

2007

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### Recommended Citation

Thomas E. Volper, *TRIPS Enforcement in China: A Case for Judicial Transparency*, 33 Brook. J. Int'l L. (2007).  
Available at: <https://brooklynworks.brooklaw.edu/bjil/vol33/iss1/7>

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# TRIPS ENFORCEMENT IN CHINA: A CASE FOR JUDICIAL TRANSPARENCY

## INTRODUCTION

Complaints of weak intellectual property right (“IPR”) enforcement in China are legion. This widespread criticism is understandable in light of the immense scale of the problem. For example, in 2005 the U.S. Trade Representative (“USTR”) proclaimed that IPR infringement rates in China had been estimated at over ninety percent “for virtually every form of intellectual property.”<sup>1</sup> Over eighty percent of all IPR infringing products seized at the U.S. border in 2006 came from China.<sup>2</sup> These figures persist in spite of China’s membership in the World Trade Organization (“WTO”) Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”).<sup>3</sup> TRIPS members are expected to meet certain minimum standards of IPR protection.<sup>4</sup> If a member violates these standards, other members may bring a case to the WTO Dispute Settlement Body (“DSB”) to demand compliance of the offending member.<sup>5</sup> After several years of threats and harsh rhetoric,<sup>6</sup> on April 10, 2007, the

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1. U.S. TRADE REPRESENTATIVE [USTR], 2005 SPECIAL 301 REPORT 16, *available at* [http://www.ustr.gov/assets/Document\\_Library/Reports\\_Publications/2005/2005\\_Special\\_301/asset\\_upload\\_file195\\_7636.pdf](http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/2005_Special_301/asset_upload_file195_7636.pdf) [hereinafter 2005 SPECIAL REPORT].

2. USTR, 2007 SPECIAL 301 REPORT 18, *available at* [http://www.ustr.gov/assets/Document\\_Library/Reports\\_Publications/2007/2007\\_Special\\_301\\_Review/asset\\_upload\\_file230\\_11122.pdf](http://www.ustr.gov/assets/Document_Library/Reports_Publications/2007/2007_Special_301_Review/asset_upload_file230_11122.pdf) [hereinafter 2007 SPECIAL REPORT].

3. *See* WTO Membership—In Brief, Dec. 11, 2005, *available at* [http://www.wto.org/english/thewto\\_e/acc\\_e/acc\\_e.htm](http://www.wto.org/english/thewto_e/acc_e/acc_e.htm) [hereinafter WTO Membership].

4. Agreement on Trade-Related Aspects of Intellectual Property Rights art. 1(1), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994), *available at* [http://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm#TRIPs](http://www.wto.org/english/docs_e/legal_e/legal_e.htm#TRIPs) [hereinafter TRIPS] (“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.”).

5. *See infra* Part I.C.

6. *See, e.g.*, Rick Valliere, *U.S. Continues to Press China for Stricter Enforcement of Intellectual Property Rights*, PAT., TRADEMARK & COPYRIGHT J., vol. 72 No. 1788, Oct. 6, 2006 (“Christian Israel, deputy assistant secretary for technology policy at the Department of Commerce, said that bringing a first intellectual property case against China under the World Trade Organization is ‘under serious consideration.’”); Kathleen E. McLaughlin, *EU Trade Chief Warns China Failure to Meet IPR, WTO Commitments May Spark Backlash*, PAT., TRADEMARK & COPYRIGHT J., vol. 72 No. 1774, June 16, 2006 (“Assistant U.S. Trade Representative Tim Stratford told a commission in Washington that a WTO case against China over IPR is ‘very possible.’ Stratford said the U.S. government is laying the foundation for a formal complaint with the trade body.”); Christopher S. Rugaber, *USTR Cites Russia, China for IPR Violations, but Avoids Punitive Action*, PAT., TRADEMARK & COPYRIGHT J., vol. 72 No. 1768, May 5, 2006 (“[T]he USTR

USTR<sup>7</sup> finally initiated action in the WTO against China based on its unsatisfactory IPR enforcement record.<sup>8</sup> The case alleges failure to meet

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will 'step up consideration of its WTO dispute settlement options' . . . ."); 2005 SPECIAL REPORT, *supra* note 1, at 15 ("The United States remains gravely concerned . . . that China has not resolved critical deficiencies in IPR protection and enforcement and, as a result infringement remains at epidemic levels."); *US, Switzerland, Japan Launch New WTO Probe On China's IP Enforcement*, INTELL. PROP. WATCH, Oct. 26, 2005, <http://www.ip-watch.org/weblog/index.php?p=120> [hereinafter *New WTO Probe*] ("During the 25 October TRIPS Council meeting, China was accused of continued 'rampant' piracy and counterfeiting . . . ."); Andrew Yeh & Christopher S. Rugaber, *China Says IPR Crackdown Under Way; Aldonas to Press China on Enforcement*, PAT., TRADEMARK & COPYRIGHT J., vol. 68 No. 1687, Sept. 17, 2004 ("China's failure to enforce its IPR laws 'is something that would amount to a violation of their WTO obligations and they do need to pick up the pace in terms of reform.'"); USTR, 2003 SPECIAL 301 REPORT, SECTION 306, at 10, *available at* [http://www.ustr.gov/Document\\_Library/Reports\\_Publications/2003/2003\\_Special\\_301\\_Report/Special\\_301\\_Report\\_Section\\_306.html](http://www.ustr.gov/Document_Library/Reports_Publications/2003/2003_Special_301_Report/Special_301_Report_Section_306.html) ("The lack of transparency and coordination among Chinese government agencies, local protectionism and corruption, high thresholds for criminal prosecution, lack of training and weak punishments all hamper enforcement of IPR.").

7. The USTR is "a Cabinet member who serves as the president's principal trade advisor, negotiator, and spokesperson on trade issues." Office of the USTR, Mission of the USTR, [http://www.ustr.gov/Who\\_We\\_Are/Mission\\_of\\_the\\_USTR.html](http://www.ustr.gov/Who_We_Are/Mission_of_the_USTR.html). It is the USTR's responsibility to monitor and enforce U.S. rights under trade agreements, which includes taking action in the dispute settlement system of the WTO. USTR, 2006 ANNUAL REPORT 219 (2006), *available at* [http://www.ustr.gov/assets/Document\\_Library/Reports\\_Publications/2006/2006\\_Trade\\_Policy\\_Agenda/asset\\_upload\\_file922\\_9075.pdf](http://www.ustr.gov/assets/Document_Library/Reports_Publications/2006/2006_Trade_Policy_Agenda/asset_upload_file922_9075.pdf).

