⁴

Finally, in terms of general responses, China can point to the tremendous strides it has made in intellectual property enforcement. China has introduced comprehensive new legislation that exceeds TRIPS requirements and has made high profile infringement arrests. Recall, China has only recently embraced the new phenomenon of Western-styled intellectual property. As Stewart and Williams observe:

China has only recently begun to regard intellectual property law as an important part of its legal infrastructure. For example, the Patent Law was only introduced in 1984 and the Copyright Law in 1990. It was also only as the WTO accession ne-

142. *Id.* art. 41(5) (emphasis added).

143. See Frederick M. Abbott, *China in the WTO 2006: "Law and its Limitations" in the Context of TRIPS*, in *WTO LAW AND DEVELOPING COUNTRIES* 59, 72-73 (George A. Berman & Petros C. Mavroidis eds., 2007).

144. See, e.g., Eric Priest, *The Future of Music and Film Piracy in China*, 21 *BERKELEY TECH. L.J.* 795, 820 (2006). This, however, may run afoul of China's national treatment obligations under TRIPS. TRIPS, *supra* note 6, art. 3 ("Each member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property . . .").

gotiation reached its latter stages that the Chinese government began to accord any priority to enforcement of IP law.¹⁴⁵

Prior to the United States filing the complaint, China had already taken a number of important steps to amend or adopt a range of laws, regulations, and other measures in the intellectual property rights area, including:

- Regulations to enhance protection for copyrighted works on the Internet, in preparation for China's recent accession to the WIPO Internet Treaties;
- Measures to protect intellectual property rights at trade fairs;
- New patent examination guidelines;
- New standards for the review of trademarks;
- New requirement that legal operating system software be installed on all computers manufactured in or imported into China, and requirement that government agencies at all levels purchase only such computers;
- Adoption of plan to encourage use of legal software by enterprises; steps to ensure government agencies use only legal software.¹⁴⁶

In terms of specific enforcement efforts, Yan Xiaohong, the Deputy Director of the State Copyright Bureau, has stated that China is tackling the problem as part of a step-by-step plan, including its 2007 National Action Plan.¹⁴⁷ In the National Action Plan, China promises to "accelerate the revision of the trade mark [sic] law" and to "study on the improvement of the copyright law."¹⁴⁸ It also promises to "harness criminalization tools to

145. Alpana Roy, *A New Dispute Concerning the TRIPS Agreement: The United States and China in the WTO*, 10(6) *J. WORLD INTELL. PROP.* 476, 478 (2007) (citing D. Stewart & B. Williams, *The Impact of China's WTO Membership on the Review of the TRIPS Agreement* 364, in *CHINA AND THE WORLD TRADING SYSTEM: ENTERING THE NEW MILLENNIUM* (Deborah Z. Cass, Brett G. Williams & George Barker eds., 2003)).

146. See Office of the United States Trade Representative, *supra* note 77, para. 16.

147. Action Plan Unveiled to Fight IPR Offences, Chinese Government Official Web Portal, Apr. 27, 2006, http://english.gov.cn/2006-04/27/content_267163.htm (last visited Nov. 18, 2008).

148. *The End of the Beginning*, EUROMONEY INSTITUTIONAL INVESTOR PLC, May 1, 2007, available at 2007 WLNR 10723445; see generally *China's Action Plan on IPR Protection 2007*, PEOPLE'S DAILY ONLINE, http://english.peopledaily.com.cn/200704/24/eng20070424_369187.html.

achieve better punitive and deterrent effects.”¹⁴⁹ In addition, Mu Xinsheng, the Minister of General Administration of Customs, has stated that Chinese and U.S. custom officials have already agreed to work together to tackle the enormous enforcement problem, agreeing to “select better targets for IPR enforcement and evaluate achievements,” and “exchange data on the number of seizures, quantity and value of goods, transportation type and the main ports of transit used.”¹⁵⁰ China undoubtedly will argue—as President Hu Jintao recently has—that it needs time to continue improving IPRs protection and enforcement, but that it has clearly exhibited its commitment to do so.¹⁵¹

After framing its response with these general arguments, China will charge a more complaint-specific response, rejecting the United States’ interpretation of “commercial scale,” and arguing that China does, in fact, provide for criminal procedures and penalties to be applied in cases of willful trademark counterfeiting and copyright piracy on a commercial scale. China can argue that “commercial scale” should be interpreted narrowly to include only those commercial activities that reach a certain egregious level of infringement: a level that should be and is distinctly different from that which defines civil liability.

Accordingly, in contrast to the United States’ position that “commercial scale” should include all commercial activities, regardless of extent or magnitude, China could argue that a panel must give effect to both words “commercial” and “scale.” That is, to give effect to the word “scale,” the extent or magnitude of the infringement must be taken into account. In other words, the distribution, manufacture, sale, etc., of infringing products would not fall within the definition of “commercial scale” unless the counterfeiters reached a certain level of these activities. Thus, for example, the distribution of a minimal amount of infringing copies (e.g., ten) would not trigger liability even if engaged in for a financial return. Similarly, activities that were not

149. Regrettably, the Plan provides no details about how China will achieve its lofty goals. See generally *China’s Action Plan on IPR Protection 2007*, *supra* note 148.

150. Clifford Coonan, *China Pacts on Piracy*, DAILY VARIETY, June 8, 2007, at 12, available at 2007 WLNR 10718848.

151. *China to Tighten IP laws*, AUSTRALIAN IT NEWS, June 11, 2007, para. 3, <http://australianit.news.com.au/story/0,24897,21884717-15306,00.html> (quoting Chinese President Hu Jintao: “China will continue to improve its laws and regulations on IPR protection and will severely penalise IPR violations.”).

engaged in for a financial return, regardless of the extent or magnitude of such activities, would not fall within the definition or “commercial scale.” This would give effect to the “commercial” aspect of “commercial scale.” Such a narrow reading would be arguably consistent with the extraordinary nature of criminal remedies in intellectual property cases.¹⁵²

Under this interpretation, even accepting the United States’ CCA report evidence,¹⁵³ China could contend that it would have been inappropriate to prosecute the administrative raid cases that fell below the stated thresholds, because available civil remedies were adequate.

China could then point to enforcement efforts that targeted commercial scale piracy. For example, on April 14, 2007, China reported that officials had destroyed thirty million pirated digital DVDs, VCDs, CDs, and pieces of software as part of a campaign to raise awareness of intellectual property issues in preparation for World Intellectual Property Day.¹⁵⁴ China could also point to its current crackdown on Internet Piracy, for which its State Copyright Bureau launched two nation-wide operations result-

152. TRIPS does not, for example, require criminal penalties for all forms of intellectual property rights violations, making optional penalties for trade secrets and patents. See TRIPS, *supra* note 6, art. 61. Even the United States recognizes that criminal penalties should be reserved for egregious acts. See, e.g., DOJ IP MANUAL, *supra* note 8, at 5.

153. China might challenge the survey as biased and limited, as it was conducted by interested industries and targeted only certain cities within China, thus not representing China overall. These cities are all located in the eastern region of China and may not represent the activity occurring in western, northern, or southern China. A more balanced view might include cities within these parts of China. To be fair, however, these cities are also the major cities of technology and may in fact be the cities where most infringing activities occur. While a panel has the right “to seek information and technical advice from any individual or body which it deems appropriate” such as third parties, it is less clear when a panel should accept information from a party and the weight to be accorded such information. See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, art. 13, 33 I.L.M. 1125 (1994) [hereinafter DSU]; see also Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 7, WT/DS58/R (May 15, 1998) [hereinafter *United States—Shrimp*] (stating that a panel has discretionary authority to accept and consider or to reject information and advice submitted to it); Panel Report, *United States—Section 110(5) of the US Copyright Act*, ¶ 6, WT/DS160/R (June 15, 2000) [hereinafter *U.S.—Section 110(5)*]. As Chinese authorities likely carried out these raids, it should be possible to verify the survey’s accuracy.

154. See *The End of the Beginning*, *supra* note 148.

ing in the closure of a number of “three-nothing” web sites.¹⁵⁵ It is these types of activities that warrant criminal penalties, China would argue.¹⁵⁶

The Judicial Interpretations also underscore China’s efforts and point specifically to the contested thresholds. The April 2007 Judicial Interpretation in particular revises the rules for criminal enforcement, lowering the thresholds and making it easier for authorities to charge counterfeiters with intellectual property crimes.

6. WTO Panel Decision

How would a WTO panel decide these issues? Before turning to the substantive aspects of the dispute, the WTO panel must resolve preliminary issues of standard of review and burden of proof.

a. Standard of Review, Burden of Proof, and Rules of Treaty Interpretation

Regarding the standard of review that a panel must apply,

155. See, e.g., *Copyright Infringement Crackdown Ahead of the Olympics*, CHINA DAILY, June 12, 2008, http://chinadaily.com.cn/olympics/2008-06/12/content_6756702.htm.

156. More forcefully, the United States can highlight China’s protection efforts with respect to its own intellectual property rights. Protection of China’s Beijing 2008 Olympic trademarks is particularly relevant here. China took extraordinary efforts to prevent fake Olympic goods from entering its market. China effectively minimized piracy by passing separate laws protecting Olympic IP merchandise. These laws contained higher punishments than the above IP laws, and calculated damages based on the legitimate goods, rather than the unauthorized goods. See Omario Kanji, *Paper Dragon: Inadequate Protection of Intellectual Property Rights in China*, 27 MICH. J. INT’L L. 1261, 1270 (2006). These Olympic-specific laws “indicate[] that authorities are indeed capable of instituting meaningful and effective IP protection, but the disparity between it and Chinese law that applies to non-Chinese IP is a stark indication of Chinese bias in IPR enforcement” *Id.* at 1284. While this may violate China’s TRIPS Article 3 national treatment obligation, it does not necessarily violate China’s Article 41 or 61 obligations. China’s efforts to crack down on counterfeit Olympic merchandise included seizure of nearly 30,000 fake Olympic souvenirs in February 2007; and a week earlier, a crackdown on fake Olympic merchandise by Chinese customs officials in which more than 100 cases of imported and exported Olympic trademark infringing goods had been handled since 2002. See generally Jeff Franks, *China Accused of Olympics Merchandise Child Labour*, THE STAR ONLINE, June 11, 2007, http://www.thestar.com.my/news/story.asp?file=/2007/6/11/worldupdates/2007-06-11T130153Z_01_NOOTR_RTRMDNC_0_-302526-1&sec=Worldupdates. The United States would demand similar efforts in regard to protection of U.S. IPRs and argue that China’s failure to provide this violates its TRIPS obligations.

Article 11 of the WTO's Dispute Settlement Understanding ("DSU") provides, in relevant part:

The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.¹⁵⁷

Accordingly, a panel must make an objective assessment of the dispute in determining whether China's laws conform to TRIPS.

The burden of proof that applies in this dispute is well-established. In *United States—Measures Affecting Imports of Woven Wool Shirts and Blouses From India* ("Shirts and Blouses"), the Appellate Body addressed the appropriate framework for resolving disputes under WTO agreements and established that the burden rests upon the complaining party to establish a prima facie case that a particular WTO provision has been violated.¹⁵⁸ A prima facie case is one which, "in the absence of effective refutation by the other party, requires a panel, as a matter of law, to rule in favour of the party presenting the prima facie case."¹⁵⁹ The complainant is also responsible for proving the existence of any fact it alleges.¹⁶⁰ Under the *Shirts and Blouses* framework, the burden then shifts to the defending party to rebut the prima facie case.¹⁶¹ Although the *Shirts and Blouses* framework involved a non-TRIPS dispute, in *United States—Sec-*

157. DSU, *supra* note 153, art. 11, 33 I.L.M. 1125, 1233 (1994).

158. See Appellate Body Report, *United States—Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, ¶ 14, WT/DS33/AB/R and Corr. 1 (Apr. 25, 1997) (adopted May 23, 1997) [hereinafter *United States—Shirts and Blouses*]; see also *U.S.—Section 110(5)*, *supra* note 153, ¶ 6 (stating that the complaining party must establish prima facie violation of basic rights provided under TRIPS).

159. Panel Report, *United States—Subsidies on Upland Cotton*, ¶ 9, WT/DS267/RW (Dec. 18, 2007).

160. See *U.S.—Section 110(5)*, *supra* note 153, ¶ 6.

161. The burden is different in two different contexts. First, if a party relies on an exception to the rights contained in a WTO Agreement, that party has the burden to establish that the conditions, if any, for invoking such exception is fulfilled. See *id.* Second, the burden of proof will be imposed on the defending party when the Member relies on an affirmative defense. See *United States—Shrimp*, *supra* note 153, ¶ 7.

tion 110(5) of the US Copyright Act,¹⁶² the panel applied this framework to a TRIPS dispute.¹⁶³

Finally, Article 3(2) of the DSU requires the panel to apply customary rules of public international law on the interpretation of treaties. It is generally accepted that these rules are found in Articles 31-33 of the Vienna Convention on the Law of Treaties of 1969 ("Vienna Convention" or "VCLT"). In particular, Article 31(1) of the Vienna Convention provides:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.¹⁶⁴

Consistent with the above WTO framework, the United States has the burden to establish a *prima facie* case that China has not complied with TRIPS Articles 41 and 61, and must provide proof for each fact it asserts. The burden then shifts to China to rebut the *prima facie* case. And, the panel must interpret TRIPS, specifically Articles 41 and 61, in good faith and in light of TRIPS' objectives and purposes.

With these preliminary issues resolved, we turn to the dispute.

b. China Should be Evaluated as a Developed Country

Elsewhere, I have argued that developing countries should be afforded wide discretion in implementing their TRIPS obligations and that panels and the Appellate Body should interpret ambiguous TRIPS provisions in developing countries' favor.¹⁶⁵ This would, at the very least, alleviate the large inequities in bargaining power between the developed and developing countries during the TRIPS negotiations and the lack of meaningful choice on the part of the developing countries in adopting TRIPS. TRIPS and the WTO Agreement also contain provisions that specifically apply to least-developed and developing countries.¹⁶⁶ Thus, a country's status may have an impact in dispute

162. U.S.—*Section 110(5)*, *supra* note 153, ¶ 6.12.

163. *See id.* ¶¶ 6.12-6.14; U.S.—*Shirts and Blouses*, *supra* note 158.

164. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969) [hereinafter VCLT].

165. *See generally* Harris, *supra* note 12.

166. *See, e.g.*, DSU, *supra* note 153, arts. 3(12), 4(10), 8(10). These articles give preference to lesser developed countries but have played a very limited role in resolving WTO disputes.

resolution. If so, for a number of reasons, China should be evaluated as a developed country,¹⁶⁷ and China should not be accorded the wide discretion appropriately reserved for developing and least-developed countries.¹⁶⁸

As mentioned above, China's economy more resembles that of a developed country than that of a developing country. Moreover, while China has been in a unique position to advance the agenda for developing countries in the global trading scheme, and is therefore capable of shifting the balance of power, it has rejected that role. Instead, it has demonstrated ambivalence towards advocating interests peculiar to developing countries and has pursued national interests. At times, pursuit of its national interests has led to opposition to the positions of developing countries.¹⁶⁹ Further, China has reached a stage in its economic development where status as a developed country—particularly with regards to IP protection—is warranted. Still further, unlike many developing countries that were not included in or did not participate in the TRIPS negotiations, China was intimately involved in the negotiations surrounding its WTO accession and TRIPS adoption. China took on these commitments with full knowledge of their importance and impact. China cannot extract the benefits of WTO membership without being fully accountable for its obligations.