8. Office of the USTR, Press Release, United States Files WTO Cases Against China Over Deficiencies in China's Intellectual Property Rights Laws and Market Access Barriers to Copyright-Based Industries (Apr. 9, 2007), *available at* [http://www.ustr.gov/Document\\_Library/Press\\_Releases/2007/April/United\\_States\\_Files\\_WTO\\_Cases\\_Against\\_China\\_Over\\_Deficiencies\\_in\\_Chinas\\_Intellectual\\_Property\\_Rights\\_Laws\\_Market\\_Access\\_Barr\\_printer.html](http://www.ustr.gov/Document_Library/Press_Releases/2007/April/United_States_Files_WTO_Cases_Against_China_Over_Deficiencies_in_Chinas_Intellectual_Property_Rights_Laws_Market_Access_Barr_printer.html) [hereinafter U.S. Announcement] ("U.S. Trade Representative Susan C. Schwab announced today that the United States will make two requests tomorrow for [WTO] dispute settlement consultations with the People's Republic of China: one over deficiencies in China's legal regime for protecting and enforcing copyrights and trademarks on a wide range of products . . . ."). USTR Schwab commented:

Piracy and counterfeiting levels in China remain unacceptably high . . . . Inadequate protection of intellectual property rights in China costs U.S. firms and workers billions of dollars each year . . . . [W]hile the United States and China have been able to work cooperatively and pragmatically on a range of IPR issues, and China has taken numerous steps to improve its protection and enforcement of intellectual property rights, we have not been able to agree on several important changes to China's legal regime that we believe are required by China's WTO commitments.

*Id.* The U.S. request for consultations focused on four specific areas of concern: "Thresholds for Criminal Liability," "Disposal of Infringing Goods," "Denial of Copyright Protection to Works Awaiting Censorship Review," and "Scope of Criminal Law on Piracy."

TRIPS enforcement standards with respect to certain aspects of China's criminal law and certain Chinese provisions for disposal of infringing products by customs authorities.<sup>9</sup>

The delay in U.S. action against China may reflect uncertainty in adjudicating a TRIPS enforcement claim before the DSB.<sup>10</sup> Another explanation for the deferral of a WTO case is that the United States first gave bilateral negotiations with China an opportunity to resolve enforcement issues.<sup>11</sup> More crucial to U.S. hesitance, perhaps, were the practical barriers to effective DSB resolution of TRIPS enforcement claims, including: the limited type of claims that may be heard, the vagueness of the TRIPS enforcement standard, a potentially high standard of proof, and deference to decisions of national resource allocation.<sup>12</sup> These impediments certainly justified pause in pursuing a WTO case that could have negative diplomatic implications,<sup>13</sup> and they may still limit the strength

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Office of the USTR, Trade Delivers, Real Results—April 2007, WTO Case Challenging Weaknesses in China's Legal Regime for Protection and Enforcement of Copyrights and Trademarks, available at [http://www.ustr.gov/assets/Document\\_Library/Fact\\_Sheets/2007/asset\\_upload\\_file908\\_11061.pdf](http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2007/asset_upload_file908_11061.pdf) [hereinafter Request for Consultations]. For general information and documents related to this case, see WTO, Dispute Settlement: Dispute DS362, China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights, [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds362\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm).

9. See *infra* note 73 and accompanying text.

10. There have been only four TRIPS enforcement cases to date, all of which were settled by mutually agreed solution and thus did not reach DSB panels. See Mutually-Agreed Solution, *Greece—Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*, WT/DS125/2 (Mar. 26, 2001); Mutually-Agreed Solution, *European Communities—Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*, WT/DS124/2 (Mar. 26, 2001); Mutually-Agreed Solution, *Sweden—Measures Affecting the Enforcement of Intellectual Property Rights*, WT/DS86/2 (Dec. 11, 1998); Mutually-Agreed Solution, *Denmark—Measures Affecting the Enforcement of Intellectual Property Rights*, WT/DS83/2 (June 13, 2001) [hereinafter TRIPS Enforcement Cases]. See also WTO, Index of Disputes Issues, [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_subjects\\_index\\_e.htm#trips\\_enforcement](http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm#trips_enforcement) [hereinafter Index of Disputes].

11. See U.S. Announcement, *supra* note 8 (“Because bilateral dialogue has not resolved our concerns, we are taking the next step by requesting WTO consultations.”).

12. See *infra*, Part III.C.

13. See, e.g., Peter K. Yu, *From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China*, 55 AM. U. L. REV. 901, 944, 946 (2006) [hereinafter Yu, *Post-WTO China*] (“[A] formal WTO complaint will strain the bilateral relationship between China and the United States, regardless of who wins at the end. . . . A weak case before the WTO will not only be unhelpful in liberating trade, but could potentially backfire on the entire international community. Pursuing such a case is worse than not bringing the case at all.”); *IP Enforcement in China, a Potential WTO Case, and U.S.-China Relations: Hearing on Intellectual Property Rights Issues and Imported Counterfeit Goods Before the U.S.-China Econ. and Sec. Review Comm’n* 8 (June 8, 2006) (statement

of the pending U.S. case. Even a favorable DSB decision may not provide the breadth and depth of overall improvement in IPR enforcement that the United States seeks.<sup>14</sup>

A direct attack on China's implementing enforcement provisions is not the only path for challenging China's IPR enforcement, and it does not address all of China's weaknesses related to IPR enforcement. China has implemented the substantive provisions of TRIPS in its domestic law,<sup>15</sup> which private right holders may use to bring claims in local dispute resolution settings.<sup>16</sup> Civil litigation is an important method for resolving IPR

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of Justin Hughes, Professor, Cardozo School of Law) [hereinafter Hughes Statement] (“[W]e now face the problem of a case against one of our principal trading partners, a case that, if it goes badly, could damage the WTO as well as what is now the globe's most important bilateral relationship. The folks at the USTR and the rest of the Executive branch are well aware of this; if it seems they are moving quite cautiously, they have good reason.”). The position of the USTR is that the dual approaches of WTO dispute settlement and cooperative efforts, such as the U.S.-China Joint Commission on Commerce and Trade, complement each other. Request for Consultations, *supra* note 8.

14. The U.S. case only addresses criminal enforcement of IPRs and destruction of infringing goods by customs authorities; thus it ignores inadequate civil recourse in China for patent infringement and cases of copyright and trademark infringement that are below criminal thresholds. *See infra* note 54 and accompanying text. In addition, the TRIPS preamble provides that “the provision of effective and appropriate means for the enforcement of trade-related intellectual property rights [should] tak[e] into account differences in national legal systems.” TRIPS pmb. *Cf.* Sol Picciotto, *Private Rights vs. Public Standards in the WTO for a Margin of Appreciation in the Interpretation of the WTO Agreements* 3 (Paper Presented at the International Conference: Beyond the Washington Consensus—Governance and the Public Domain in Contrasting Economies: The Cases of India and Canada, Feb. 12–14, 2001), available at <http://isidev.nic.in/pdf/SPicciotto.PDF> (proposing the application of the “margin of appreciation” standard that has been developed in European human rights law to WTO obligations). The principle of granting some amount of deference to national legal systems, when combined with a fuzzy standard for enforcement in Article 41(1) of TRIPS, *see infra* note 181 and accompanying text, may lead the DSB to hold China accountable to a level of IPR enforcement that falls short of expectations. *See infra* note 184 and accompanying text.

15. *See infra* note 105 and accompanying text.