Accordingly, in appraising the complaint, the panel should not afford China the same discretion it would grant other developing countries or interpret ambiguous provisions in China's favor. As discussed below, however, this does not imply that China will not be able to take advantage of the built-in flexibilities that TRIPS provides. Thus, for example, the TRIPS preamble states that in recognizing the need for new rules and disciplines, members should provide for effective and appropriate means for the enforcement of trade-related IPRs, *taking into ac-*

167. See *supra* Part I.D.

168. See, e.g., Harris, *supra* note 12 (arguing that developing countries should be granted wide discretion in implementing their TRIPS obligations in view of the unfair bargaining conditions present during TRIPS negotiations).

169. See Harpaz, *supra* note 2, at 47 ("China often lends oral support and sometimes may even co-sponsor developing country proposals, but unlike Brazil or India, does not take a leadership role by submitting papers on behalf of developing groups or speaking out on their behalf, or trying to attract other developing countries to join its proposals."); see generally Harris, *supra* note 12.

count differences in national systems.¹⁷⁰ As such, a WTO panel should be mindful that China's current legal system is relatively new and differs from the systems used in the United States and other countries.

c. Willful Trademark Infringement and Copyright Piracy
on a Commercial Scale

The gravamen of the United States' complaint is that China's criminal laws do not provide remedies for willful trademark infringement and copyright piracy committed on a commercial scale. The United States must prove that the stated thresholds are insufficient to encompass commercial scale counterfeiting and piracy.

i. What is "On a Commercial Scale?"

In ruling on the United States' complaint and interpreting Articles 41 and 61, the panel must interpret "commercial scale." This will be the crucial issue in this dispute. If the panel interprets the term broadly, as recommended by the United States, the United States may prevail on its claim that activity occurs below a level that constitutes commercial scale piracy. If, on the other hand, the panel interprets the term more narrowly, the United States will have a more difficult time establishing a *prima facie* case.

To interpret "commercial scale," the panel will first turn to TRIPS itself and find that TRIPS does not define "commercial scale."¹⁷¹ The panel will next look to prior WTO decisions. Although WTO jurisprudence does not follow *stare decisis*, prior Appellate Body decisions carry great weight. Again, however, this inquiry will take little time. There have been three WTO-TRIPS complaints that address TRIPS' enforcement provisions of Articles 41 and 61. All of these were initiated by the United States.¹⁷² However, none of these complaints required that a

170. See TRIPS, *supra* note 6, pmbl.

171. TRIPS does not define "willful" either, but that should pose little problem and is not at issue. Willful generally refers to a specific intent or knowledge of the infringement.

172. These disputes include: (1) the United States' complaint against Sweden, asserting that Sweden did not make available provisional measures in the context of civil proceedings; Request for Consultations by the United States, *Sweden—Measures Affecting the Enforcement of Intellectual Property Rights*, WT/DS86/1 (June 2, 1997); (2) the United

panel be created, as all of them were resolved by a mutually agreed upon solution.¹⁷³ Since none of these complaints proceeded beyond the initial filing stage, they provide no guidance. The WTO thus will be in “uncharted jurisprudential territory.”¹⁷⁴

ii. The “Ordinary Meaning” of “Commercial Scale”

The panel next will determine the “ordinary meaning” of “commercial scale,” in its context and in light of TRIPS’ object and purpose.¹⁷⁵ Panels and the Appellate Body have relied heavily on dictionary meanings when ascertaining the “ordinary meaning.”¹⁷⁶ The Oxford English Dictionary defines “commercial” as “concerned with or engaged in commerce,” and “making or intended to make a profit.”¹⁷⁷ The Oxford English Dictionary defines “scale” as (1) “a graduated range of values forming a standard system for measuring or grading something;” (2) “a measuring instrument based on such a system;” and (3) relative size or extent.¹⁷⁸ Under these definitions, a panel can find that any infringement in which the infringer engages in commerce or intends to make a profit constitutes commercial scale for which criminal penalties are appropriate. Thus, *any single act* of infringement may fall within this definition and any stated threshold above *one* would be inconsistent with TRIPS Article 61.¹⁷⁹

This appears to be the United States’ interpretation, as it argues that the term “commercial scale” extends to those who engage in commercial activities in order to make a financial re-

States’ complaint that Greece did not provide effective remedies against copyright infringement with respect to unauthorized broadcasts of copyrighted motion pictures and television programs; Request for Consultations by the United States, *Greece—Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*, WT/DS125/1 (May 7, 1998); and (3) a companion complaint against the European Union for Greece’s failure to provide effective remedies for copyright infringement. Request for Consultations by the United States, *European Community—Enforcement of Intellectual Property for Motion Pictures and Television Programs*, WT/DS124/1 (Apr. 30, 1998).

173. See *infra* note 359 and accompanying text.

174. See ABBOTT ET AL., *supra* note 86, at 613.

175. See U.S.—Section 110(5), *supra* note 153, ¶ 6.43.

176. See *id.*

177. See Definition of Commercial, COMPACT OXFORD ENGLISH DICTIONARY ONLINE, http://www.askoxford.com/concise_oed/commercial?view=uk.

178. See Definition of Scale, COMPACT OXFORD ENGLISH DICTIONARY ONLINE, http://www.askoxford.com/concise_oed/scale_3?view=uk.

179. This definition would also fittingly preserve space for private use, as long as no profit was made.

turn, regardless of the extent or magnitude of the commercial activities. If this is indeed the preferred definition, it is still not clear that the United States has presented enough evidence to establish a *prima facie* case that China has violated TRIPS.¹⁸⁰

While the United States has demonstrated that much commercial activity occurs under China's stated thresholds, it has not demonstrated that this is an unacceptable level of commercial activity. As a preliminary matter, it is not clear how a panel should engage in fact-finding. DSU Article 13 allows a panel to accept and consider or reject information submitted to it, but does not address whether a panel must accept information provided by a party to the dispute.¹⁸¹ It is thus not clear how the panel should treat the CCA Report, whether or not China attacks the accuracy or credibility of the Report. Nevertheless, WTO disputes involve a great deal of diplomacy and it is highly unlikely a panel will outright reject a party's evidence, even if clearly biased. Thus, for purposes of this Article, we will assume that the panel will accept the CCA Report, whether or not it will accept the conclusions based in it.

As regards to the United States' argument that the CCA Report demonstrates an unacceptable level of commercial activity, the survey evidence demonstrates that about seventeen percent of the administrative raid cases are subject to criminal penalties. The United States' own criminal statistics reveal that this may be an appropriate level. In 2002, for example, in the United States, 8254 civil cases were filed as compared to 405 criminal cases.¹⁸² Criminal cases thus represented about five percent of the total

180. The Appellate Body has not resolved the question of what standard must be met in order to establish a *prima facie* case that a violation has occurred. The Appellate Body has, however, stated that there should not be a single standard and that "precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to provision and case to case." *United States—Shirts and Blouses*, *supra* note 158, at 14; *see also* Peter Lichtenbaum, *Procedural Issues in WTO Dispute Resolution*, 19 MICH. J. INT'L L. 1195, 1248 (1998). Of course, should the panel conclude that the United States fails in establishing a violation of Articles 41 and 61, China would not have to invoke any justification or exception to defend the United States' case. *See U.S.—Section 110(5)*, *supra* note 153, ¶ 6.16.

181. DSU, *supra* note 153, art. 13.

182. ABBOTT, ET AL., *supra* note 86, at 614 (*citing* UNITED STATES DEPARTMENT OF JUSTICE, *Bureau of Justice Statistics, Special Report: Intellectual Property Theft, 2002* (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ipt02.pdf>). Of those convicted, less than half received prison time. *Id.*

cases filed. These statistics “do not from a ‘numerical’ standpoint suggest that a large number of actions are required to evidence compliance with WTO obligations.”¹⁸³ Assuming the accuracy and relevancy of the CCA Report evidence, seventeen percent of Chinese actions may, from a numerical standpoint and in light of China’s embryonic legal system, be appropriate.

Nonetheless, this broad interpretation rejecting thresholds may go too far. An interpretation in which any single infringing act can subject an infringer to criminal sanctions would cast a wide net that would capture infringing acts such as the intended sale of a single CD or DVD, in addition to capturing large-scale commercial activities. It seems unlikely that WTO members would extend criminal sanctions to this conduct in light of the civil remedies also made mandatorily available for such conduct and the concern during TRIPS negotiations that criminal penalties be limited to “professional infringers.”¹⁸⁴ In short, criminal liability should not be coextensive with civil liability. More importantly, such a reading reads out of Article 61 the term “scale.” In other words, this reading reads “commercial” and “scale” as two separate and independent requirements, each of which would be sufficient to require criminal penalties. Stated differently, this interpretation reads “commercial scale” as “commercial or scale,” rather than “commercial scale.” By focusing solely on “commercial,” this interpretation would include commercial activity that does not depend upon the magnitude or extent of the activity.¹⁸⁵ While such a reading of Article 61 is possible, it is less plausible in view of the difficulty that Members had in agreeing on criminal sanctions and the role criminal sanctions are intended to play, which is to deter egregious acts of infringement. Instead, “commercial scale” might be read to include both commercial activity *and* a certain level or magnitude of that activity.

On the other hand, an interpretation that allows for large-

183. ABBOTT ET AL., *supra* note 86, at 614.

184. DANIEL GERVAIS, *THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS* 327 (2d ed. 2003).

185. See TRIPS, *supra* note 6, art. 61. Similarly, the United States contends that a certain magnitude of piracy and counterfeiting should be sufficient to qualify as commercial scale piracy and counterfeiting regardless of whether the activity is “commercial.” See U.S. First Submission, *supra* note 97, ¶ 110. While the United States is not arguing that China’s laws are inconsistent with this interpretation, it seems likely that this interpretation also misses the point by focusing on one of the two terms (that is, “scale” rather than “commercial scale”).

scale infringement, without an intent to profit or for no financial return, also appears inconsistent with TRIPS' objective to protect the private rights of intellectual property owners. Such activities should not be excluded, because these activities are indeed comparable to commercial scale piracy, particularly from a rights holders' vantage point. Similarly, small-scale piracy should be excluded from the term "commercial scale," even if done for a financial return, as mentioned above.

The United States' argument and the "commercial or scale" interpretation highlights the difficulty with attacking thresholds. As the United States argues, thresholds draw arbitrary lines in delineating the types of trademark counterfeiting and copyright piracy that is subject to criminal penalties.¹⁸⁶ Any threshold would provide would-be infringers with the "safe harbor" about which the United States complains. Line drawing as to a particular appropriate threshold seems problematic and, if required to do so, a panel might afford China discretion to set its own thresholds, in effect self-defining "on a commercial scale," relying on TRIPS Article 1(1) (members are free to determine how best to meet their obligations under TRIPS within the context of their own legal systems).¹⁸⁷

The plain language of Article 61 does not mandate specific thresholds but rather suggests a more open-ended approach—the freedom of countries to adopt different strategies. This affords members discretion in an area as sensitive as criminal intellectual property sanctions. This discretion creates breathing space for countries to implement domestic policy, including tailoring intellectual property laws to specific values, goals, culture, etc., and to permit experimentation in resolving particular issues (the notion that member states are "laboratories of experimentation").¹⁸⁸

It is thus doubtful that a panel will define "commercial

186. See U.S. First Submission, *supra* note 97, ¶ 144 ("This constrained system ignores a range of probative evidence demonstrating the existence of commercial scale operations not captured using China's criminal thresholds.")

187. See TRIPS, *supra* note 6, art. 1(1).

188. See, e.g., Edward Lee, *The New Canon: Using or Misusing Foreign Law To Decide Domestic Intellectual Property Claims*, 46 HARV. INT'L L.J. 1, 21 (2005) (arguing, among other reasons, that, when it is practically impossible to assess empirically what the proper balance in intellectual property laws should be, it is better to allow for a diversity of approaches among countries to avoid magnifying the harm imposed by a single bad rule).

scale” in terms of threshold units (or, for that matter, specific dollar amounts). The panel rather may define commercial scale by looking to certain levels where commercial piracy has a significant adverse impact on the rights holders, while also considering the nature of the illegal enterprise. An interpretational definition based on the impact on the rights holders would be consistent with the language of Article 61 and would also be consistent with the overall object and purpose of TRIPS, i.e., the need to protect the rights holders’ private rights and “the need to promote effective and adequate protection of intellectual property rights.”¹⁸⁹ Moreover, such an interpretation would still leave considerable flexibility for countries to address criminal intellectual property enforcement, would capture large-scale non-commercial activity, and should also exclude small-scale commercial activities.

An interpretation based on the impact on an intellectual property owner’s rights will involve a fact-driven inquiry, which will not depend solely on resort to a particular threshold.¹⁹⁰ Rather, facts relevant to this inquiry would include:

- (1) the number and type of infringers;
- (2) the quantity of each infringer’s inventory;
- (3) the price comparisons between legitimate and infringing goods;
- (4) the difference in quality between legitimate and infringing goods; and
- (5) the type and size of the rights holder’s business.¹⁹¹

189. See TRIPS, *supra* note 6, pmb1.

190. Thresholds might still play a role, for example, by stating that a certain threshold delineates prejudicial impact from non-prejudicial impact. Thresholds will need to be specific, however, to the particular type of good or work involved. For example, thresholds that constitute prejudicial impact with respect to CDs/DVDs would not be the same as those that constitute prejudicial impact for so-called “fast-moving consumer goods,” such as personal care products or small electronics, that sell quickly and at low prices. See, e.g., U.S. First Submission, *supra* note 97, ¶ 121. Nevertheless, relying on the prejudicial impact should reduce, if not eliminate, the need to look to thresholds.

191. These facts are principally focused on determining whether a rights holders’ interest is prejudiced but, admittedly, may be difficult to determine. For example, it is difficult, if not impossible, to determine the enterprises and infringing businesses in China’s market. See U.S. First Submission, *supra* note 97, ¶ 122 (noting that a single wholesale mall in Yiwu, China, “houses some 30,000 stores, many of them in small 10-by-15 foot stalls.”).

In view of these factors, it is not clear that the United States has presented sufficient evidence to establish a *prima facie* case that China has violated TRIPS. First, it is not clear what percentage of establishments and enterprises the CCA Report includes. Specifically, the United States argues that the Chinese market for copyright and trademark goods “is fragmented and characterized by a profusion of small manufacturers, middlemen, and distributors.”¹⁹² Yet, the CCA Report looks to only 2000 complaints filed against some retail targets.¹⁹³ Also, the CCA Report focused on the establishments operating under or above the stated thresholds and did not look to the economic or prejudicial impact on the rights holder.¹⁹⁴

Although it is less likely, in addition to looking to the ordinary meaning or a policy-based approach to interpret “commercial scale,” a panel might interpret “commercial scale” or determine appropriate criminal sanctions by resort to an additional source, which incidentally also might support a prejudicial impact interpretation.¹⁹⁵ By looking to other countries’ criminal intellectual property laws, a panel may glean an appropriate international standard upon which to base TRIPS’ standard. A panel can justify resort to national laws in interpreting TRIPS provisions as a “subsequent practice” by WTO members.¹⁹⁶ As

192. *Id.* (citing Don Lee, *30,000-Store Wholesale Mall Keeps Chinese Competitive*, S.F. CHRON., Dec. 8, 2006, at A-31, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/12/08/MNG8TMRPV81.DTL>).

193. *Id.* ¶ 155.

194. *Id.* ¶¶ 157-61.

195. See DSU, *supra* note 153, art. 13(2) (“Panels may seek information from any relevant source . . .”).

196. VCLT, *supra* note 164, art. 31(3)(b); See also Panel Report, *Canada—Patent Protection of Pharmaceutical Products*, WT/DS114/R (March 17, 2000). Canada made a similar argument that the WTO should consider the national laws of member countries in determining whether Canada complied with its TRIPS obligations. In the context of TRIPS exceptions to patent rights, the panel rejected this argument.