16. *See* Mart Leesti & Tom Pengelly, *Institutional Issues for Developing Countries in Intellectual Property Policymaking, Administration & Enforcement* (Comm'n on Intellectual Prop. Rights, Study Paper 9), available at [http://www.iprcommission.org/papers/pdfs/study\\_papers/sp9\\_pengelly\\_study.pdf](http://www.iprcommission.org/papers/pdfs/study_papers/sp9_pengelly_study.pdf).

[A]s articulated in the preamble to the TRIPS Agreement, “. . . intellectual property rights are private rights.” The impact of this concept is that IPR regimes should lean heavily towards supporting the resolution of disputes arising over intellectual property assets between parties under civil law and so reduce the enforcement burden on the state to the minimum.

*Id.* at 17.

disputes in western countries,<sup>17</sup> and China has taken steps to promote its courts as a desirable forum for bringing IPR claims.<sup>18</sup> Problems with China's judicial system, however, impede potential litigants.<sup>19</sup>

Corruption, local protectionism, and political influence undermine the judicial system in China.<sup>20</sup> TRIPS enforcement provisions include procedures for ensuring "fair and equitable" judicial resolution of disputes,<sup>21</sup> but a challenge to China's compliance with these procedures would encounter the same difficulties as the current U.S. case.<sup>22</sup> An alternative approach, or at least a parallel objective, should be to focus on China's compliance with the transparency provisions in Article 63(1) of TRIPS—specifically, the requirement to publish certain judicial decisions.<sup>23</sup> China's judicial decision-making remains opaque, as few written opinions are published, and even fewer reach the public unaltered by China's highest court.<sup>24</sup> If the United States were to challenge China in the DSB on Article 63(1) transparency, a reasonable interpretation and application of that provision should find China not in conformity. A more transparent judicial system in China would create a fair and predictable environment for private litigants to protect their rights, which would improve overall IPR enforcement.<sup>25</sup>

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17. DANIEL C.K. CHOW, *A PRIMER ON FOREIGN INVESTMENT ENTERPRISES AND PROTECTION OF INTELLECTUAL PROPERTY IN CHINA* 212 (2002).

18. *See infra* Part II.C.

19. *See* DELI YANG, *INTELLECTUAL PROPERTY AND DOING BUSINESS IN CHINA* 213–216 (2003) [hereinafter YANG, *DOING BUSINESS IN CHINA*]. A survey of thirty-five companies with business in China concluded that litigation was the least preferred strategy of resolving IP-related issues. *Id.* An important factor in deterring companies from litigation in China was inadequacy of judicial enforcement. *Id.*

20. *See* Randall Peerenboom, *Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People's Republic of China*, 19 *BERKELEY J. INT'L L.* 161, 214–217, 225–227 (2001).

21. TRIPS art. 42 ("Members shall make available to right holders civil judicial procedures concerning the enforcement of any intellectual property right covered by this Agreement.") (footnote omitted). *See also* TRIPS art. 41(2) ("Procedures concerning the enforcement of intellectual property rights shall be fair and equitable.").

22. *See infra* Part III.C.

23. TRIPS art. 63(1).

24. *See infra* Part II.C.

25. Transparency in governmental operations is a critical factor for foreign investors because it reduces uncertainty and suppresses corruption. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *PUBLIC SECTOR TRANSPARENCY AND THE INTERNATIONAL INVESTOR* 8 (2003). In China, the lack of transparency in intellectual property enforcement systems has inhibited IPR holders. *See* CHOW, *supra* note 17, at 212–213. Greater transparency in the Chinese judiciary would encourage more foreign technology-based investment in China, and would lead those investors to seek IPR enforcement through civil litigation.

Part I of this Note describes certain TRIPS provisions, including those related to enforcement of IPRs. Part II discusses IPR protection in China under the TRIPS agreement, which is affected by Chinese legal culture. Part III explores adjudication before the DSB as a path for achieving improved IPR enforcement in China by analyzing the efficacy of the current U.S. case. It concludes that TRIPS limits its members' capacity to directly improve IPR enforcement among other members, specifically China, through the DSB. Part IV recognizes that private right owners are ultimately responsible for enforcing their rights in China, but are limited by the shortcomings of the domestic judicial system. Thus, Part IV proposes a solution for better enforcement that focuses on improved transparency, based on Article 63(1) of TRIPS, for effecting change in China's judicial system.

## I. TRIPS

### A. TRIPS Objectives and Principles

TRIPS establishes a set of minimum standards for IPR protection among members.<sup>26</sup> The central theme of TRIPS is to create a system of rights creation and protection that reflects Western standards, but with enough flexibility for developing nations with limited institutional capacity to adhere to the agreement.<sup>27</sup> TRIPS allows developed countries to collect "technology rents" for their intellectual property in the developing world,<sup>28</sup> but also strives to help developing countries acquire and integrate new technologies through foreign investment, which is called

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26. Susy Frankel, *WTO Application of "The Customary Rules of Interpretation of Public International Law" to Intellectual Property*, 46 VA. J. INT'L L. 365, 375 (2006) ("A feature of the TRIPS Agreement that affects its interpretation is its nature as an agreement of minimum standards that aims to have a certain level of intellectual property protection across all WTO members. It is a 'low-level' harmonization agreement, and provides minimum standards for protection of intellectual property rights, which may be implemented in different ways at the domestic level.").

27. See TRIPS pmb. (recognizing the need for "the provision of effective and appropriate means for the enforcement of trade-related intellectual property rights, taking into account differences in national legal systems," and "the special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations").

28. Technology rents are capital returns for intellectual property producers who license to or extract payment from intellectual property users, provided the existence of intellectual property rights. See Frederick M. Abbott, *Toward a New Era of Objective Assessment in the Field of TRIPS and Variable Geometry for the Preservation of Multilateralism*, 8 J. INT'L ECON. L. 77, 80 (2005) [hereinafter Abbott, *Toward a New Era*].

technology transfer.<sup>29</sup> There is a specific requirement in TRIPS to ensure technology flows from developed countries to the least-developed countries.<sup>30</sup> But even without an express requirement for technology transfer to the other developing countries, there is a general theory that intellectual property protection stimulates acquisition of new technologies, so long as there are appropriate controls to govern such activity.<sup>31</sup>

Private businesses may follow several different modes of foreign investment that introduce new technology to a developing country. A basic example is the selling of goods in the country.<sup>32</sup> Goods that contain useful technology can be studied and reverse engineered.<sup>33</sup> A company may take it one step further and license technology to a foreign entity for manufacture and sale within the country.<sup>34</sup> If a company wants to maintain greater control over technology being manufactured in the country, it may become a multinational enterprise by gaining a total or partial stake in a foreign entity and license the technology to that entity.<sup>35</sup> Foreign investors may also open research and development facilities abroad to create new technology.<sup>36</sup> In each case, the state of IPR protection is a critical factor in deciding whether to invest and in the investment strategy.<sup>37</sup>

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29. See TRIPS art. 7.

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

*Id.*

30. TRIPS art. 66(2) (“Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base.”). China is not considered a least-developed country. See WTO Membership, *supra* note 3.