More remotely, a panel might look to TRIPS provisions that allow exceptions to rights holders’ intellectual property rights (“exception provisions”) and to those cases interpreting those provisions (“exception cases”). In particular, Articles 13 and 17 of the TRIPS Agreement allow for certain exceptions to copyrights and trademarks if such exceptions meet a tripartite test: the exceptions must be limited to (1) certain special cases; (2) which do not conflict with a normal exploitation of the work; and (3) which do not unreasonably prejudice the legitimate interests of the right holder. At first blush, applying a standard for exceptions to a standard for criminal liability seems odd; however, both place limits on unacceptable conduct, and the exception provisions prohibit conduct that has a prejudicial impact on a rights holder’s interest—a standard comparable to the proposed prejudicial impact of “commercial scale” provision in Arti-

such, national laws can demonstrate practices that might be relevant as indicators of certain norms shared by countries, or evidence that countries interpret specific provisions in similar ways.

d. Various Developed Countries' Criminal Intellectual Property Laws

The Vienna Convention permits judicial bodies to resort to additional interpretive aids to assist in interpreting treaties, specifically allowing resort to "any subsequent practice in the application of the treaty."¹⁹⁷ Thus, a review of Member Countries' national criminal intellectual property laws may be relevant in ascertaining an international standard for appropriate criminal sanctions. Particularly relevant would be national laws that specifically define "commercial scale" and laws that include liability thresholds. Remedies of imprisonment and monetary fines may also be relevant in determining whether the criminal laws are sufficient to provide a deterrent. To the extent that a pattern or standard emerges, a panel could determine that it is appropriate to apply such a standard to this dispute. Two points should be made, however. First, whether five years in a U.S. prison corresponds to five years in a Chinese prison is unknown. For purposes of this analysis, we will assume this is so. Second, different countries' legal systems are at different stages. For example, the United States' legal system must be considered—particularly in comparison to China's—a mature system. Thus, the standards necessary to ensure compliance with laws or to deter infringement in each country may not be the same—nor should they be.¹⁹⁸ With these points in mind, we first turn to the United

cle 61. See, e.g., TRIPS, *supra* note 6, arts. 13, 17, 61 (allowing for exceptions to copyright). Similar TRIPS provisions also exist in Articles 17 and 30 for exceptions to trademarks and patents, respectively. See *id.* arts. 17, 30.

197. VCLT, *supra* note 164, art. 31(3)(b).

198. See, e.g., TRIPS, *supra* note 6, pmb. (noting that in providing for effective enforcement means, differences in national legal systems must be taken into account). This also raises additional concerns. Should countries' criminal intellectual property laws resemble each other in order for each country to comply with their TRIPS obligations? Arguably, they should not. TRIPS affords sufficient discretion and flexibility to each country such that national laws can differ significantly and still comply with TRIPS. Assuming this is so, a second question becomes whether China's criminal intellectual property laws should be compared with developed or developing countries' national laws. This was addressed earlier. These issues also highlight the problems with looking to national laws to interpret treaties. Which laws should be reviewed? Unless a panel reviews each member's laws—a daunting task, considering the WTO consists of over

States' system.

i. The United States

The United States' criminal copyright laws are found in 17 U.S.C. § 506, which defines the prohibited conduct, and 18 U.S.C. § 2319, which sets forth the punishment. Section 506 separates misdemeanor criminal offenses from felony criminal offenses. An infringer commits a misdemeanor if that person willfully infringes a copyright, and the infringement was committed for purposes of commercial advantage or private financial gain: "by the reproduction or distribution, during any 180-day period, of one or more copies of one or more copyrighted works, which have a total retail value of more than US\$1000; or by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution."¹⁹⁹ Two things stand out about the misdemeanor copyright laws. First, liability attaches only if the infringer's motive was for "commercial advantage or private financial gain."²⁰⁰ Second, the numerical threshold is *one*—an infringer is criminally liable for the reproduction of a *single* copy of a *single* copyrighted work.²⁰¹ The minimum sentence is a maximum of one year in prison and/or a fine.²⁰²

150 members—a review of national laws will necessarily produce an ad hoc and partial view of national practice. One can reasonably ask whether such a review can shed any light on the meaning of a WTO Agreement.

199. 17 U.S.C §§ 506(a)(1)(B)-(C) (2005). Section 506 also details other actions that may give rise to criminal misdemeanor charges: (1) fraudulent placing of a copyright notice on a work; (2) fraudulent removal of a copyright notice; and (3) knowingly making a false representation of a material fact in an application for copyright registration. *Id.* §§ 506(c)-(e).

200. 17 U.S.C § 506(a)(1)(A) (2005); Copyright Act of 1976, Pub. L. No. 94-553, § 506, 90 Stat. 2541, 2586 (codified as amended at 17 U.S.C. § 101 et seq. (1976)). The Copyright Act of 1976 revamped this criminal provision by changing the previous requirement, i.e., "for profit," to the "for purposes of commercial advantage" standard. This lowered the standard from requiring that the defendant actually profit from infringing activities to an intent to profit from the activity. *See* Copyright Act of 1976, Pub. L. No. 94-553, § 506, 90 Stat. 2541, 2586 (codified as amended at 17 U.S.C. § 101 et seq. (1976)); *see also* United States v. LaMacchia, 871 F. Supp. 535, 539-40 (D. Mass. 1994) (noting that an infringer acts for commercial advantage or private financial gain if he seeks a profit.); 4 NIMMER ON COPYRIGHT § 15.01[A][2].

201. 17 U.S.C. § 506(a)(1)(B).

202. 28 U.S.C. § 2319(b)(3) (2005).

Felony liability attaches when the violation is willful and consists of the reproduction or distribution of at least *ten* copies that are valued together at more than US\$2500.²⁰³ The felony threshold is higher in order to exclude low-level infringement such as “children making copies for friends as well as other incidental copying of copyrighted works having a relatively low retail value.”²⁰⁴ The maximum felony sentence is ten years imprisonment and/or a fine.²⁰⁵

The No Electronic Theft Act of 1997 (“NET Act”) is the latest amendment to the U.S. criminal copyright laws.²⁰⁶ The NET Act makes it a felony to reproduce or distribute copies of copyrighted works electronically *regardless of whether the defendant had a profit motive*.²⁰⁷ The change reflects the ease of using the In-

203. *Id.* §§ 2319(b)(1), (c)(1). Four essential elements are required to prove felony copyright infringement: (1) a registered copyright exists; (2) the defendant acted willfully; (3) the defendant infringed by reproducing or distributing the copyrighted work; and (4) the works infringed were at least 10 copies of one or more copyrighted works with a total value of US\$2500 and were made or sold within a 180-day period. Laura Gasaway, *Criminal Copyright Infringement*, INFO. OUTLOOK, Apr. 2004, http://findarticles.com/p/articles/mi_m0FWE/is_4_8/ai_n6108144. Under amendments enacted in 2005, felony liability also attaches when the violation involves the distribution of a work being prepared for commercial distribution over a publicly-accessible computer network. *See* 18 U.S.C. § 2319(d)(2).

204. H.R. REP. NO. 102-997, at 6 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3569, 3574. These criminal infringement provisions were the result of 1982 amendments, which made more serious crimes punishable as felonies. *See generally* Gasaway, *supra* note 203. There is also a question as to what “retail value” means. Generally, this will mean the value of the legitimate good; however, in certain situations, under the Criminal Sentencing Guidelines, the term “retail value” refers to the value of the infringing product. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B5.3 cmt. n.2(c) (2007); DOJ IP MANUAL, *supra* note 8 at 71. The DOJ IP Manual acknowledges that calculating a work’s retail value can be complicated, such as when the work has appeared in multiple versions, and states that the market value may be used instead in some circumstances. *See id.* at 48.

205. 18 U.S.C. § 2319(b)(2), (d)(4).

206. No Electronic Theft Act (“NET Act”), Pub. L. No. 105-147, 111 Stat. 2678 (1997). Congress is considering a bill to further strengthen criminal copyright penalties. *See* Declan McCullagh, *Major Copyright Bill Boost Penalties, Creates New Agency*, THE ICONOCLAST, Dec. 5, 2007, http://news.cnet.com/8301-13578_3-9829826-38.html. According to McCullagh, the new bill “ratchets up civil penalties for copyright infringement, boosts criminal enforcement, and even creates a new federal agency charged with bringing about a national and international copyright crackdown.” *Id.* para. 3.

207. 17 U.S.C. § 506(a)(1)(B). Thus, criminal liability is triggered when the infringement: (1) is for purposes of commercial advantage or private financial gain or (2) involves the reproduction or distribution of one or more copies of a work or works within a 180-day period with a total retail value of US\$1000. *See id.* A commercially motivated infringer, however, receives a higher penalty, up to a five-year federal prison

ternet to distribute copyrighted works and also the reality that the Internet allows infringers to engage in large-scale infringement without a desire for financial gain, all with devastating effects for the intellectual property rights holder.²⁰⁸

As for trademark infringement, selling one counterfeit item is a felony—there is no misdemeanor trademark crime.²⁰⁹

ii. The European Union: The Intellectual Property Enforcement Directive

In 2004, the European Parliament and the European Council issued Council Directive 2004/48/EC, the Intellectual Property Enforcement Directive (“IP Enforcement Directive” or “Directive”).²¹⁰ The Directive’s objective is to ensure a “high, equivalent and homogenous level” of intellectual property protection throughout the European Union.²¹¹ The IP Enforcement Directive does not establish criminal procedures and penalties for member countries to adopt (but does note that in addition to civil measures, criminal sanctions also constitute a means of ensuring the enforcement of intellectual property rights).²¹² The Directive is instructive, however, because it provides for specific measures that apply only with regard to infringement committed “on a commercial scale.”²¹³ The Directive defines “commercial scale” as acts “carried out for direct or indirect economic or commercial advantage.”²¹⁴ This is consistent with the previous ordinary meaning as being “engaged in commerce,” and “making or intended to make a profit.” While the Directive and this particular definition are instructive, it is nonetheless an edict, and because it did not make its way into Members’ laws, it

term and US\$250,000 in fines; a noncommercial willful infringer is subject to up to a one-year prison term and US\$100,000 in fines. *See generally* Gasaway, *supra* note 203.

208. *See generally* Gasaway, *supra* note 203.

209. *See* 18 U.S.C. § 2320(a) (2006).

210. Directives are addressed to the Member States and are binding with respect to the results to be achieved. Member States have discretion in choosing the particular form to implement the results. *See* DUNOFF, RATNER & WIPPMAN, *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS, A PROBLEM-ORIENTED APPROACH* 256 (2002).

211. Council Directive No. 2004/48, ¶ 10, O.J. L 157/45, at 49 (2004) (hereinafter “Directive” or “IP Enforcement Directive”).

212. *Id.* ¶ 28. The Directive also makes clear that it does not affect Member States’ international obligations under TRIPS relating to criminal penalties and procedures. *Id.* art. 2(3).

213. *See id.* arts. 6(2), 8(1), and 9(2).

214. *Id.* ¶ 14.

can only provide insight into how individual Members might interpret “commercial scale.”

iii. France

In France, Articles L. 335-1 et seq. of the Intellectual Property Code set out the provisions governing criminal sanctions for copyright infringement. Article L. 335-2 of the Intellectual Property Code provides for imprisonment of up to three years and fines of up to EUR300,000 (US\$463,409) for *any* infringing act, including the sale, exportation, and importation of infringing works.²¹⁵ Article L. 335-9, in cases of habitual offenders, allows for doubling the period of imprisonment or the amount of fines. Applying the IP Directive’s “commercial scale” definition here might imply that one infringing act leads inexorably to “direct or indirect economic or commercial advantage.”

iv. Germany

Under German copyright law (*Urheberrechtsgesetz*), sections 106 et seq. of the Copyright Act establish criminal copyright infringement sanctions for acts defined by reference to definitions that trigger civil sanctions. But, these acts are interpreted in accord with the interpretive rules applied in criminal cases. In particular, unlike civil sanctions, criminal sanctions are available only for intentional, rather than merely negligent, infringement.²¹⁶ Germany’s criminal law provisions refer to the “unauthorized exploitation of copyrighted works” and include the reproduction, distribution, public communication, and any adaptation or a transformation of *a work*.²¹⁷ Convicted infringers are subject to imprisonment for up to three years or a fine.²¹⁸ Fur-

215. Law No. 94-102 of February 5, 1994, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], February 8, 1994, art. L335-2 (Fr.), translated in <http://www.legifrance.gouv.fr> (2003) (“Any edition of writings, musical compositions, drawings, paintings or other printed or engraved production made in whole or in part contrary to the laws and regulations relating to the property of authors shall constitute an infringement; any infringement shall constitute an offense. Infringement in France of works published in France or abroad shall be punishable with a two-year prison term and a fine of FRF 1,000,000. The sale, exportation and importation of infringing works shall be subject to the same penalties.”). Articles L335-3 to L335-7 set forth additional infringing acts. See *id.* arts. L335-3–L-335-7.

216. See *Strafgesetzbuch* [StGB], art. 15 (F.R.G.).

217. *Urheberrechtsgesetz* [UrhG], art. 106 (F.R.G. Copyright Law) (published 9 Sept. 1965, last amended on 8 May 1998).

218. *Id.*

ther, Section 108a provides that when a person commits the above infringing acts “on a commercial basis” the person is subject to imprisonment up to five years or a fine. The section does not define “on a commercial basis.”

v. United Kingdom

The United Kingdom 1988 Copyright Act also contains criminal copyright provisions, which, unlike civil liability, require proof of knowledge or reason to know that a copyright was being or would be infringed.²¹⁹ Section 107 of the 1988 Copyright Act, entitled “Criminal liability for making or dealing with infringing articles, &c.,” provides that, for summary convictions, a person who commits an offense is subject to a prison term not exceeding six months and a fine not exceeding the statutory maximum.²²⁰ For indictments, a person is subject to a prison term not exceeding ten years and a fine.²²¹ A person commits an offense by selling, making, importing, exhibiting, distributing, or “distribut[ing] otherwise than in the course of a business to such an extent as to affect prejudicially the owner of the copyright” *an article* which is, and which he knows or has reason to believe is, *an infringing copy* of a copyrighted work.²²²

vi. Argentina

Articles 71 et seq. of the Copyright Act establishes criminal sanctions under Argentine law. Article 71 penalizes whoever in any way or form infringes upon those rights recognized by the Act as if he had committed a fraudulent act.²²³ Article 72 enumerates the following “fraudulent” acts subject to criminal liability: (1) the unauthorized reproduction of a work; (2) piracy under cover of the misappropriated name of an authorized publisher; (3) the publication of a work while suppressing or altering the name of its author; (4) the publication of more copies than authorized; and (5) the modification of the text of a

219. Copyright, Designs and Patents Act, 1988, c. 48, § 107 (Eng.).

220. *See id.* § 107(4)(a).

221. *Id.* § 107(4)(b).

222. *Id.*

223. *See* Miguel A. Emery, *Economic Rights; Enforcement, in* INTERNATIONAL COPYRIGHT LAW AND PRACTICE ARG § 8 (2008); Intellectual Property Law No. 11.723 (Sept. 28, 1933), art. 71 (Arg.).

work.²²⁴ Each of these acts appears to apply to a single infringing work. Because copyright infringement is equated to fraud, some courts have held that criminal copyright infringement requires bad faith.²²⁵

vii. Australia

Australian law also subjects certain infringing acts to criminal liability. Among those infringing acts are acts in which the infringement constitutes “commercial-scale infringement . . . that has a prejudicial impact on the copyright owner.”²²⁶ Other acts that trigger criminal liability are: (1) making infringing copies commercially; (2) selling or hiring out, or offering to sell or hire out, an infringing copy; (3) exhibiting an infringing copy in public commercially; (4) importing an infringing copy commercially; (5) distributing an infringing copy for purpose of trade or commercial gain; (6) possessing an infringing copy with the intention of selling it, letting it for hire, offering to sell or let it, distributing it for commercial gain, exhibiting it in public; (7) making or possessing a device for making infringing copies; (8) advertising the supply of infringing copies; (9) causing a public performance that infringes copyright; (10) causing a recording or film to be heard or seen in public that infringes copyright; and (11) converting a work or other subject matter from a hard copy or analog form to a digital form, which is treated as an “aggravated offense.”²²⁷

Criminal offenses in the Copyright Act are divided into indictable, summary, and strict liability offenses. The main difference between these tiered offenses concerns the level of fault that must be satisfied and the penalties that apply. To establish an indictable offense, it is necessary to show that the infringement was either intentional or reckless.²²⁸ Most summary of-

224. See Emery, *supra* note 223, § 8.

225. *Id.* Other courts disagree.