31. See COMMISSION ON INTELLECTUAL PROPERTY RIGHTS, INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY 24–26 (2002), available at [http://www.iprcommission.org/papers/pdfs/final\\_report/CIPRfullfinal.pdf](http://www.iprcommission.org/papers/pdfs/final_report/CIPRfullfinal.pdf). For a range of perspectives on this theory, see WIPO-WTO Joint Workshop: Intellectual Property Rights and Transfer of Technology, available at [http://www.wipo.int/documents/en/meetings/2003/wipo\\_wto/wipo\\_wto\\_03\\_program.html](http://www.wipo.int/documents/en/meetings/2003/wipo_wto/wipo_wto_03_program.html).

32. CHOW, *supra* note 17, at 31.

33. Keith E. Maskus, *Using the International Trading System to Foster Technology Transfer for Economic Development*, 2005 MICH. ST. L. REV. 219, 230.

34. CHOW, *supra* note 17, at 32.

35. *Id.* at 34–35.

36. *Id.* at 35–36.

37. See *id.* at 6–7.



*B. TRIPS Provisions*

## 1. Substantive Rights

Part II of TRIPS sets forth the substantive rights to be protected. TRIPS negotiators found it practical to rely on existing international intellectual property standards.<sup>38</sup> Therefore, TRIPS incorporates the Paris Convention for the Protection of Industrial Property (1967), the Berne Convention for the Protection of Literary and Artistic Works (1971), and the Treaty on Intellectual Property in Respect of Integrated Circuits (1989) into the main body of protected rights.<sup>39</sup> It would have been infeasible not to include these agreements because they were entrenched in legal institutions and industry practice.<sup>40</sup> TRIPS also added some new rights, including provisions related to rental rights, trademarks, service marks, and geographical indications.<sup>41</sup> Although these additions expanded the field of international intellectual property, the distinguishing feature of TRIPS is the inclusion of enforcement provisions.<sup>42</sup> There was a pressing need for such a system of enforceable rights, the lack of which was the main failure of the “Paris-Berne” system.<sup>43</sup>

## 2. Enforcement Procedures

Part III of TRIPS contains provisions related to the enforcement of the rights enumerated in Part II of the agreement. Article 41 outlines general enforcement obligations, including, in paragraph 1, that “Members shall ensure that enforcement procedures . . . are available under their law so as to *permit effective action* against any act of infringement of intellec-

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38. See DANIEL GERVAIS, *THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS* 68 (2d ed. 2003).

39. *Id.* at 69. TRIPS references the 1967 Paris Convention and the 1971 Berne Convention, TRIPS n.2, although the original conventions were adopted in 1883 and 1886, respectively. WIPO-Administered Treaties, <http://www.wipo.int/treaties/en>. The Treaty on Intellectual Property in Respect of Integrated Circuits was adopted in 1989, TRIPS n.2, but never entered into force. GERVAIS, *supra* note 38, at 69.

40. GERVAIS, *supra* note 38, at 68.

41. *Id.* at 69.

42. *Id.* (“There was no precedent for this in the field of intellectual property at the multilateral level.”).

43. See Jose Felgueroso, *TRIPS and the Dispute Settlement Understanding: The First Six Years*, 30 *AIPLA Q.J.* 165, 171–172 (2002). (“[T]he international system of intellectual property rights instituted by the Paris and Berne Conventions, and administered by the WIPO, was fragmented and unenforceable. . . . In contrast, through the WTO, any Member State may bring a complaint before an international trade panel to enforce rights and obligations recognized in the TRIPS Agreement.”).

tual property rights.”<sup>44</sup> Paragraph 5 of Article 41 qualifies this standard for enforcement because it excuses members from creating a distinct judicial system for IPR cases, upgrading law enforcement capability, or devoting more resources to IPR enforcement than any other type of law enforcement.<sup>45</sup> The freedom of resource allocation seems to undermine effective enforcement, especially in member countries with weak overall law enforcement. According to one scholar, however, there is no excuse for failing to meet TRIPS enforcement obligations if no increase in resources is needed.<sup>46</sup> But the degree to which a member must exercise its enforcement procedures in light of Article 41(5), if any, remains questionable.

There are civil and criminal procedures and remedies for violations.<sup>47</sup> On the civil side, TRIPS allows for a dual system of judicial and administrative decision-making.<sup>48</sup> Articles 42–49 include basic requirements for judicial and administrative systems, such as the right to notice of claim, representation by independent legal counsel, standards of evidence, and remedies such as injunctions.<sup>49</sup> TRIPS also requires that administrative decisions be subject to judicial review, and that litigants have the opportunity for appeal from initial judicial decisions, at least on questions of law.<sup>50</sup>

The required criminal procedures are in Article 61, which applies to “wilful trademark counterfeiting or copyright piracy on a commercial scale.”<sup>51</sup> Regarding other cases of infringement, there are no criminal enforcement requirements.<sup>52</sup> But members have the option to “provide for criminal procedures and penalties . . . in other cases . . . in particular where they are committed wilfully and on a commercial scale.”<sup>53</sup> If a

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44. TRIPS art. 41(1) (emphasis added).

45. TRIPS art. 41(5).

[T]his Part does not create any obligation 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.

*Id.*

46. GERVAIS, *supra* note 38, at 289.

47. TRIPS Part III, §§ 2, 5.

48. TRIPS arts. 42, 49.

49. TRIPS arts. 42–49.

50. TRIPS art. 41(4).

51. TRIPS art. 61.

52. *See id.*

53. *Id.*

member does not adopt criminal procedures that apply to any “other cases,” then cases of patent infringement and trademark and copyright infringement not deemed to be on a commercial scale are not subject to criminal prosecution.<sup>54</sup> Private right owners have sole responsibility for taking action in such cases.

### 3. Transparency

TRIPS continues the theme of transparent compliance with treaty obligations that lies at the heart of WTO agreements.<sup>55</sup> Article 63 includes several provisions that require making domestic intellectual property laws and decisions publicly available to right owners, notifying laws to the Council for TRIPS for review,<sup>56</sup> and providing members with information on certain cases of interest.<sup>57</sup> Specifically, Article 63(1) states in part:

Laws and regulations, and *final judicial decisions* and administrative rulings of general application, made effective by a Member pertaining to the subject matter of this Agreement (the availability, scope, acquisition, enforcement and prevention of the abuse of intellectual property rights) *shall be published . . .* in such a manner as to enable governments and right holders to become acquainted with them.<sup>58</sup>

The procedure to make laws and regulations publicly available is by notification as provided for in Article 63(2).<sup>59</sup> Article 63 offers no specific procedure for publishing “final judicial decisions and administrative rulings of general application.”<sup>60</sup> As such, it is not exactly clear what is re-

54. *See id.*

55. *See* Jiangyu Wang, *The Rule of Law in China: A Realistic View of the Jurisprudence, the Impact of the WTO, and the Prospects for Future Development*, 2004 SING. J. LEGAL STUD. 347, 380 (2004) (“Transparency is one of the pillar principles of the WTO, underpinning all substantive areas of the multilateral trading system.”). *See also* Working Group on the Relationship Between Trade and Investment, *Communication from the European Community and its Member States: Concept Paper on Transparency*, para. 3, WT/WGTI/W/110 (Mar. 27, 2002) [hereinafter *Transparency Paper*] (“Ministers of WTO Members have recognised ‘. . . the case for a multilateral framework to secure transparent, stable and predictable conditions for long-term cross border investment, particularly [Foreign Direct Investment (FDI)] . . .’ The reason is that greater transparency encourages higher flows of FDI . . .”) (omissions to quotation in original) (footnote omitted).