226. Copyright Act, 2006, § 132AC (Austl.) (introduced by Copyright Act Amendment Act 2006).

227. *Id.* at §§ 132AC-AO.

228. Indictable offenses have maximum penalties of imprisonment for five years and/or between 550 to 850 penalty units for natural persons. See Brad Sherman & James Lahore, *Economic Rights & Enforcement*, in *INTERNATIONAL COPYRIGHT LAW AND PRACTICE AUS*, § 8 (2007).

fenses require intention and/or negligence.²²⁹ The strict liability offenses do not contain a fault requirement. They target lower levels of commercial piracy such as the sale of pirated works at street markets. To avoid criminalizing activities considered to be a legitimate part of commercial life, strict liability offenses only apply in a limited number of cases and are subject to multiple defenses.²³⁰

viii. Brazil

Brazilian law criminalizes copyright infringement used “for commercial purposes or with gainful intent.”²³¹ This includes the unauthorized copying, holding or distributing of infringing copies, or public communication. Penalties include fines, seizure, destruction or loss of infringing materials, suspension of the offender’s permission to operate for designated periods of time, and mandatory sentences of up to four years. While the threshold appears to be one consistent with other countries, Brazilian law does allow for private use. A person can copy a work of authorship or phonogram for private use, even if such copy amounts to a complete reproduction, provided that only one copy is made.²³²

ix. Canada

Under the Canadian Copyright Act,²³³ a person who commits certain infringing acts also commits a summary criminal offense and may be indicted at the prosecutor’s discretion. The Supreme Court of Canada has held that copyright infringement is not theft under the Criminal Code, but a charge of fraud is, perhaps anomalously, still available. Canadian law also requires a specific *mens rea*: the infringer must have acted intentionally, or recklessly with knowledge of the facts constituting the offense, or with willful blindness.²³⁴

229. These have maximum penalties of imprisonment for two years and/or 120 penalty units. *See id.*

230. The maximum penalty for a strict liability offense is sixty penalty units for a natural person. *Id.*

231. Manoel J. Pereira dos Santos & Otto B. Lickse, *Economic Rights & Enforcement*, in *INTERNATIONAL COPYRIGHT LAW AND PRACTICE BRA*, § 8 (2007).

232. *See id.*

233. *See* Copyright Act, R.S.C., ch. 30, s.1, § 42 et seq. (Can.).

234. *See id.*

x. India

The final two countries include India and South Korea, which provide comparable Asian countries for assessment. Under Indian law, Sections 63 through 69 of the Copyright Act deal with offenses relating to the infringement of copyrights and provide for the punishments of imprisonment or fines or both.²³⁵ The Amendment Act of 1994 provides for a minimum punishment of imprisonment for a period of not less than seven days, but one which may extend to three years, and for fines not less than 50,000 Rupees, but which may extend to 200,000 Rupees, for any person who knowingly makes, or uses on a computer *an infringing copy* of a computer program.²³⁶ A court has discretion to impose a fine of 50,000 rupees only if the infringing copy is not used for gain or in the course of trade or business (e.g., for private use).²³⁷

xi. South Korea

Under South Korea's criminal laws, a person who infringes *a work* willfully and for purposes of commercial advantage or private financial gain is subject to penalties including KRW 500,000²³⁸ or imprisonment for not more than five years.²³⁹ Penalties may be increased for repeat offenders, with imprisonment of ten years and/or a fine of not more than KRW 1,000,000.²⁴⁰

Whether this section's brief review of various countries' criminal intellectual property laws demonstrates an international standard for "on a commercial scale" is debatable. Only one provision (the IP Enforcement Directive) actually defines "commercial scale," and that definition (indirect or direct economic advantage) is sufficiently vague as to provide little guidance.²⁴¹

235. See The Copyright Act §§ 63-69 (India).

236. See The Copyright (Amendment) Act, 1994, No. 38, Acts of Parliament, 1994, § 63B (India).

237. See *id.*

238. KRW is the currency of South Korea.

239. See Copyright Act art. 136, as amended February 29, 2008 (S. Korea).

240. See *id.* art. 136(2).

241. See Directive, *supra* note 211, ¶ 14. Taken at face value, Council Directive No. 2004/48 ("IP Enforcement Directive" or "Directive") is expansive, as it is difficult to imagine any infringing conduct that is not either directly or indirectly carried out for direct or indirect economic or commercial advantage. Think, for example, of copies being made for home use. Such conduct provides a direct or indirect economic advantage, as the copier avoids having to pay for an additional work. Of course, because

The review, however, does reveal one striking similarity among the laws. With the exception of the United States' felony criminal infringement law, none of the laws require a threshold limit above one single infringing act to trigger criminal liability. Thus, it is tempting to suggest that an international standard exists that defines "commercial scale" in this manner. Accordingly, any standard applying *any* thresholds—such as China's—is inconsistent with international norms and, arguably, violates TRIPS. (Countries might have discretion with respect to other elements, for example, a particular *mens rea* such as willful or knowingly, or a particular monetary threshold.) This would support the United States' position, and an international standard without a numerical threshold would remedy the arbitrary threshold concern and could be justified on deterrence grounds.²⁴² As such, the United States could credibly argue, and a panel could find, that China's laws containing thresholds violate TRIPS. China would be required to amend its laws by removing all threshold barriers, thus providing effective enforcement and deterrence.

On the other hand, many of the countries' laws require that infringing acts be carried out for commercial advantage or financial gain (e.g., Australia, Brazil, the European Union, South Korea, and the United States) and a number of countries impose criminal liability only when the infringing acts prejudicially affect the rights owner (e.g., Australia, the United Kingdom, and the United States). This would imply that small-scale infringement is immune from criminal sanctions and again underscore the benefit of individual flexibility.

In the end, China's lack of conformity with other countries' laws is a far cry from declaring that China's thresholds are inconsistent with China's TRIPS obligations under Articles 41 and 61, particularly as it is not clear that an international standard does exist. Moreover, in arguing that no threshold is appropriate, it is difficult to ignore the United States' ten-copy threshold.²⁴³ At

TRIPS allows for members to go beyond their TRIPS obligations, the EU Directive might be characterized as providing for criminal penalties beyond what is required.

242. See U.S. First Submission, *supra* note 97, ¶ 151.

243. While it is certainly easy to understand the rationale for allowing this threshold, i.e., to exclude low-level infringement from possible enhanced penalties, it is less clear why this could not also be accomplished without the threshold by way of prosecutorial discretion. In other words, even by providing that criminal penalties will

the very least, a panel could conclude that the United States' criminal copyright law suggests that the United States recognizes that some threshold may be appropriate in defining "commercial scale" (or in deterring infringement), and that China's laws similarly recognize the suitability of thresholds. Of course, the panel would still have to determine the much more difficult question as to what the appropriate threshold should be, but this is sure to favor China.

In sum, based on policy concerns and to effectuate TRIPS' objective to protect the rights of intellectual property owners, a panel might define "commercial scale" not by reference to particular thresholds, but instead by reference to whether infringing acts prejudice the rights of intellectual property owners. Support for such an interpretation comes not only from TRIPS' objective, but also from various countries' laws and from the underlying policy mandating criminal sanctions. Thus, with support also from the ordinary meaning of the term "commercial scale," a panel will likely find that TRIPS Article 61 requires China to provide for criminal sanctions for large-scale commercial and noncommercial infringement, but allow for small-scale commercial and noncommercial infringement. China's laws, including the thresholds, monetary limitations, and specific *mens rea*, should pass muster under this standard and be found as consistent with China's TRIPS obligations, particularly in light of China's nascent legal system. The United States may also be required to submit additional evidence concerning the prejudicial impact that infringing conduct causes, such as an unreasonable loss of income, to determine whether the roughly seventeen percent of infringers that fall outside the stated thresholds justify a finding that China's laws, indeed, might not comply with TRIPS.

7. Do Remedies Constitute a Deterrent to Infringement?

The United States' other claim is that the high thresholds and other deficiencies in China's criminal laws violate TRIPS because they do not sufficiently deter future infringement.²⁴⁴ Per-

be available for any act of infringement, these laws do not mandate that all such conduct will, in fact, be prosecuted. The United States might argue that thresholds are appropriate in the United States, but because of China's rampant piracy, may not be appropriate for China. This would be unconvincing.

244. See TRIPS, *supra* note 6, arts. 41, 61. Both TRIPS Article 41 and 61 refer to the need to deter future infringement. While these two articles relate to different sanc-

haps recognizing the difficulty with arguing that the specific fines and terms of imprisonment are inadequate to sufficiently deter future infringement, the United States argues a more nuanced position. The United States argues that TRIPS Article 61 mandates that countries make remedies, including imprisonment and monetary fines, available sufficient to provide a deterrent. Because China's thresholds fail to capture certain cases of willful trademark counterfeiting and copyright piracy on a commercial scale, China's measures do not *at all* provide for criminal remedies for these cases, and thus neither make such remedies available nor provide a deterrent.²⁴⁵ Accordingly, the United States' argument hinges on how the panel defines "commercial scale" and whether the panel will find that activity that currently falls outside the thresholds constitutes commercial scale counterfeiting and piracy. In view of the above discussion suggesting that the panel will find that such activity does not fall within the definition of commercial scale counterfeiting or piracy, the United States will likely not be able to establish a *prima facie* case that China's laws are inconsistent with Article 61's deterrence requirement.

The United States might also rely on the CCA Report to support its position that China's criminal law thresholds fail to deter future infringement. As the United States demonstrates, the percentage of counterfeiters and pirates that fall outside the thresholds remained constant despite the reduced liability threshold. This suggests that the thresholds fail to deter and instead serve as "guideposts for how to avoid the risk of criminal prosecution."²⁴⁶ In evaluating this argument, a WTO panel will have to determine what constitutes a sufficient deterrent to future infringements, perhaps looking at deterrence in general and then to the CCA Report and China's enforcement efforts.²⁴⁷

tions, i.e., civil and criminal, for purposes of this analysis the two will be considered together. *See id.*

245. *See* U.S. First Submission, *supra* note 97, ¶ 166 ("China can not make the necessary remedies available or sufficient to deter piracy and counterfeiting, when many classes of commercial scale piracy and counterfeiting are not even subject to criminal prosecution or conviction.").

246. U.S. First Submission, *supra* note 97, ¶ 153.

247. *See* TRIPS, *supra* note 6, arts. 41, 61.

a. Do Criminal Penalties Deter Future Infringement?

Whether criminal penalties deter crime is questionable. While there are conflicting studies, countless studies have found that stronger criminal laws have no deterrent effect.²⁴⁸ While a number of these studies involve different (yet comparable) contexts such as drugs and murder,²⁴⁹ others specifically address the deterrent effects of stronger penalties in the intellectual property context.²⁵⁰ For example, Professor Mark Schultz, discussing increased penalties for copyright infringement, argues that the reason deterrent-based strategies are ineffective is that it is very difficult to convince infringers that they will be caught and punished:

To influence behavior, [people's] estimates [of the risk of getting caught] need to be high enough to exceed some

248. See, e.g., Hashem Dezhbakhsh et al., *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 AM. L. & ECON. REV. 344 (2003) (suggesting that while capital punishment may have a strong deterrent effect, tougher sentencing laws provide little to no deterrent effect); John J. Donohue & Justin Wolfers, *The Ethics and Empirics of Capital Punishment: Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791 (2005) (the statistical studies addressing the deterrent benefit of capital punishment are statistically insignificant and analysis is susceptible to economic factors, representing "profound uncertainty" as to the deterrent effect); Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713 (2007); Joanna M. Shepherd, *Deterrence Versus Brutalization: Capital Punishment's Differing Impacts Among States*, 104 MICH. L. REV. 203 (2005) (in the context of capital punishment, when capital punishment exists but is rarely used, there is no deterrent effect and in some instances, increases crime); Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751 (2005); Symposium, *Capital Punishment and Capital Murder: Market Share and the Deterrent Effects of the Death Penalty*, 84 TEX. L. REV. 1803 (2006) (when looking at the statistics only from the perspective of homicides punishable by capital punishment, no deterrent effect has been found). *But cf.* Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397 (1975) (widely cited source for the argument that capital punishment deters murder at a rate of each execution deterring eight murders); Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703 (2005) (statistical analysis that capital punishment has a powerful impact and that failure to implement it has a direct, measurable impact on increased deaths makes such punishment morally necessary). The conflicting studies more likely lead us to question whether any strong conclusions could be drawn about deterrence.

249. See *supra* note 248 and accompanying text; see generally Robert J. MacCoun, *Drugs and the Law: A Psychological Analysis of Drug Prohibition*, 113 PSYCHOL. BULL. 497 (1993) (deterrence effects on drug use).

250. See, e.g., Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law*, 21 BERKELEY TECH. L.J. 651 (2006); Tom R. Tyler, *Compliance with Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U. J. INT'L L. & POL. 219 (1997).

threshold of being psychologically meaningful. Typically, neither the reality nor the perception of enforcement meets this goal. Most laws are not enforced stringently enough to create a strong deterrent effect. Compounding this difficulty is the fact that people often underestimate their chance of getting caught.²⁵¹

Simply put, most laws are not enforced stringently enough to create a strong deterrent effect.²⁵² Schultz also notes the possible negative public fallout from such laws, observing that “[d]rastically increasing penalties is unlikely to be a politically viable strategy.”²⁵³ Moreover, as Tom Tyler recognizes, increasing enforcement and penalties for intellectual property infringement will consume large amounts of public resources.²⁵⁴ With many other issues competing for such resources, it is increasingly difficult to argue the wisdom of using such resources for intellectual property enforcement. Ultimately, both Tyler and Schultz conclude that the most “effective way to persuade people to comply with copyright law is to convince them that it is the right thing to do.”²⁵⁵

For this Article, a number of deterrence articles merit further consideration: one involves criminalizing intellectual property infringement in the United States; the other increasing criminal penalties in China. Professor Eric Goldman analyzed the effects of the “NET Act” that Congress passed in 1997 to deter and punish U.S. copyright infringement (specifically, the illegal copying and trading of software). The NET Act imposed imprisonment of one to six years for any violation. Despite the criminalization of infringement and that a number of prosecutions resulted, Goldman noted that the NET Act “has not conformed the behavior of traders or had any real effect on piracy generally.”²⁵⁶ Similar to Tyler and Schultz, Goldman argues that infringers did not comply with the law because they did not be-

251. Schultz, *supra* note 250, at 663 (quoting COMM. TO REVIEW RESEARCH ON POLICE POLICY AND PRACTICES, FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE 295 (Wesley G. Skogan & Kathleen Frydl eds., 2004)).

252. See Schultz, *supra* note 250, at 663.

253. *Id.* at 664.

254. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 22-23 (1990).

255. Schultz, *supra* note 250, at 665.

256. Eric Goldman, *A Road to No Warez: The No Electronic Theft Act and Criminal Copyright Infringement*, 82 OR. L. REV. 369, 396 (2003).

lieve in it.²⁵⁷

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.²⁵⁸ The study found that during the period of stronger criminal penalties, rather than slow, economic property crimes nearly quadrupled.²⁵⁹ 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.²⁶⁰ There is thus an open question whether China's criminal penalties (or any country's, for that matter) *can* deter future infringement.

Nonetheless, whether criminal penalties deter future crimes is, in large part, beside the point. In mandating criminal penalties for intellectual property rights violations, WTO members necessarily concluded that criminal penalties do deter future infringement. As such, a panel should be limited to resolving whether China's stated thresholds have any deterrent effect and, if so, at what point do the thresholds no longer have that effect. Looking to the CCA Report and to enforcement statistics may aid in determining whether thresholds have that deterrent effect. Here, we evaluate the United States' CCA Survey evidence and also look at China's pre-TRIPS enforcement statistics when no stated thresholds applied and its post-TRIPS enforcement statistics when thresholds applied.²⁶¹ Based on these statistics, the United States again may have a difficult time proving that specific thresholds or that lowering current thresholds will deter future infringement.

b. CCA Report

The United States argues that the CCA Report demonstrates that China's thresholds fail to deter future infringement. Comparing administrative enforcement raids before and after

257. *See id.* at 409.

258. *See generally* Peter D. Nestor, Comment, *When the Price is Too High: Rethinking China's Deterrence Strategy for Robbery*, 16 *PAC. RIM. L. & POL'Y J.* 525 (2007).

259. *Id.* at 526.

260. *Id.* at 540-41.

261. A further meaningful comparison would include statistics after China further reduced the thresholds. These statistics, however, are too recent and not available.

the April 2007 Judicial Interpretation, which reduced the copy thresholds for criminal penalties from 1000 to 500, the United States demonstrates that the amount of activity that fell below the relevant thresholds remained the same, despite the lowered limit.²⁶² Both before and after the changed thresholds, more than eighty-two percent of all administrative enforcement raids fell below the thresholds.²⁶³ While compelling, this does not inescapably lead to the suggested conclusion.

Instead, a more detailed inquiry must be made into how many of the post-April 2007 Judicial Interpretations were already below the lowered 500-infringing-copy threshold. That is, if the majority of the infringers that were found to keep inventory between zero to 999 infringing copies actually kept that inventory within zero to 499 infringing copies, then the lowered threshold would, of course, result in no change in the percentage below the threshold. Even accepting the United States' position, the real problem may lie with China's enforcement efforts rather than in the perceived weakness of its laws.

c. China's Pre-TRIPS Enforcement

China's State Administration of Industry and Commerce ("SAIC") is primarily responsible for enforcing trademarks. It provided the following statistics for penalties between 1997 and 2000.²⁶⁴

Year	Cases	Avg Fine	Avg Damages	Criminal Prosecutions
1997	15,321	[US]\$679	[US]\$40	57 total or 1 in 268 cases
1998	14,216	[US]\$699	[US]\$41	35 total or 1 in 406 cases
1999	16,938	[US]\$754	[US]\$40	21 total or 1 in 806 cases
2000	22,001	[US]\$794	[US]\$19	45 total or 1 in 489 cases

These statistics are deplorable. However, the statistics are noteworthy in that they reflect China's efforts before it acceded to TRIPS in 2001.²⁶⁵ Thus, the statistics provide meaningful com-

262. See U.S. First Submission, *supra* note 97, ¶ 160.

263. *Id.* ¶ 161.

264. CHOW AND LEE, *supra* note 5, at 789 (citing State Administration of Industry and Commerce ("SAIC") of the People's Republic of China, Annual Statistics).

265. See MERTHA, *supra* note 67, at 203-04 (noting that in 2002 only about 2.5% of all trademark-violating cases were prosecuted under China's Criminal Code. In addi-

parisons to China's post-TRIPS enforcement.

d. China's Post-TRIPS Enforcement

Three years after acceding to the WTO and TRIPS, in 2004, the Supreme Court of China issued its first Judicial Interpretation setting specific thresholds. That year, Chinese courts heard almost 8400 civil cases but only 385 criminal trademark infringement cases.²⁶⁶ More troubling, Chinese administrative agencies referred only ninety-six cases for criminal prosecutions out of 51,851 trademark infringing cases that the agencies handled, even though the almost 52,000 cases resulted in the seizure and destruction of over forty million counterfeit goods.²⁶⁷ Furthermore, according to data that China provided in response to U.S. requests, in 2004, China's criminal copyright prosecution fared no better—China filed no cases under Article 218 and only thirteen cases under Article 217.²⁶⁸

China's criminal enforcement efforts in 2005 were similarly anemic. That year, SAIC indicated that less than 0.3% of the total trademark cases were prosecuted as criminal offenses.²⁶⁹ Chinese prosecutors initiated six cases in 2005 under Article 218, and twenty-eight cases under Article 217.²⁷⁰ As for trademark counterfeiting, China prosecuted ninety-eight cases in 2005

tion, only one out of ten cases which could have been handled by the criminal court actually were). The author does offer hope for optimism as he states that the number of criminal cases has begun to increase, "slowly but steadily." *Id.* at 203. He also explains that "[e]ven though the actual number of cases currently appears infinitesimal, when seen against a baseline of even three years earlier, it appears significant." *Id.* at 206.

266. See Cedric Lam, *China & Hong Kong: Recent Developments in Intellectual Property*, http://www.buildingipvalue.com/06AP/314_317.htm.

267. See *id.* ("China has two routes for enforcing intellectual property rights: judicial proceedings and administrative actions."). The administrative remedy remains the most popular route for enforcing intellectual property rights in China. However, "[i]n July 2005, the People's Procuratorate issued a draft regulation directing administrative bodies to refer IP violations promptly to criminal authorities for prosecution when a case meets the prescribed standards for criminal prosecution." *Id.* One possible explanation for the statistical disparities is the lack of qualified judges, government agents and lawyers. China has been addressing this problem over the last decade. See generally SHENKAR, *supra* note 22, at 60.

268. See OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 2006 SPECIAL 301 REPORT 18 n.1, available at http://www.ustr.gov/assets/Document_Library/Reports_Publications/2006/2006_Special_301_Review/asset_upload_file473_9336.pdf.

269. See *id.*

270. See *id.*

under Article 215.²⁷¹ These statistics demonstrate that China's post-TRIPS criminal enforcement efforts have been no better than its pre-TRIPS criminal enforcement efforts despite the clarification of the criminal laws and the introduction of stated thresholds. There are two ways to view this. For one, the statistics might substantiate the United States' allegations that the thresholds are still not low enough to capture the rampant commercial scale piracy that continues to plague China and is subject to criminal prosecution. It also substantiates the claim that the laws do not by any measure deter infringement and must be strengthened. By further lowering the thresholds, as the United States desires, the Chinese government can better prosecute these serious infringers and deter future infringement. The second, more plausible view, is that these statistics indicate that thresholds are not the problem—enforcement is.

A comparison to the United States' enforcement statistics supports the view that thresholds are not the problem.²⁷² As in China, in the United States, criminal actions against intellectual property rights infringers represent a small fraction of the overall intellectual property rights enforcement. Recall, in 2002, compared to over 8200 civil cases filed, only 405 intellectual property criminal cases were referred to government authorities, of which only 134 cases were sentenced for criminal intellectual property offenses.²⁷³ Presumably, the United States complies with its TRIPS obligations.²⁷⁴ Yet, these criminal enforcement statistics suggest a less than reassuring answer that thresholds are the problem. While the statistics do not indicate how many of the criminal cases were felonies—thus, exceeding the ten copy threshold—even in the implausible event that all of the cases were felony cases the numbers do not paint a flattering picture. If the United States' criminal intellectual property laws comply with TRIPS, similar—and arguably even less effective—criminal

271. *See id.*

272. Of course, other than threshold limits, many other factors come into play here, such as available resources, local culture, and other available remedies and penalties. Nonetheless, the threshold limit might play a role, and for the United States to prevail on its claim, it must demonstrate that thresholds play a role.

273. ABBOTT ET AL., *supra* note 86, at 614 (citing to UNITED STATES DEPARTMENT OF JUSTICE, Bureau of Justice Statistics, *Special Report: Intellectual Property Theft, 2002* (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ipt02.pdf>). Of those convicted, less than half received prison time. *See id.*

274. *See id.*

intellectual property laws will also comply with TRIPS. China's criminal laws may fit that bill.

e. Crimes of a "Corresponding Gravity"

As a final refutation to the United States' lack of deterrence claim, China can point to Article 61's prescription that Member Countries make remedies available sufficient to provide a deterrent "consistently with the level of penalties applied for crimes of a corresponding gravity."²⁷⁵ Two possible crimes of a corresponding gravity come to mind: fraud and theft. Looking to China's fraud and theft provisions, a panel could find China's thresholds are appropriate.

i. Fraud

China's fraud and theft criminal provisions use the same vague language as that used in its intellectual property criminal provisions. For example, under China's Criminal Code Article 266, a person commits a fraud when that person swindles a relatively large amount of public or private property.²⁷⁶ The penalties for fraud are also similar—a prison sentence of not more than three years, concurrently with or independently of a fine. If the amount involved is "very large" or "the circumstances are serious," the offender faces a prison sentence of between three and ten years. If the amount involved is "exceptionally large" or "the circumstances are extremely serious," the offender faces a "fixed-term imprisonment of not less than ten years, life imprisonment, and may in addition include a fine or confiscation of property."²⁷⁷

ii. Theft

The language used in China's Criminal Code theft provision is similar. Article 264 provides that "[a]nyone who steals a relatively large amount of public or private money and property shall be sentenced to [a] fixed-term imprisonment of not more than three years, criminal detention or public surveillance, and may in addition or exclusively be subject to a fine."²⁷⁸ If the

275. See TRIPS, *supra* note 6, art. 61.

276. See Criminal Code, § 266 (P.R.C.).

277. See *id.*

278. *Id.* § 264.

amount involved is “very large” and the “circumstances are serious,” the offender faces a prison term between three and ten years. Finally, if the amount involved is “exceptionally large” and the “circumstances are extremely serious,” the offender shall be sentenced to a fixed-term imprisonment of not less than ten years or life imprisonment. The theft provision is different from both the fraud and the intellectual property criminal provisions in one important respect: theft carries the possibility of a death sentence. A person is subject to life imprisonment or death if the person steals property from a financial institution and obtains an “exceptionally large amount” of property, or steals rare and precious cultural relics with serious circumstances.²⁷⁹

While the theft and fraud provisions do not have comparable Judicial Interpretations that define “huge, serious circumstances,” etc., China can nonetheless rely on these provisions to argue that its intellectual property laws comply with Article 61 as they are comparable to the penalties applied to “crimes of a corresponding gravity.”²⁸⁰

B. *Negative Consequences of Filing the Complaint*

Without question, IPRs enforcement represents a critical issue in the U.S.-China relationship. The numerous agreements and contentious negotiations involving IPRs enforcement reflect this. But the filing of the complaint goes beyond the merits of the IPRs dispute. Indeed, independent of the legal analysis,

279. *See id.* § 264. Article 267 provides similar penalties:

Anyone who loots public property, where the amount involved is relatively large, shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention or public surveillance, and may in addition or exclusive be subject to a fine. If the amount involved is very large or the circumstances are serious, the sentence shall be fixed-term imprisonment of not less than three years and not more than ten years, and may in addition include a fine. If the amount involved is exceptionally large or the circumstances are extremely serious, the sentence shall be fixed term imprisonment of not less than ten years, life imprisonment, and may in addition include a fine or confiscation of property.

Id. § 267.

280. Of course, if the penalties for theft and fraud do not serve as a deterrent, then it is not clear whether similar penalties will serve as a deterrent for counterfeiting and piracy. As mentioned earlier, at least one China-specific study found that strong criminal penalties do not serve as a deterrent in robbery cases. This may hold true for theft, fraud, and intellectual property crimes.

other important considerations come into play. The next Section examines the negative implications of the complaint and the countervailing motivations beyond IPRs enforcement that likely drive the dispute. It is likely that these other considerations heavily influenced the United States' decision.

1. No Guarantee That United States Will Prevail

An important consideration in the detailed and prolonged negotiations with China over IPR enforcement was the United States' obvious interest in resolving the matter without resort to the WTO dispute settlement process. There are a number of reasons why the United States would refrain from initiating a WTO complaint against China. For one, there is the possibility that the United States will not prevail, as discussed above. The United States has brought eighteen TRIPS complaints, only a handful against developing countries,²⁸¹ and only three specifically targeting lack of enforcement—all against Western trading partners, none of which have gone to a panel or Appellate Body decision.²⁸² Thus, there is no precedent upon which to evaluate the current U.S. complaint. However, as discussed above, TRIPS provides considerable flexibility to countries in implementing their TRIPS obligations, including those relating to enforcement.²⁸³ This favors China and counsels against filing the complaint.

Second, even if the United States were to win a favorable WTO ruling, it is not clear what the United States would gain. The WTO complaint alleges that China's thresholds for trigger-

281. One reason for the lack of complaints against developing countries is that TRIPS delays compliance with its terms for developing and least developing countries for five and ten years, respectively. The deadlines for least developing countries have been further extended another ten years. See, e.g., *Frequently Asked Question about Trips*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/trips_e/tripfq_e.htm#Who'sSigned (last visited Nov. 18, 2008).

282. See, e.g., Requests for the Consultations by the United States, *European Communities—Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*, WT/DS124/1 (May 7, 1998); Requests for the Consultations by the United States, *Greece—Enforcement of Intellectual Property Rights for Motion Pictures and Television Pictures*, WT/DS125/1 (May 7, 1998); Requests for the Consultations by the United States, *Sweden—Measures Affecting the Enforcement of Intellectual Property Rights*, WT/DS86/1 (June 2, 1997); Requests for the Consultations by the United States, *Denmark—Measures Affecting the Enforcement of Intellectual Property Rights*, WT/DS83/1 (June 13, 2001).

283. Precedent, even though not formally a binding basis for future cases (i.e., no *stare decisis*), remains highly persuasive.

ing criminal penalties for IP infringement are too high.²⁸⁴ The problem with China's lack of enforcement, however, is not that China has failed to enact legislation strengthening intellectual property rights; it is that China does not enforce such legislation. As shown, only a fraction of the total number of enforcement actions that could be brought under the current criminal statute are actually brought. Thus, there is no guarantee that a successful WTO complaint will result in more criminal complaints and prosecutions. Rather, lower thresholds from a successful complaint must be accompanied by some measure of mandatory criminal prosecutions. Thus, reducing the threshold for criminal prosecution is not likely to make a significant difference.²⁸⁵ In light of this, it is puzzling that the United States has limited its claims against China in a manner seeking further legislation without seeking concomitant enforcement.