56. The Council for TRIPS is charged with monitoring members’ compliance with TRIPS obligations. TRIPS art. 68.

57. TRIPS arts. 63(1)–63(3).

58. TRIPS art. 63(1) (emphasis added).

59. GERVAIS, *supra* note 38, at 335.

60. *See* TRIPS art. 63.

quired for members to comply with this clause. Notification of laws and regulations can only confirm nominal compliance with TRIPS standards.<sup>61</sup> Publication of judicial decisions, however, makes transparent the application of substantive law during litigation,<sup>62</sup> which in turn reveals how effective civil enforcement is in practice.<sup>63</sup> This aspect of transparency should not be discounted in any application of Article 63(1).

### C. WTO Dispute Settlement

Article 64(1) grants members access to the WTO dispute settlement mechanism, as defined in the Understanding on Rules and Procedures Governing the Settlement of Disputes,<sup>64</sup> for disputes arising under TRIPS.<sup>65</sup> This mechanism, referred to as the Dispute Settlement Body (“DSB”),<sup>66</sup> allows a member to bring a complaint against another member.<sup>67</sup> The first step in bringing a complaint is to submit a request for consultation to another member<sup>68</sup> and to notify this action to the DSB.<sup>69</sup> The request must identify the legal basis for the complaint.<sup>70</sup> A mutually agreed solution is the preferred outcome,<sup>71</sup> but if the consulting parties cannot settle the dispute within specified time limits, the complaining

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61. See J.H. Reichman, *Enforcing the Enforcement Procedures of the TRIPS Agreement*, 37 VA. J. INT’L L. 335, 339 (1997) [hereinafter Reichman, *Enforcing the Enforcement Procedures*] (“[A]dopting legislation that complies with international minimum standards becomes only the starting point. States must further apply these laws in ways that will stand up to external scrutiny . . . then they must adequately enforce them in compliance with detailed criteria concerning procedural and administrative matters . . .”) (footnote omitted).

62. See *Transparency Paper*, *supra* note 55, at para. 11 (“Lack of transparency . . . is not only a problem concerning the legislation and rules . . . but is often related to the application of the rules.”).

63. See Chris X. Lin, *A Quiet Revolution: An Overview of China’s Judicial Reform*, 4 ASIAN-PAC. L. & POL’Y J. 255, 309 (2003) (“[A]llowing the public to see how a court reaches its decision ultimately results in greater fairness of the judicial process and increases the public’s trust in the system.”).

64. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994), available at [http://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm](http://www.wto.org/english/docs_e/legal_e/legal_e.htm) [hereinafter DSU].

65. TRIPS art. 64(1).

66. DSU art. 2(1).

67. DSU art. 2(1).

68. See YANG GUOHUA, BRYAN MERCURIO & LI YONGJIE, WTO DISPUTE SETTLEMENT UNDERSTANDING: A DETAILED INTERPRETATION 39 (2005).

69. *Id.* at 42.

70. *Id.*

71. DSU art. 3(7).

party may request that a DSB panel be established.<sup>72</sup> The U.S. case against China reached this impasse during consultations in early June 2007, and on August 13, 2007 the United States requested the formation of a DSB panel.<sup>73</sup>

A DSB panel is composed of three panelists appointed by the parties,<sup>74</sup> and is only allowed to review claims within its terms of reference, which are the relevant provisions the parties agree upon.<sup>75</sup> The goal of the panel is to produce a report that includes “the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes.”<sup>76</sup> The DSB established a panel in the U.S.-China case on September 25, 2007, and the panel will make its report available in late 2008.<sup>77</sup>

A party to the dispute may appeal the panel report to the Appellate Body, a standing body of the DSB with expertise in international trade law.<sup>78</sup> An appeal is limited to issues of law addressed by the DSB panel,<sup>79</sup> and the Appellate Body has unqualified authority to “uphold,

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72. YANG, MERCURIO & LI, *supra* note 68, at 41.

73. Office of the USTR, Press Release, United States Requests WTO Panel in Case Challenging Deficiencies in China's Intellectual Property Rights Laws (Aug. 13, 2007), available at [http://www.ustr.gov/Document\\_Library/Press\\_Releases/2007/August/United\\_States\\_Requests\\_WTO\\_Panel\\_in\\_Case\\_Challenging\\_Deficiencies\\_in\\_Chinas\\_Intellectual\\_Property\\_Rights\\_Laws\\_printer.html](http://www.ustr.gov/Document_Library/Press_Releases/2007/August/United_States_Requests_WTO_Panel_in_Case_Challenging_Deficiencies_in_Chinas_Intellectual_Property_Rights_Laws_printer.html). The request alleges three areas where Chinese measures are inconsistent with TRIPS: (1) “Thresholds for criminal procedures and penalties,” (2) “Disposal of goods confiscated by Customs Authorities that infringe Intellectual Property Rights,” and (3) “Denial of copyright and related rights protection and enforcement to works that have not been authorized for publication or distribution within China.” Request for the Establishment of a Panel by the United States, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/7 (Aug. 21, 2007) [hereinafter Request for a Panel]. A fourth area of contention—the scope of criminal procedures—that was originally included in the request for consultations was excluded from this request to establish a panel. See Request for Consultations, *supra* note 8. The likely reason for the exclusion of this issue was that it was resolved during consultation. See *id.* (“China published a Judicial Interpretation April 7 that may be designed to address this problem. The United States would welcome this development and plans to discuss the new Judicial Interpretation with China during WTO consultations.”).

74. YANG, MERCURIO & LI, *supra* note 68, at 86, 88.

75. *Id.* at 74.

76. DSU art. 12(7).

77. Paul Garwood, *WTO Inquiry Launched into U.S. Complaints Against China's IP Record*, INTELL. PROP. WATCH, Sept. 27, 2007, <http://www.ip-watch.org/weblog/index.php?p=758>. China refused the first U.S. request to establish a panel, but under WTO rules the panel was automatically established upon a second request. *Id.*

78. YANG, MERCURIO & LI, *supra* note 68, at 195.

79. DSU art. 17(6).

modify or reverse” the panel’s legal conclusions on those issues.<sup>80</sup> If a panel or the Appellate Body finds a particular measure is inconsistent with a member’s treaty obligations, it must recommend that the DSB request the offending member to remedy the inconsistency.<sup>81</sup> The coercive element to such a request is the threat of trade sanctions, which the DSB may grant if the losing party to a dispute does not implement a report.<sup>82</sup>

There are normally three types of complaints that may be brought to the DSB: violation complaints; non-violation complaints; and situation complaints.<sup>83</sup> Complaints under TRIPS, however, are restricted to violation complaints because there is disagreement as to the impact of allowing non-violation complaints or situation complaints.<sup>84</sup> Outside of

80. DSU art. 17(13).

81. YANG, MERCURIO & LI, *supra* note 68, at 223.

82. Felgueroso, *supra* note 43, at 178–180. During TRIPS negotiations, there was debate over whether to bring TRIPS under the WTO dispute settlement mechanism, or to create a separate mechanism for TRIPS. See GERVAIS, *supra* note 38, at 22. Because TRIPS does provide access to the DSB, members can seek retaliatory measures, such as trade sanctions, in other areas of trade for failure to meet TRIPS obligations. DSU art. 22(3).