Moreover, the primary reason for China's lack of enforcement is that enforcement occurs at the local level—not the national level—and local enforcement officials are reluctant to shut down piracy. Officials are reluctant because piracy has a positive effect on local economy and shutting down piracy would significantly adversely affect the entire local economy. Legitimate businesses, including hotels, restaurants, nightclubs, and transport businesses, among others, have arisen to support China's piracy industry. In addition, the China Small Commodities Market, of which the piracy industries are a part, is the town's largest taxpayer. Cracking down on piracy will disrupt this local economy and could result in massive unemployment and social strife and turmoil. Chow and Lee forcefully make this point:

No problem of this size and scope could exist without the direct or indirect involvement of the state. In China, the national government in Beijing appears to be sincere in its recognition of the importance of protecting intellectual prop-

284. See *infra* Part II.A.4.

285. See Mertha, *supra* note 67, at 209. The ultimate goal may be the default criminalization of counterfeiting, but even this suffers from the need to rely on aggressive enforcement by Chinese officials. One suggestion for a more effective remedy is a mandatory criminal penalty in certain situations. On the other hand, rather than encourage intellectual property enforcement or deter future infringement, "increased criminalization of counterfeiting could create a situation where punishments would go far beyond establishing the sought after deterrent effect and become a tool for repression." *Id.* at 208 n.141.

erty rights, but national level authorities are policy and law-making bodies whereas enforcement occurs on the ground at the local level. At this level, local governments are either directly or indirectly involved in supporting the trade in counterfeit goods. Counterfeit has become so important that this illegal trade now supports entire local economies and a crackdown on counterfeiting would result in a shut-down of the local economy with all of the attendant costs of unemployment, dislocation, social turmoil, and chaos. Because the costs of a crackdown at the local level can be so severe, counterfeiting is heavily defended at local levels.²⁸⁶

Clearly, simply changing the threshold for criminal complaints is unlikely to result in a change in local officials' attitudes concerning intellectual property protection.²⁸⁷

2. The Filing Could Impede China's Efforts to Change Domestic Attitudes

Additionally, by bringing the complaint, the United States may impede China's efforts to convince Chinese citizens that protecting intellectual property is in the country's best interests.²⁸⁸ Along with the obvious economic benefits attained by becoming a WTO member, China's decision to become a member was motivated by China's desire to introduce external pressures to help overcome internal obstacles, including social unrest, in the reform process.²⁸⁹ Simply put, a necessary condition for China to accept stronger intellectual property rights is that Chinese citizens and local businesses must be convinced that protection is good for domestic interests. Before now, this has been difficult, in view of the lack of credible evidence supporting this.²⁹⁰

286. CHOW AND LEE, *supra* note 5, at 774.

287. Mertha's comments here are particularly appropriate: "Top-down pressure can result in dramatic, substantive changes in China's legislative, regulating and policymaking processes, but this same form of pressure has little, if any, sustained effect on the implementation and enforcement stages." Mertha, *supra* note 67, at 225.

288. In light of China's political system, some may legitimately debate whether the Chinese government feels it has to convince its citizens of anything. Instead, it may be more accurate to state that advocates of stronger IPR enforcement must convince Communist hardliners and corrupt local officials that it is in these parties' best interest to protect intellectual property rights. This may be a difficult proposition.

289. Julia Ya Qin, *The Impact of WTO Accession on China's Legal System: Trade, Investment and Beyond*, <http://ssrn.com/abstract=985321>.

290. Scholars have argued for increased intellectual property protection on a num-

Further exacerbating the difficulty, China's citizens have traditionally viewed intellectual property protection negatively, as strong intellectual property protection runs counter to China's cultural and historical underpinnings and Communist ideals.²⁹¹ Strong IPRs protection, particularly exerted by exogenous pressures, fuels the flames of anti-American sentiment. China's hostile attitude towards U.S. imperialism and the transplanting of Western ideals is worsened with each U.S. threat to retaliate for China's failure to enforce intellectual property laws. Despite this, over the past decade, China's Central Administration has made significant efforts to persuade the country that the WTO (including TRIPS) is good for China's economy.²⁹² Many efforts to improve IPRs protection have come from within, rather than from foreign pressures. Businesses and government have focused on "knowledge economy" as an attempt to incorporate information into the long-term economic development.²⁹³ The growth of legitimate intellectual property stakeholders in China, largely with governmental assistance, has allowed the Chinese government to emphasize that IPRs provide protection for

ber of grounds, including (1) that such protection is based on the "natural rights" of a creator to the fruits of one's labor; (2) that increased protection will result in future benefits such as creating a culture or ideology of protection for local emerging artists; and (3) that increased protection will result in increased technology transfer and foreign direct investment. *See, e.g.*, Robert J. Gutowski, Comment, *The Marriage of Intellectual Property and International Trade in the TRIPS Agreement: Strange Bedfellows or a Match Made in Heaven?*, 47 *BUFF. L. REV.* 713, 715-16 (1999); Frederick M. Abbott, *The New Global Technology Regime: The WTO TRIPS Agreement and Global Economic Development*, 72 *CHI-KENT L. REV.* 385, 391 (1996); Richard E. Vaughan, *Defining Terms in the Intellectual Property Protection Debate: Are the North and South Arguing Past Each Other When We Say "Property?" A Lockean, Confucian, and Islamic Comparison*, 2 *ILSA J. Int'l & Comp. L.* 307, 321-30 (1996). These justifications have been severely criticized. *See, e.g.*, Martin Kohr, *How the South is Getting a Raw Deal at the WTO*, in *VIEWS FROM THE SOUTH, THE EFFECTS OF GLOBALIZATION AND THE WTO ON THIRD WORLD COUNTRIES* 22 (2000); Marci Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 *VAND. J. TRANSNAT'L L.* 613 (1996); A. Samuel Oddi, *TRIPS—Natural Rights and a "Polite Form of Economic Imperialism,"* 29 *VAND. J. TRANSNAT'L L.* 415 (1996).

291. *See supra* Part I.B.

292. Quite obviously, China has benefited greatly from WTO membership. However, despite enormous growth, China is experiencing serious employment problems and social unrest as a result of its economic reform. *See* Harpaz, *supra* note 2, at 68; *see also* Eric Posner & John C. Yoo, *Reply to Helfer and Slaughter*, 93 *CAL. L. REV.* 957, 969-70 (2005) (questioning whether countries join the WTO for the benefits of the adjudicatory system themselves or for the substantive benefits of the particular treaty regime).

293. *See generally* Peter K. Yu, *The Sweet and Sour Story of Chinese Intellectual Property Rights*, <http://www.peteryu.com/sweetsour.pdf>.

Chinese businesses, not just foreign businesses.²⁹⁴ The government also provided resources to educate the public, including online resources of current IPRs cases and theories, and how China can and does comply with its TRIPS obligations.²⁹⁵ These efforts reinforce the contention that the benefits from WTO membership justify stronger IPRs enforcement. Importantly, these efforts have resulted in slow but gradual recognition by Chinese citizens of the benefits of WTO participation.²⁹⁶ Avoiding setbacks in this area is essential to China's full acceptance of and compliance with its WTO obligations. The United States' WTO complaint threatens to undermine this.

3. China may be Meeting its WTO Obligations

More directly related to the United States' charges is that China may already be meeting its TRIPS obligations. China has passed an impressive array of laws to comply with TRIPS. These laws were passed after extensive negotiation and careful review and, on their face, appear to comply with both the spirit and letter of TRIPS. Moreover, because TRIPS provides a considerable amount of flexibility to members, China's IP legislation may be TRIPS compliant. A number of commentators concur.²⁹⁷

Further, China's recent WTO ascension and its membership in WIPO signify its commitment to adhere to international intellectual property norms, as it continues to reform and modernize its economy. The United States' complaint addresses what it believes to be specific deficiencies in Chinese national law regarding enforcement of intellectual property rights and is a direct indictment of China's ability to live up to agreed international norms.²⁹⁸ Even assuming that China is not complying with its

294. *Id.* at 7-8.

295. See generally Robert Slate, *Judicial Copyright Enforcement in China: Shaping World Opinion on TRIPS Compliance*, 31 N.C.J. INT'L L. & COM. REC. 665 (2006).

296. Massey, *supra* note 31, at 237.

297. See, e.g., Harpaz, *supra* note 2, at 46 ("Although a discussion of the issue of compliance is beyond the scope of this paper, it appears to me that overall China is meeting its WTO commitments. A close look at the USTR's 2005 *Report to Congress on China's WTO Compliance*, demonstrates, in my view, that China is generally complying with its WTO commitments, though there are a number of problems, particularly regarding Intellectual Property Rights, which I consider to be a minor infraction.") (citing OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2005 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE, http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/asset_upload_file293_8580.pdf).

298. See generally Consultations, *supra* note 79.

WTO obligations, strong reasons exist for allowing China additional time to comply.

China's current level of economic development may not be appropriate for the level of intellectual property protection desired by the United States. The extent of both piracy and intellectual property protection depends upon a country's stage of economic development. More specifically, a country's economic development level alters the cost-benefit ratio of protecting intellectual property. As a country progresses, it will pass through at least three stages of economic development, with each stage presenting a different cost-benefit scenario for IPRs protection.²⁹⁹ The first stage is a very low level of economic development, wherein a country has little technological capacity and infrastructure such that intellectual property protection would be irrational; these countries would not have the ability to utilize technology in a meaningful manner.³⁰⁰ The second stage of economic development is that in which a country has the markets and infrastructure necessary for innovation, but has certain limitations. These countries, because they are capable of using more advanced technology, become intellectual property pirates.³⁰¹ Here, again, protection of intellectual property is not paramount because such protection interferes with continued economic progress. The third stage is that in which a country has an advanced level of economic development, with businesses that create world-class inventions providing the country with a significant competitive advantage.³⁰² These countries not only demand increased protection domestically, but also seek increased protection worldwide. Scholars argue that a country in the first and second stages of economic development should be protected from economic damage and be allowed to promote development until the country reaches the stage where it is in the country's best interest to strengthen its intellectual property laws.³⁰³

299. See generally Stefan Kirchanski, *Protection of U.S. Patent Rights in Developing Countries: US Effort to Enforce Pharmaceutical Patents in Thailand*, 16 LOY. L.A. INT'L & COMP. L. REV. 569 (1993).

300. See *id.* at 596.

301. See *id.* at 597.

302. See *id.*

303. See generally *id.*; CHOW AND LEE, *supra* note 5, at 777; COMMISSION ON INTELLECTUAL PROPERTY RIGHTS, INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY: REPORT OF THE COMMISSION ON INTELLECTUAL PROPERTY RIGHTS 22 (2003),

This sentiment is echoed by the Commission on Intellectual Property Rights, an international commission set up by the British government to explore how national intellectual property regimes could best be designed to benefit developing countries within the context of international agreements such as TRIPS.³⁰⁴ In its final report, the Commission cautioned:

[R]apid economic growth is more often associated with weaker IP protection. In technologically advanced developing countries, there is some evidence that IP protection becomes important at a stage of development, but that stage is not until a country is well into the category of upper middle income developing countries.³⁰⁵

Chow and Lee make a similar point:

If history is any guide, most nations appear to experience a surge in commercial piracy at some point in their history when they reach a certain stage of economic development. The United States was the leading pirate nation of the day in the nineteenth century as copies of books by Charles Dickens and other foreign authors were made available in the [United States] without payment of royalties.³⁰⁶

In light of this, these authors ask: “Why shouldn’t China have the same opportunity to accelerate its economic growth . . . ?”³⁰⁷

China’s economic development, as supported by its legal system, is still in its early stages of development (perhaps the second stage outlined above). China dismantled its legal system during the Cultural Revolution (1966-76) and only recently (1978) resuscitated the system. As such, it will take time for China’s system to make progress and operate at its optimal level. During this time, piracy will exist. Indeed, every country that has seen substantial economic and technological growth, including the United States, has done so in part through piracy.³⁰⁸ Allowing China additional time to progress to a stage in which protection is warranted, both externally and internally, may be fit-

available at http://www.iprcommission.org/papers/pdfs/final_report/CIPRfullfinal.pdf [hereinafter CIPR REPORT].

304. See CIPR REPORT, *supra* note 303, at 22.

305. See *id.* at 22.

306. CHOW AND LEE, *supra* note 5, at 777 (citing SHENKAR, *supra* note 22, at 82).

307. See *id.* at 777-78.

308. See Yu, *China Puzzle*, *supra* note 41, at 175.

ting.³⁰⁹

4. The Complaint Could Trigger Chinese Retaliation or Trade Wars

There are at least two final reasons why the United States should not have filed the WTO complaint. One is related to retaliation, the other to a preferred mode of resolving complaints. Filing the WTO complaint could result in resentment, which in turn could result in Chinese retaliation or the escalation of trade wars. In fact, recently, the United States and China have narrowly averted a series of trade wars and economic sanctions over intellectual property infringement.³¹⁰ Since the United States

309. Professor Peter Yu suggests that China is not far from a “crossover point,” i.e., moving from the second to the third stage of economic development. *Id.* at 202. He identifies two primary crossover motivators spurring China towards intellectual property enforcement reform. The first is external pressure from the United States. The second is the development of local stakeholders who benefit from stronger protection. As Yu argues, these motivators, combined with other motivating forces such as China’s desire to develop a knowledge-based economy, China’s economic and reputational gains due to its WTO accession, and China’s shift toward an export-driven economy, will naturally and before long lead China to reach the point where intellectual property protection will become of primary importance. *See id.* at 176; *see also* Abbott, *supra* note 143, at 74-75 (observing that China is likely to strengthen intellectual property rights enforcement when local stakeholders increase their attention to innovation and branding). It was hoped the Beijing Olympics would provide further incentives: “As China continues to increase exports and develop products under globally recognized trademarks, especially after the much-anticipated push around the 2008 Beijing Olympics (and again during the 2010 World Expo in Shanghai), the existence of effective intellectual property protection is likely to be of paramount importance.” Yu, *China Puzzle*, *supra* note 41, at 202.

310. Since China’s early economic emergence in the 1970s, the United States and China have engaged in a series of back-and-forth disagreements over intellectual property. In one of the earlier disputes, China agreed to protect U.S. patent and trademark rights with the same level of protection as U.S. intellectual property protection. *See* Bird, *supra* note 69, at 339 (citing the Agreement on Trade Relations Between the United States of America and the People’s Republic of China of 1979, July 7, 1979, U.S.-P.R.C., 31 U.S.T. 4652). China modified its laws, but dissatisfied, in 1989 the United States placed China on its Priority Watch List. *Id.* at 339-40. Once again, China enacted new intellectual property laws. Once again, frustrated, in 1991 the United States designated China as a Priority Foreign Country, threatening US\$1.5 billion in retaliatory tariffs. *See id.* at 340 (explaining that the United States threatened tariffs on Chinese textiles, shoes, electronics, and pharmaceuticals). China was predictably hostile. Rather than bow to the U.S. pressure, China threatened its own tariffs on aircraft, chemicals, steel, and agricultural goods. The series of events ended in a negotiated settlement—the Memorandum of Understanding on January 17, 1992—avoiding a trade war. *See id.* As described previously, following the 1992 agreement China made substantial and significant changes to its intellectual property laws. *See supra* Part I.C.1; *see also* Bird, *supra* note 69, at 341 (“Within the three-year period from the adoption of

filed its IPR enforcement complaint against China, China has filed a countervailing duty/anti-dumping complaint against the United States, and on March 5, 2008, the United States filed yet another complaint against China for violating obligations in the financial sector under GATS.³¹¹ The United States may very well lose in a trade war, as China may be less reliant on U.S. exports than the United States on Chinese exports.³¹² In some ways, China holds the United States' economic fate in its hands. At the very least, China is able to put equal or greater economic pressure on the United States.

Also, importantly, trade retaliation can damage China's economy and delay further economic and technological development, preventing it from reaching a level where intellectual

the 1992 MOU China improved its intellectual property protection on all fronts.”). However, throughout the 1990's it became clear that, despite substantive changes to its laws, China's enforcement of IPRs was severely deficient. *See id.* In 1994 the USTR again designated China as a Priority Foreign Country and the Clinton Administration threatened tariffs on US\$1 billion worth of Chinese imports. *See id.* Again, China retaliated by threatening tariffs of its own as well as suspending negotiations on potential joint-ventures with U.S. automakers. *See id.* In light of the competing threats, the countries negotiated a settlement. *Id.* at 342; *see supra* Part I.C.2. The cycle repeated itself in 1995 and 1996, and after a period of threatened sanctions, the United States and China reached an agreement in which the United States would remove China from its Special 301 list in return for China's improved enforcement of IPRs. Bird, *supra* note 69, at 342. The cycle of threatened retaliation was broken in the late 1990's as China pushed for entry to the WTO. Bird dubbed this the China Cycle of Coercion. Bird, *supra* note 69, at 343. Peter Yu more aptly described this as the “cycle of futility.” Yu, *supra* note 41. Whatever it is called, the United States was not able to obtain its objectives, largely because of the Chinese economy's rapid growth and the diminished prestige of U.S. foreign policy.

311. Request for Consultations by the United States, *China-Measures Affecting Financial Information Services and Foreign Financial Information Suppliers*, WT/DS373/1 (Mar. 5, 2008).