83. The DSU incorporates these three grounds for a complaint by referencing Article XXIII of GATT. DSU art. 3(1). There is a basis for a complaint

[i]f any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

- (a) the failure of another contracting party to carry out its obligations under this Agreement, or
- (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
- (c) the existence of any other situation

General Agreement on Tariffs and Trade art. XXIII(1), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]. The types of complaints provided for in paragraphs (a), (b), and (c) are referred to as violation, non-violation, and situation complaints, respectively. See, e.g., Debra P. Steger, *The Jurisdiction of the World Trade Organization*, 98 AM. SOC’Y INT’L L. PROC. 142, 143 (2004).

84. See TRIPS art. 64(2) (“Subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 shall not apply to the settlement of disputes under this Agreement for a period of five years from the date of entry into force of the WTO Agreement.”). The moratorium on non-violation complaints has been extended indefinitely. See Council for TRIPS, *Minutes of Meeting*, para. 89, IP/C/M/54 (July 26, 2007) (“[T]he TRIPS Council [will] continue its examination of the scope and modalities for complaints of the types provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 . . . . It was agreed that in the meantime, Members would not initiate such complaints under the TRIPS

TRIPS, non-violation complaints may target any measure taken by a member that thwarts the expected benefits of an agreement, regardless of whether a measure directly conflicts with a particular provision in the agreement.<sup>85</sup> Non-violation complaints thus allow for much broader attacks than violation complaints, which are only useful for challenging particular implementations of, or failures to implement, specific provisions.<sup>86</sup> Situation complaints a fortiori allow for even broader attacks than non-violation complaints. The bar against non-violation and situation complaints narrows the ability to enforce TRIPS obligations by confining challenges to the text of the agreement.

## II. CHINESE IPR PROTECTION UNDER TRIPS

### A. China's Brief History in the WTO

China acceded to the WTO on December 11, 2001 after 15 years of negotiations.<sup>87</sup> China's accession protocol mandated membership in TRIPS and the other multilateral WTO agreements.<sup>88</sup> The developed nations that controlled the agenda of the Uruguay Round,<sup>89</sup> the United States, the European Communities, Japan, and Switzerland, negotiated TRIPS mainly as a way to collect technology rents, although ostensibly they aimed to benefit developing countries.<sup>90</sup> China's accession to the WTO was, in some opinions, yet another opportunity for these developed countries to protect economic interests by exerting more influence over

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Agreement.”). Situation complaints have never been brought before the DSB, and never was there such a case under GATT. YANG, MERCURIO & LI, *supra* note 68, at 315. This particular category seems to provide a fallback for a complaint that does not fit into the other two categories of complaints. *See id.*

85. *See* YANG, MERCURIO & LI, *supra* note 68, at 308.

86. *See* GATT art. XXIII(1)(a).

87. WTO Membership, *supra* note 3.

88. *See* WTO, *Accession of the People's Republic of China*, pt. I, § 1(3), WT/L/432 (Nov. 23, 2001) [hereinafter *Accession*].

89. This round of multilateral negotiations created the WTO, including the TRIPS agreement. Nathan E. Stacy, *The Efficacy and Fairness of Current Sanctions in Effecting Stronger Patent Rights in Developing Countries*, 12 TULSA J. COMP. & INT'L L. 263, 271 (2004).

90. *See* Abbott, *Toward a New Era*, *supra* note 28, at 80–81. *See also* Frederick M. Abbott, *TRIPS in Seattle: The Not-So-Surprising Failure and the Future of the TRIPS Agenda*, 18 BERKELEY J. INT'L L. 165, 166–167 (2000); *cf.* SUSAN K. SELL, *PRIVATE POWER*, PUBLIC LAW 8 (2003) (“The TRIPS process was far more complex than a state-centric account would lead us to believe. In the TRIPS case, private actors pursued their interests through multiple channels and struck bargains with multiple actors . . .”).

China's legal system.<sup>91</sup> China, however, has maintained that it will still benefit from TRIPS-based IPR protections.<sup>92</sup>

Some critics doubt that a strong Western-style IPR regime is essential for driving technology transfer to developing countries.<sup>93</sup> For instance, many developed countries, including the United States, first relied on intellectual property appropriation for economic growth before instituting intellectual property protections.<sup>94</sup> Indeed, China's economic surge has relied on appropriation of technology, rather than protection of technology.<sup>95</sup> Nevertheless, China accepts the premise that it must increase IPR protection to become a fully developed country.<sup>96</sup> Tian Lipu, the commissioner of the State Intellectual Property Office of the People's

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91. See Peerenboom, *supra* note 20, at 249.

92. See STATE INTELLECTUAL PROPERTY OFFICE OF THE PEOPLE'S REPUBLIC OF CHINA [SIPO], CHINA'S INTELLECTUAL PROPERTY PROTECTION IN 2005, available at [http://www.sipo.gov.cn/sipo\\_English/ndbg/bps/200605/t20060509\\_99488.htm](http://www.sipo.gov.cn/sipo_English/ndbg/bps/200605/t20060509_99488.htm) [hereinafter SIPO 2005].

93. See COMMISSION ON INTELLECTUAL PROPERTY RIGHTS, INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY: EXECUTIVE SUMMARY 28 (2002), available at [http://www.iprcommission.org/papers/pdfs/final\\_report/CIPR\\_Exec\\_Sumfinal.pdf](http://www.iprcommission.org/papers/pdfs/final_report/CIPR_Exec_Sumfinal.pdf). See also Maskus, *supra* note 33, at 223; Frederick M. Abbott, *The WTO TRIPS Agreement and Global Economic Development*, 72 CHI.-KENT L. REV. 385, 391 (1996) ("The arguments suggesting that higher levels of IPRs protection will benefit the developing countries are logical. They may in small or large part be correct. But the train of logic is not supported by empirical evidence.").

94. See Steve Lohr, *New Economy; The Intellectual Property Debate Takes a Page From 19th-Century America*, N.Y. TIMES, Oct. 14, 2002, at C4.

[T]he economies that were shining success stories of development, from the United States in the 19th century to Japan and its East Asian neighbors like Taiwan and South Korea in the 20th, took off under systems of weak intellectual property protection. Technology transfer came easily and inexpensively until domestic skills and local industries were advanced enough that stronger intellectual property protections became a matter of self-interest.