312. *See* Keith Bradsher, *China Leans Less on U.S. Trade*, N.Y. TIMES, Apr. 18, 2007, at 1 (“To be sure, China's exports to the United States are huge and growing, as is the trade imbalance, which is significantly larger than the European Union's deficit with China. That is the main reason trade is a focus of attention for the newly empowered Democrats in Congress, making it likely that trade frictions between the two countries will persist and possibly worsen in the months ahead.”); *see also* Yu, *supra* note 41, at 198. One commentator has argued that China may retaliate by attempting to recoup losses in other areas, which will not be in China—or the WTO's—long term interests. Christopher Duncan, *Out of Conformity: China's Capacity to Implement World Trade Organization Dispute Settlement Body Decisions After Accession*, 18 AM. U. INT'L L. REV. 399, 481-82 (2002) (“[S]purned by having to respond to a large number of TRIPs disputes, China could attempt to use the DSU's retaliation or cross-retaliation enforcement mechanisms to legitimize its own non-compliance in the event that China successfully challenges another Member. This possibility is clearly not in the best long-term interests of either China or the WTO.”) (citation omitted).

property protection becomes beneficial.³¹³ The acrimonious U.S.-China relationship could decelerate China's intellectual property reform.³¹⁴

5. Negotiation and Diplomacy may be More Effective than Resort to the WTO Dispute Settlement Process

Finally, the United States' filing of the WTO complaint may hinder the chances for both countries to resolve their dispute through negotiation and diplomacy. Understandably, the WTO dispute settlement agreement elevates informal settlement over formal dispute resolution. Article 3(7) of the DSU states: "A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred."³¹⁵ Some U.S. diplomats recognize that such informal attempts are more likely to lead to an amicable resolution, as they lead to decreased rather than increased tensions. U.S. Treasury Secretary Henry Paulson's comment regarding the need for discussion rather than litigation is illustrative:

The task of the SED [Strategic Economic Dialogue] is long-term, and that is difficult in a town where short-termism is the order of the day. A newspaper headline at the conclusion of the recent SED meeting said that it did not "resolve major issues." This, in my opinion, misses the point. The dialogue is an on-going process. To get results, we must build relationships, and take smaller, deliberate steps forward together to create momentum for greater change. Through candid discussions, we will ease, rather than increase, tensions and get to solutions and action.³¹⁶

The complaint could harden stances on both sides making resolution problematic (even if prior negotiations produced slow results).

In sum, the United States' WTO complaint could go awry

313. Kirchanski, *supra* note 299, at 605.

314. See Bird, *supra* note 69, 339-44. Another important consideration is the effect the complaint will have on the legitimacy and efficacy of TRIPS and the WTO. Arguably, there is more riding on how a WTO panel will resolve the dispute than simply the implications for China and the United States.

315. DSU, *supra* note 153, art. 3(7).

316. Henry M. Paulson, Jr., Secretary, U.S. Department of Treasury, Remark at the Heritage Foundation Lee Lecture: China and the Strategic Economic Dialogue (June 5, 2007) (emphasizing the need for precise, measured steps appropriate for trade talks, not sweeping solutions).

and slow China's legal reform process, such as what occurred during China's WTO accession, when intellectual property rights reform slowed as China encountered obstacles from negotiations with the United States and the European Union.³¹⁷ This was overcome through continued negotiations and China's realization that a commitment to strengthening intellectual property rights and WTO accession begat economic benefits and reputational gains.³¹⁸

C. *Reasons Underlying the Filing of the WTO Complaint*

In light of the myriad reasons for the United States to refrain from initiating a WTO complaint, the United States' action is questionable. Compounding this is the basis of the complaint. As seen, the complaint does not address the lack of enforcement, as many scholars believed was the more immediate concern.³¹⁹ Rather, the complaint addresses the lack of effective legislation. Accordingly, the filing of the complaint could be viewed as a strategic error. However, a number of reasons may explain the United States' action, and tempting as it may be to view the issue of IPR enforcement in isolation, this would be a mistake.³²⁰ The reality is that more than China's lack of intellectual property enforcement fuels the United States' action. In examining these reasons, it is instructive to briefly review the history of the United States' use of the international dispute settlement system, including the WTO dispute settlement system. This history sheds light on the United States' current use of the WTO dispute settlement system, including the filing of the complaint.

317. See Yu, *supra* note 41, at 196 (quoting Hong Xue & Chengsi Zheng, CHINESE INTELLECTUAL PROPERTY LAW IN THE 21ST CENTURY xxxix (2002)). Professor Yu remarks that "[i]t would not be too far-fetched to argue that China might still remain outside the WTO had it not strengthened its protection of intellectual property rights." *Id.* at 196.

318. *Id.* at 196-97 ("To some extent, the economic benefits and reputational gains that were associated with China's accession to the WTO far exceeded the socio-economic costs incurred by increased intellectual property protection.")

319. See Thomas E. Volper, Note, *TRIPS Enforcement in China: A Case for Judicial Transparency*, 33 BROOK. J. INT'L L. 309, 339 (2007) (noting that the U.S. approach is ineffective because it "[f]ocuses primarily on lack of criminal enforcement . . .").

320. This is not to suggest that IPR enforcement is not a key issue. China's non-compliance reportedly costs the United States upward of US\$200 billion annually. See COUNCIL ON FOREIGN RELATIONS, U.S.-CHINA RELATIONS: AN AFFIRMATIVE AGENDA, A RESPONSIBLE COURSE 57 (2007). It is merely that other factors are clearly at play.

1. "Pragmatic, Short-term and Highly Contextual Calculations"

In a recent article, Professor Jeffrey Dunoff argued that the United States pursues WTO remedies not for an abstract commitment to the rule of law, but to pursue specific economic and geostrategic interests.³²¹ In helping to explain the United States' current use of the WTO dispute settlement system, Dunoff examined the history of the United States' participation in and use of existing international dispute settlement systems.³²² Dunoff traced the U.S. trading system from its birth, when trade, subject to "interest-group politics," was largely a national, domestic concern, through the growth of the United States' involvement in a bilateral and, ultimately, the multilateral trading system.³²³ Early bilateral agreements did not contemplate legalized dispute settlement, but instead demonstrated a desire to settle disputes through voluntary consultations, under the belief that economic disputes could be better addressed through diplomatic rather than legalistic mechanisms.³²⁴ When, however, the United States turned to the international trade dispute settlement system, in almost every instance it did so because of domestic pressures or "pragmatic, short-term and highly contextual calculations that [the dispute settlement] mechanism serve[d] U.S. interests better than alternative arrangements."³²⁵ By using the

321. See generally Jeffrey L. Dunoff, *Does the U.S. Support International Tribunals? The Case of the Multilateral Trade System*, in *THE UNITED STATES AND INTERNATIONAL COURTS AND TRIBUNALS* (Cesare Romano ed., forthcoming 2007), available at <http://ssrn.com/abstract=984294> ("To the extent adjudication of trade disputes is seen as advancing U.S. economic interests, it is likely that the United States will continue to support legalized dispute settlement."); see also Nzelibe, *supra* note 54, at 3 ("[M]ember states operate in an institutional and political context in which the purported benefits of an action outweighs its costs.")

322. See generally Dunoff, *supra* note 321.

323. *Id.* at 2-3. Dunoff noted that during the nineteenth century, the benefits of a liberal approach to trade were felt by a diffuse population, while the well-organized, concentrated interest groups were disadvantaged by liberalization. As a result, these organized groups had a disproportionate influence in national policy. This protectionist approach continued through the 1930s. The 1930 Smoot-Hawley legislation imposing high import duties resulted in parallel protectionism in other countries. "In short order, Canada, Cuba, France, Mexico, Italy, Spain, Australia and New Zealand all raised their tariffs; twenty-six states imposed quotas and exchange controls by 1931; and the United Kingdom abandoned liberalized trade the following year." *Id.*

324. *Id.* at 5 ("The underlying premise—apparently widely accepted at the time—was that economic disputes could be better addressed through diplomatic rather than legalistic mechanisms.")

325. *Id.* at 1.

system, U.S. trade officials mediated pressures exerted by both foreign trade officials and domestic political actors.³²⁶ Conversely, viewing the dispute settlement mechanism in instrumental terms, when highly legalized processes were perceived to threaten United States' interests, the United States' use of the settlement mechanism differed—the United States neither advocated for nor participated in these legalized dispute settlement mechanisms.³²⁷

The United States' WTO complaint against China bears out Professor Dunoff's observations. It is more than championing the rule of law or general U.S. dissatisfaction that is fueling action against China.³²⁸ It is the United States' specific relationship and dissatisfaction with China. More particularly, the answer lies in a broad analysis of both the current international

326. From the 1940s to the 1960s, the United States pushed to create an international trade organization, ultimately leading to the General Agreement and Trade Tariffs ("GATT"). The dispute resolution procedure adopted, while international, closely resembled proposals submitted by the United States. *Id.* at 11 (the GATT was "an expression of American policy."). The GATT followed the failure of the International Trade Organization ("ITO"), which was doomed to failure when the United States failed to ratify the ITO Charter. *See id.* William Diebold, *Reflections on the International Trade Organization*, 14 N. ILL. U. L. REV. 335, 339 (1994) (attributing the failure of the ITO largely to protectionist pressures and a lack of business support); *see generally* Seymour J. Rubin, *The Judicial Review Problem in the International Trade Organization*, 63 HARV. L. REV. 78 (1949); John H. Jackson, *Perspectives on the Jurisprudence of International Trade: Costs and Benefits of Legal Procedures in the United States*, 82 MICH. L. REV. 1570 (1984). During the early GATT years, the United States frequently used the dispute settlement mechanism, more than any other party. Dunoff, *supra* note 321, at 12. This use can be explained by the United States' relative power and the GATT membership, which consisted of a small number of "[l]ike-minded states . . ." *Id.* at 13.

327. Dunoff, *supra* note 321, at 15. During the 1960s, the membership of the GATT changed dramatically. The European Community emerged as a new "muscular superpower." *Id.* at 14. (quoting ROBERT E. HUDEC, *ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM* 12 (1993)).

328. The U.S. response to China's emergence as an international force has spanned the gambit from adversary—following the 1999 bombing of the Chinese Embassy in Belgrade and the 2001 spy-plane incident on Hainan Island—to a partner in the war on terror and the Six-Party talks on the North Korean nuclear issue. U.S. Department of State, Bureau of East Asian and Pacific Affairs, *China*, <http://www.state.gov/r/pa/ei/bgn/18902.htm> (last visited Nov. 18, 2008). Following the events of September 11, 2001, the natural focus of the administration and Congress shifted from addressing and managing issues with the key powers to combating terrorism. The effect on U.S. relations with China has been to promulgate a short-term, pragmatic strategy dictated by international events and domestic political pressures. *See* Dunoff, *supra* note 321, at 29 (discussing the United States' employment of the dispute settlement system as a reflection of "[p]ragmatic Executive Branch decisions designed to deflect protectionist pressures and silence Congressional critics.").

and domestic realities, including the current international economic climate, both the United States' and China's international political positions, the current relationship between the United States and China, and the domestic political and economic environment of both countries.³²⁹ Thus, rather than focus solely on the United States' interests in isolation, the analysis is specific to the U.S.-China relationship and its inherent dynamics.³³⁰ Looking more closely at the U.S.-China relationship may thus help not only explain the WTO complaint, but may also presage its possible outcome.

2. Domestic Industry Pressures

A recent task force created by the Council of Foreign Relations characterizes the sources of tension between the United States and China as being four-fold: (1) China's rapid economic development, (2) China's lagging political liberalization and respect for human rights, (3) China's expanding economic and political influence in the developing world, and (4) United States' resources being diverted to combat terrorism.³³¹ These four areas form much of the underlying motivation for the United States' complaint against China. Of these four areas, though, China's rapid economic development predominates.

China's rapid economic development has proven to be both problematic and lucrative for U.S. business interests. The sheer population of China presents an unprecedented and untapped market for American goods and services, including those central

329. See generally Jordan Brandt, *Comparing Foreign Investment in China, Post-WTO Accession, With Foreign Investment in the United States, Post-9/11*, 16 PAC. RIM. L. & POL'Y J. 285 (2007); Symposium, *China and the WTO*, 24 ARIZ. J. INT'L & COMP. L. 89 (2007); Eileen Francis Schneider, Note, *Be Careful What You Wish For: China's Protectionist Regulations of Foreign Direct Investment Implemented in the Months Before Completing WTO Accession*, 2 BROOK. J. CORP. FIN. & COM. L. 267 (2007).

330. The broader U.S.-China relationship has long involved a degree of nuance and complexity, from the half century long dispute over the status of Taiwan, to concerns over human rights and political freedoms, to the growing economic interdependence of the United States and Chinese markets. As China has emerged as an international power, the relationship has grown increasingly more complicated. In the post-Deng Xiaoping era, China's economy has grown at a rate of near to or exceeding double-digits. China has reasserted itself as a major power in Asia, it continues to modernize its already numerically staggering military, and it has become an increasingly important presence within international organizations. The United States and China both have the potential to exert immense political, economic and military power at the regional and global level.

331. COUNCIL ON FOREIGN RELATIONS, *supra* note 320, at 6-7.

in the intellectual property debate such as software, music, and films.³³² Here, the analysis dovetails with Dunoff's claim that the ability of domestic constituencies, including intellectual property users, to influence or compel state action affects United States' action.³³³ Indeed, within the United States, unions, corporate groups, and industry groups carry extensive lobbying power over the executive and legislative branches of government.³³⁴ For example, in a statement to the Committee on House Ways and Means Subcommittee on Trade, Thea M. Lee, Policy Director of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), impressed upon Congress the need to take immediate action against China. Specifically, in supporting a bill relating to currency valuation, Lee stated:

Currency manipulation is an urgent economic issue for American workers and businesses. We all live and work and compete in the global economy—but in order to succeed in the global economy, we need our own government to ensure that the terms of competition are fair. Defining—and ade-

332. See Peter K. Yu, *From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China*, 55 AM. U.L. REV. 901, 929-30 (2006) (noting that American companies have to compete with both local companies and other foreign companies that are "[r]ushing to the Chinese market because of 'China fever.'" (citing HAROLD CHEE & CHRIS WEST, MYTHS ABOUT DOING BUSINESS IN CHINA 30 (2004))).

333. Professor Dunoff argues that "[m]any U.S. cases involve something of a 'partnership' with interested private actors, who provide organization, financial, political and informational resources to the USTR." Dunoff, *supra* note 321, at 26. Domestic industry groups long pressured the USTR to initiate a WTO complaint against China. In response, the USTR pursued bilateral negotiations, usually backed by Section 301 threats, rather than bring the complaint. In 2005, industry groups again requested the USTR to bring a complaint. The USTR declined, however, noting that the industry "had not presented the kind of specific information that would be required to successfully pursue a WTO complaint." Abbott, *Law and Its Limitations*, *supra* note 144, at 67.

334. Not all businesses are ready to criticize China. Some businesses operating in China out of fear of loss of business have been reluctant to provide information to the U.S. government to bring a case before the WTO. Support from U.S. businesses for WTO action largely depends upon whether the business is operating in China. Many businesses that operate within China counsel against WTO action. See, e.g., *The End of the Beginning*, *supra* note 148. Part of the reluctance stems from possible recriminations and retaliation from the Chinese government, which might hurt U.S. businesses in China. Businesses are acutely aware that they are subject to Chinese regulation and that Chinese authorities can immediately negatively impact their business, for example, by shutting it down. As such, multinational corporations operating in China "have adopted a cooperative non-confrontational strategy that seeks to educate China that protecting intellectual property rights are in China's own long-term best interests." CHOW & LEE, *supra* note 5, at 790.

quately addressing—currency manipulation is an essential element of ensuring fair global competition, but the institutions of the global economy and our own government have so far failed to rise to this challenge.

. . . .

So many promises, so few results.

The Bush administration has refused to hold the Chinese government to its international obligations on trade, currency manipulation and human rights, and has denied American businesses import relief they are entitled to under the law

. . . .

The AFL-CIO believes that the Bush Administration needs to move beyond “bilateral consultation” and continued dialogue to address the urgent problems in the U.S.-China and U.S.-Japan trade and economic relationships.

First, the Administration should use the annual Treasury Department exercise to send a clear and consistent message to the governments of both China and Japan that they have been identified as currency manipulators and that concrete actions will follow if needed adjustments are not made in a timely fashion.

Second, the Administration should signal that it will initiate WTO dispute resolution with respect to ongoing currency manipulation.

But Congress cannot wait for this Administration to act.

We urge Congress to give immediate consideration to the Fair Currency Act of 2007, H.R. 782.³³⁵

Of course, the industries most related to intellectual property rights have been vocal in their attacks against China. The movie industry, for example, has constantly criticized China for its lack of enforcement and has also criticized the U.S. Administration for not enforcing intellectual property protection commitments obtained in trade agreements.³³⁶ Dan Glickman, Chairman and CEO of the Motion Picture Association of America, has criticized the Administration, complaining that

335. *Hearing Before the Subcommittee of Trade of the House Committee on Ways and Means*, 110th Cong. (2007) (statement of Thea Lee, Policy Director, American Federation of Labor-Congress of Industrial Organizations (“AFL-CIO”)).

336. See generally Andrew Noyes, *Intellectual Property; Web Piracy Called a Dagger in Movie Industry’s Heart*, TECHNOLOGY DAILY, June 12, 2007.

“trade agreements ‘do no good if we cannot enforce them’” and also criticized the Bush Administration for spending “more time working on new deals than enforcing those already in place.”³³⁷ According to Glickman, China, as the worst infringer of U.S. IPRs, “can and should show the world that it intends to play by the rules [because] the whole world is watching,” a reference to the 2008 Beijing Olympics.³³⁸ Other businesses echo these cries.³³⁹

3. Congressional Pressure

So too has Congress been vocal in its recriminations against China. This involves more than intellectual property rights violations, and includes a wide range of economic and security issues.³⁴⁰ Much of Congress’s ire has been focused on the trade imbalance with the underlying loss of American jobs and reduced wages.³⁴¹ The U.S. trade deficit with China reached a high of US\$232.5 billion in 2006.³⁴² It is of no small moment

337. See Sen. Finance, *Trade Enforcement*, CONGRESSIONAL QUARTERLY, June 12, 2007 (Testimony by Dan Glickman, MPAA Chair & CEO).

338. *Id.*

339. See, e.g., Mark Kleinman, *Chasing Copycats in a Tiger Economy Western Firms Fight an Increasingly Fraught Battle to Protect their Names in China*, THE DAILY TELEGRAPH (U.K.), June 9, 2007, at City 30. (“Inadequate protection of intellectual property rights in China costs U.S. firms and workers billions of dollars each year, and in the case of many products, it also poses a serious risk of harm to consumers in China, the U.S. and around the world.”); see also COUNCIL ON FOREIGN RELATIONS, *supra* note 320, at 57-58 (2007); Tai-Heng Cheng, *Power, Norms, and International Intellectual Property Law*, 28 Mich.J. Int’l L. 109, 150-53 (2006) (describing the impact of Chinese piracy of U.S. intellectual property and the response of the U.S. aerospace industry to potential sanctions against China levied by the United States).

340. See U.S. *Interests in the Reform of China’s Financial Services Sector: Hearing of the H. Fin. Serv. Comm.*, 110th Cong. (2007) (statement of Rep. Barney Frank) (recognizing the concern of Americans and noted that the Chinese economic market is open only for those areas in which China dominates. “The Chinese should understand that until and unless they do a better job of practicing in China what they preach within the United States, namely, openness in terms of your economy even when another economy might outperform you, they will continue to run into resistance.”).

341. See Wayne M. Morrison, *China-U.S. Trade Issues*, TABLE CONGRESSIONAL RESEARCH SERVICE (CRS) REPORTS AND ISSUE BRIEFS, H.R. DOC. NO. 275,1958, S.571 (2007) (“The Bush Administration has come under increasing pressure from Congress to take a more aggressive stance against various Chinese economic and trade practices. Numerous bills introduced in Congress look to restrict or punish China for these practices, either directly, such as a proposal to remove permanent normal trade relations status, or indirectly, such as placing restrictions on U.S. companies dealing with countries that restrict Internet access.”).

342. See *The End of the Beginning*, *supra* note 148 (explaining that the United States

that the United States' WTO complaint was filed shortly after Democratic Party leaders called upon President Bush to generate a comprehensive plan to eliminate the rising deficit with China.³⁴³ At the same time, the Administration was engaged in intensive negotiations with Congress regarding the approval of recent trade agreements (signed with Columbia, Peru, and Panama) and extending the Administration's trade promotion authority.³⁴⁴ Tied closely to the trade imbalance is the valuation of China's currency, and the perception that China has intentionally maintained an overvalued Yuan to promote its own exports.³⁴⁵ This again is consistent with Professor Dunoff's claim that the timing of the United States' complaints "reflects the historic American pattern of initiating disputes when the country is facing negative trade balances, rising protectionist voices at home, or when the Administration is about to seek new trade negotiation authority from the Congress."³⁴⁶

Congress has not limited itself to rhetorical attacks against China; rather, Congress has also introduced substantial legislation to exert pressure on both the Executive Branch and, ultimately, on China. Such legislation includes: (1) a bill that threatens China with sanctions if it does not revalue its currency (providing that a country that engages in exchange rate misalignment can be subject to a countervailing export subsidy);³⁴⁷ (2) a bill seeking to establish a "trade prosecutor;"³⁴⁸ and (3) a bill to "improve the management, coordination and effective-

has posted a trade deficit since the 1970s, and it has been rapidly increasing since 1997. The U.S. trade deficit hit a record high of US\$763.6 billion in 2006, up from US\$716.7 billion in 2005); see also ANIL HIRA & RON HIRA, *OUTSOURCING AMERICA: WHAT'S BEHIND OUR NATIONAL CRISIS AND HOW WE CAN RECLAIM AMERICAN JOBS* 36-38 (2005). Scholars such as Paul Craig Roberts, Paul Samuelson, and Lou Dobbs have expressed concerns over outsourcing, predicting trade deficit. *Id.*

343. See Dunoff, *supra* note 321, at 28 (citing G. Yerkey, *Democrats call on Bush to Craft Plan to Eliminate Trade Deficits with "Big 3,"* WTO REPORTER (February 15, 2007)).

344. See *id.* at 29.

345. A close analogy may be drawn to similar congressional attacks against Japan during its export-led development in the 1970s and 1980s.

346. Dunoff, *supra* note 321, at 28.

347. Trade Prosecutor Act, S.445, 110th Cong. (2007) (establishing the position of Trade Enforcement Officer and a Trade Enforcement Division at the Office of the U.S. Trade Representative).

348. Intellectual Property Enforcement Act, S.522, 110th Cong. (2007) (improving the management, coordination, and effectiveness of international intellectual property enforcement).

ness of international intellectual property enforcement.”³⁴⁹ The protectionist voices in Congress and in the private sector concern others, such as Treasury Secretary Henry Paulson, who stated that those who believe in open economies are “swimming against a strong protectionist tide” that reflects the view of “a large section of the American public.”³⁵⁰ In short, protectionism is the sentiment of the day.³⁵¹

The problem, of course, is that protectionism is not a growing force only in the United States. Protectionism begets protectionism.³⁵² It is thus no surprise that it is playing a role in China’s domestic politics as well. China’s custom regulations and protection of domestic industries such as the telecommunications industry—where only six of 20,000 telecommunications licenses had gone to foreigners³⁵³—have led the United States and the European Union to complain about China’s trade practices. While the United States has an impressive trade relationship with China—a recent study by the Institute for Interna-

349. Fair Currency Act, S.796, 110th Cong. (2007) (providing that exchange rate misalignment by any foreign nation is a countervailable export subsidy).

350. Henry M. Paulson, Jr., Secretary, U.S. Department of Treasury, Remark at the Heritage Foundation Lee Lecture: China and the Strategic Economic Dialogue (June 5, 2007).

351. Congress’ actions are likely politically motivated. For one, it could be argued that the United States is using the WTO dispute settlement system to forestall protectionist measures in Congress. The administration has been under increased pressure from Congress. See generally Morrison, *supra*, note 341. Treasury Secretary Henry Paulson, Commerce Secretary Carlos Gutierrez, and Trade Rep. Susan Schwab have warned that action taken by Congress to address the China problem “could potentially violate our international obligations” and may lead to retaliation. See Jed Graham, *Congress Pushes Anti-China Legislation as Paulson Warns Bill Could Backfire*, INVESTOR’S BUSINESS DAILY, Aug. 2, 2007, at A01. Working through the WTO dispute settlement system may be the only alternative to prevent Congress from taking more serious action, such as raising tariffs. See generally Editorial, *Strategic Economic Dialogue Stumbles*, THE JAPAN TIMES, May 28, 2007. Second, the 2008 election cycle starting as early as any cycle in history, and economic issues forming the bedrock of most Congressional and Senatorial campaigns. See Andrew Gumbel, *Rivals Compete to Show Off Economic Nows*, THE INDEPENDENT (London), Jan. 24, 2008, at 32. Polls indicate that the economy is the number one concern for voters, and “the deepening economic crisis will dominate everything between now and November.” *Id.* As such, both political parties will be staking out positions supporting American economy and protecting American jobs from the actual or perceived threats posed by China.

352. Historically, this in-kind response to protectionism goes back to the 1930 Smoot-Hawley legislation, when high tariffs in the United States was followed by increased tariffs in eight countries, and a number of protectionist measures in other countries. Dunoff, *supra* note 321, at 3.

353. Richard McGregor & Andrew Bounds, *EU Trade Chief Warns China’s Surplus is ‘Unsustainable’*, FIN. TIMES (London), June 11, 2007, at 8.

tional Economic and Center for Strategic and International Studies found that the United States' economy was approximately US\$70 billion richer as a result of trade with China,³⁵⁴ China's trade relationship with the European Union is more impressive and growing even faster, with bilateral trade growing by twenty-nine percent in the last year (projected to exceed £170 billion by the end of 2007).³⁵⁵ It will thus be important for Europe to also exert pressure on China. Europe is currently taking a wait-and-see approach.³⁵⁶

At bottom, the United States' IPR enforcement complaint against China largely reflects the broader tensions within the U.S.-China relationship. The current administration is under significant Congressional pressure to maintain the United States' position in the global economy, as well as its political clout. Meanwhile, even though many U.S. businesses decry China's lack of enforcement, others that have benefited from ongoing reforms in China's economy are torn between potential loss of business resulting from retaliatory Chinese state action and the ongoing losses resulting from piracy. The breadth of issues impacting the U.S.-China relationship suggests that the IPR issue would best be resolved diplomatically, rather than through the WTO dispute settlement process, particularly as these countries are going to be repeat players in the contest for global power and influence.³⁵⁷

That this is not the case suggests that the United States may simply have had little choice. The very detailed negotiations sur-

354. FRED BERGSTEN, BATES GILL, NICHOLAS R. LARDY, & DEREK MITCHELL, CHINA: THE BALANCE SHEET: WHAT THE WORLD NEEDS TO KNOW NOW ABOUT THE EMERGING SUPERPOWER 10 (Inst. For Int'l Econ. & Ctr. For Strategic and Int'l Studies ed., Public Affairs 2006).

355. See generally McGregor & Bounds, *supra* note 353. The European Union is obviously concerned. See *id.* (warning that the European Union is growing impatient at China's failure to "tame an export machine driven by a powerful combination of low cost of capital, lax environmental and regulatory controls and a burgeoning entrepreneurial class, with greater freedom to do business offshore than ever before."). European Union Commissioner for Trade Peter Mandelson has cautioned, "[i]f China wants to keep our trade relationship on an even keel then it is going to have to recognise the misgivings that exist in Europe about those policies which in our view restrict European companies entering its market." *Id.*

356. See generally McGregor & Bounds, *supra* note 353.

357. Constant attacks being waged at the WTO may likely lead to a "breakdown in cooperative behavior." This is especially so since both states enjoy comparable military capabilities, with both countries enjoying nuclear capabilities and large economies. See Nzelibe, *supra* note 54, at 11.

rounding China's WTO accession, several agreements during the 1990s, rampant piracy with no improvement despite continuous promises, the enormous trade deficit, cries in Congress for protectionist policy, and the possible damage to U.S. reputation left the United States with no real alternative. Still, the United States can use the WTO complaint to optimize its position across this range of issues, obtaining concessions beyond WTO compliance.³⁵⁸ It has done this with a number of other WTO complaints, which the United States filed but ultimately resolved without a formal ruling.³⁵⁹ China's high visibility on the world stage as a result of the 2008 Beijing Olympics also provided the United States with the opportunity to take advantage of China's relative vulnerability to international pressure.³⁶⁰ At any rate, the complaint moves the United States and China to a new level of potential conflict.

CONCLUSION

If the United States is successful in its complaint, China would be required to lower thresholds for criminal penalties. This does not ensure a corresponding rise in criminal prosecutions or, for that matter, a reduction in infringement. However, the complaint is important in a number of respects. First, by 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. Second, the current WTO complaint can be seen as an intermediary step in the United States' effort to have China improve IPRs enforcement. In its 2006 Top to Bottom Review of U.S.-China Trade Relations, the USTR identified three phases in its trade relations with China. Phase One consisted of the fifteen-year period from 1986-2001. During that period, the United States'

358. See generally Christopher Duncan, *Out of Conformity: China's Capacity to Implement World Trade Organization Dispute Settlement Body Decisions After Accession*, 18 AM. U. INT'L L. REV. 399 (2002).

359. See, e.g., Mutually Agreed Solution, *China-Value-Added Tax on Integrated Circuits*, WT/DS309/8 (Oct. 5, 2005); Mutually Agreed Solution *China-Measures Granting Refunds, Reductions, or Exemptions from Taxes and Other Payments*, WT/DS358/14 (Jan. 4, 2008).

360. Dunoff, *supra* note 314, at 29 (citing H. Cooper, *Darfur Collides with Olympics, and China Yields*, N.Y. TIMES, Apr. 13, 2007, at A1).

trade policy was principally focused on “negotiating foundational trade agreements with China necessary to bring China into the rules-based world trading system.”³⁶¹ This phase ended with China acceding to the WTO. During this time, the United States’ trade with China increased from US\$8 billion to US\$121 billion, moving China from the eighteenth U.S. trading partner to the fourth.³⁶² During the second phase, from 2001 to 2005, the principal focus of U.S. trade policy towards China was “to monitor China’s integration into the global trading system and ensure compliance with its accession obligations.”³⁶³ The current phase, 2006-forward, seeks a “more equitable and durable” trade relationship with China, focusing on growth of U.S. exports, and also on ensuring full compliance with China’s international obligations, including the more difficult obligations.³⁶⁴ Seen in this light, the United States has moved beyond monitoring China’s global trade integration and into a more active role in ensuring full compliance. The complaint may be one of a series of complaints that steadily make certain that China is fully implementing its obligations. One such future action could be related to *enforcement* of existing laws rather than on enacting additional legislation.

More likely, however, is that the 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. The consequence is that the complaint may further damage the relationship between the United States and China. The potential gains must come from other non-IP areas such as correcting the currency valuation and reducing the trade deficit. Whether the potential gains will outweigh the potential damage is the ultimate question. The answer remains to be seen.

361. USTR, *supra* note 76, at 8.

362. *Id.*

363. *Id.* at 9.

364. *Id.* at 10-11.