But according to the recent report [by the Commission on Intellectual Property Rights], this kind of economic-development tactic—copying to jump-start an industry—is endangered by the United States-led push for stronger intellectual property rights worldwide.

*Id.*

95. Abbott, *Toward a New Era*, *supra* note 28, at 81–82.

96. See SIPO 2005, *supra* note 92; STATE COUNCIL INFORMATION OFFICE, NEW PROGRESS IN CHINA'S PROTECTION OF INTELLECTUAL PROPERTY RIGHTS (2005), available at <http://www.china.org.cn/english/2005/Apr/126297.htm>. See also Deming Liu, *Now the Wolf Has Indeed Come! Perspective on the Patent Protection of Biotechnology Inventions in China*, 53 AM. J. COMP. L. 201, 237–238 (2005).



Republic of China ("SIPO"), recognizes the need for China to transition from "made in China" to "invented in China."<sup>97</sup>

Since China has become a member of TRIPS, there has been a large increase in the number of U.S. and other foreign businesses applying for patent protection in China.<sup>98</sup> There has also been a great increase in the number of Patent Cooperation Treaty ("PCT") applications from China to the World Intellectual Property Organization ("WIPO").<sup>99</sup> These are signs that China is moving toward a technology-based economy. This progress may not continue, however, if technology investors find China to be an inhospitable environment for defending their rights.<sup>100</sup>

### *B. Compliance with TRIPS Provisions*

As part of its obligations of becoming a member, China was required to amend its patent, copyright, and trademark law to be in compliance with TRIPS.<sup>101</sup> The transitional review mechanism required notification of laws and regulations to the Council for TRIPS.<sup>102</sup> The Council also

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97. Kathleen E. McLaughlin, *Chinese IP Official Says Country is Working to Protect Ideas and Brands*, PAT., TRADEMARK & COPYRIGHT J., vol. 71 No. 1758, Feb. 24, 2006. Tian Lipu was responding to an interviewer's characterization of China as the "world's factory." *Id.* Toward moving beyond this status, he said that "China has not only established a complete intellectual property legal regime and a law enforcement framework that are in conformity with international practice, but also an effective IPR protection mechanism." *Id.* (the quoted interview is available at [http://english.gov.cn/chinatoday/ft/060208\\_interview.htm](http://english.gov.cn/chinatoday/ft/060208_interview.htm)).

98. *Patent Applications Increase*, CHINA DAILY, Aug. 29, 2006, available at <http://www.china.org.cn/english/BAT/179386.htm>.

99. Daniel Pruzin, *International Patent Applications Up in 2005, Sparked by East Asia*, PAT., TRADEMARK & COPYRIGHT J., vol. 71 No. 1756, Feb. 10, 2006. Applications received from China (and Hong Kong) increased by 43.7 percent in 2005. *Id.* PCT applications do not provide any enforceable protection, but provide developing countries a means to process patent applications. Applications are filed with a national patent office or with WIPO and are then examined for patentability in one of several examining offices. WIPO, Summary of the Patent Cooperation Treaty (PCT) (1970), [http://www.wipo.int/treaties/en/registration/pct/summary\\_pct.html](http://www.wipo.int/treaties/en/registration/pct/summary_pct.html). Based on an opinion of patentability from the examining office, an applicant may decide to seek an actual patent in any PCT contracting country. *Id.* Developing countries without sufficient resources to examine patents may rely on the PCT opinion in deciding whether to grant a patent. *See id.*

100. *See* Wayne M. Morrison, *Congressional Research Service Report for Congress: China-U.S. Trade Issues* 21 (July 11, 2007), available at <http://www.usembassy.it/pdf/other/RL33536.pdf> [hereinafter Morrison, *China-U.S. Trade Issues*] ("Many observers contend that, without a solid IPR enforcement regime, innovation and growth of IPR-related industries in China will likely be greatly retarded.")

101. *Accession*, *supra* note 88, Annex 1A § VI(a).

102. TRIPS art. 63(2). There is a transitional review mechanism in place that uses question checklists relating to each area of intellectual property. The member being re-

provided a separate checklist of questions for China to answer to ensure that enforcement laws and practices were in compliance with Part III of TRIPS.<sup>103</sup> The transitional review of China is not complete,<sup>104</sup> but to date China's laws are generally in compliance with substantive TRIPS provisions.<sup>105</sup> The United States, however, remains dissatisfied with China's implementation of Article 61, relating to criminal procedures and remedies.<sup>106</sup>

In December 2004, China issued a judicial interpretation that lowered thresholds for criminal liability.<sup>107</sup> Despite this move, the United States still claimed the Chinese thresholds for criminal liability were too high and thus under-inclusive of activity that should be deemed criminal.<sup>108</sup> In April, 2007, just days before the U.S. announcement of a WTO case, China once again issued a judicial interpretation lowering its criminal

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viewed must answer these questions before a review meeting. There may be follow-up questions and replies during a review meeting. A review of China's legislation was initiated at the September 17–19, 2002 TRIPS Council meeting. See Council for TRIPS, *Review of Legislation*, IP/Q/CHN/1, IP/Q2/CHN/1, IP/Q3/CHN/1, IP/Q4/CHN/1 (Dec. 10, 2002).

103. Council for TRIPS, *Checklist of Issues on Enforcement*, IP/C/5 (Nov. 30, 1995). China's responses to this checklist were made available on July 19, 2002. See Council for TRIPS, *Checklist of Issues on Enforcement*, IP/N/6/CHN/1 (July 19, 2002).

104. The TRIPS Council is required to conduct annual reviews of China's implementation of TRIPS for eight years following accession. *Accession*, *supra* note 88, pt. I, § 18(4).

105. See Hughes Statement, *supra* note 13, at 8; Robert Slate, *Judicial Copyright Enforcement in China: Shaping World Opinion on TRIPS Compliance*, 31 N.C. J. INT'L L. & COM. REG. 665, 673 (2006).

106. See Hughes Statement, *supra* note 13, at 8; Slate, *supra* note 105, at 673.

107. See Interpretation by the Supreme People's Court and the Supreme People's Procuratorate on Several Issues of Concrete Application of Laws in Handling Criminal Cases of Infringing Intellectual Property (effective Dec. 22, 2004), available at [http://www.ipr.gov.cn/ipr/en/info/Article.jsp?a\\_no=2038&col\\_no=121&dir=200603](http://www.ipr.gov.cn/ipr/en/info/Article.jsp?a_no=2038&col_no=121&dir=200603). See also Slate, *supra* note 105, at 674 (“[T]he judicial interpretation . . . significantly lowered the threshold for criminal piracy in some areas and made limited overall improvements to the criminal law.”).

108. See USTR, 2006 SPECIAL 301 REPORT 18, available at [http://www.ustr.gov/assets/Document\\_Library/Reports\\_Publications/2006/2006\\_Special\\_301\\_Review/asset\\_upload\\_file473\\_9336.pdf](http://www.ustr.gov/assets/Document_Library/Reports_Publications/2006/2006_Special_301_Review/asset_upload_file473_9336.pdf) [hereinafter 2006 SPECIAL REPORT] (“[T]he United States has concluded that China's high thresholds for criminal liability (*i.e.*, the minimum values or volumes required to initiate criminal prosecution) continue to be a major reason for the lack of an effective criminal deterrent. The partial reforms reflected in the December 2004 measure did not go far enough; the mandated thresholds remain so high that they make it impossible as a matter of law to prosecute many commercial infringers, especially at the retail level.”).

threshold levels.<sup>109</sup> The USTR dismissed this measure, stating that “China recently announced it has dropped its quantity threshold from 1000 to 500 . . . but the reduced threshold still creates a major safe harbor problem. The thresholds are so high that they appear to permit pirates and counterfeiters to operate on a commercial scale.”<sup>110</sup>

Even if China were to further amend its IPR criminal law, China would still face criticism that it does not take enough action to stop illegal and infringing activity. According to one SIPO spokesman, bribery of local officials is often required to investigate infringements.<sup>111</sup> In cases that do receive consideration, China chooses to rely on “toothless administrative enforcement,” rather than turn the cases over to police.<sup>112</sup> As a result, “infringers continue to consider administrative seizures and fines as a cost of doing business.”<sup>113</sup> Because of these practices, less than one percent of copyright and trademark cases are criminally investigated.<sup>114</sup> The piracy rate for copyright-related products in China remains around ninety percent.<sup>115</sup> One may argue that these figures indicate China’s lack of IPR enforcement in criminal cases is beyond any discretionary limits, and amounts to a lack of “effective action” under Article 41(1).<sup>116</sup> This argument only begs the question: how much enforcement constitutes “effective action”?

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109. See Intellectual Property Protection in China, New Interpretation Issued to Enhance Criminal Protection of IP, [http://english.ipr.gov.cn/ipr/en/info/Article.jsp?a\\_no=67882&col\\_no=934&dir=200704](http://english.ipr.gov.cn/ipr/en/info/Article.jsp?a_no=67882&col_no=934&dir=200704) (“On April 5, the Supreme People’s Court (SPC) and the Supreme People’s Procuratorate (SPP) promulgated the ‘Interpretation on Several Issues of Concrete Application of Laws in Handling Criminal Cases of Intellectual Property Infringement (II)’ . . . which functions as a supplement to the previous interpretation adopted in 2004 . . .”).

110. Request for Consultations, *supra* note 8.

111. Jason Subler, *China White Paper Defends IPR Progress But Admits ‘Serious’ Infringements Remain*, INT’L TRADE REP., vol. 22 No. 17, Apr. 28, 2005 (referring to comments made by Zhang Qin, spokesman for SIPO).

112. 2006 SPECIAL REPORT, *supra* note 108, at 18.

113. *Id.*

114. *Id.* at 17.

115. 2007 SPECIAL REPORT, *supra* note 2, at 18 (“[O]verall piracy and counterfeiting levels remained unacceptably high in 2006. The U.S. copyright industries estimate that 85 percent to 93 percent of all copyrighted material sold in China were pirated, indicating little or no improvement over 2005.”).

116. See Hughes Statement, *supra* note 13, at 9 (“With intellectual property infringement in China being ‘open and notorious,’ it would seem that the present enforcement system broadly fails this Article 41 standard.”) (footnote omitted).

### C. The Chinese Judicial System

China has a four-tiered court system with the Supreme People's Court at the highest level, followed by the Higher People's Courts, Intermediate People's Courts, and Basic People's Courts.<sup>117</sup> In 1993, the government created IPR tribunals in Beijing's Intermediate and Higher People's Courts, and in 1996, an IPR tribunal was established in the Supreme People's Court.<sup>118</sup> There are also other "grass roots" IPR courts being formed outside Beijing.<sup>119</sup> The Chief Justice of the Supreme People's Court IPR Tribunal has created a Web site where he posts various news about IPR enforcement in China.<sup>120</sup> Although TRIPS does not require any special courts for intellectual property cases,<sup>121</sup> China's initiatives demonstrate an added commitment to civil IPR enforcement. For China's new courts to provide effective IPR enforcement, however, China must also commit to reforming judicial culture.

Certain cultural features prevent impartial judicial decision-making in China. For example, formal legal processes are often foregone in favor of *guanxi*, or "informal relationships."<sup>122</sup> In Chinese society, *guanxi* is an important means for regulating social, economic, and political functions,<sup>123</sup> but in the judicial system the practice has resulted in widespread corruption.<sup>124</sup> The use of personal connections has inevitably led to bribery of judges.<sup>125</sup> Local protectionism is another pervasive problem in China's judicial system.<sup>126</sup> Judges are subject to removal by the local people's congresses, which creates political pressure to rule in favor of

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117. PITMAN B. POTTER, *THE CHINESE LEGAL SYSTEM: GLOBALIZATION AND LOCAL LEGAL CULTURE* 26 (2001).

118. Slate, *supra* note 105, at 679–680.

119. *Id.* at 680.

120. *Id.* at 687. The Chinese version of the Web site is available at <http://www.chinaiprlaw.cn>. The English version is available at <http://www.chinaiprlaw.com/english/default.htm>. However, the English version does not appear to have been updated since 2005.

121. *See supra* note 45 and accompanying text.

122. POTTER, *supra* note 117, at 30.

123. *Id.* at 12–13.

124. *Id.* at 30. *See also* Peerenboom, *supra* note 20, at 227 ("In other countries, courts usually serve as one of the main ways to attack corruption. However, the low stature of the PRC courts, and their dependence on local governments for funding make them unlikely candidates to hold the line against corruption . . . . Moreover, the judiciary itself has been plagued by corruption.").

125. *Id.* at 31.

126. Peerenboom, *supra* note 20, at 194–195 ("By far the most prevalent source of external interference in the judicial process is not the CCP but local government officials.").

local agencies and businesses.<sup>127</sup> Furthermore, the Chinese legal philosophy of instrumentalism regards law as a tool for implementing policy.<sup>128</sup> As such, the government produces broadly worded laws that allow local judges to rule with great discretion and no real consistency.<sup>129</sup>

China's judicial weaknesses are due in part to the structure of the Chinese government. The 1982 Constitution (amended in 2004) gives a textual commitment to an independent judiciary,<sup>130</sup> but the practical operation of the government precludes any true independence.<sup>131</sup> Further, vesting more power in the judiciary, such as the power "to interpret the Constitution," is implicitly prohibited by the Constitution.<sup>132</sup> Thus, while China's economic transformation has been a driving force behind legal reform,<sup>133</sup> China's judicial system remains a legacy of the old command economy model.<sup>134</sup> The judiciary remains under the strict control of the

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127. *Id.* at 195.

128. POTTER, *supra* note 117, at 10.

129. *Id.* at 11.

130. Article 126 states "The people's courts shall, in accordance with the law, exercise judicial power independently and are not subject to interference by administrative organs, public organizations or individuals." XIAN FA art. 126 (1982) (P.R.C.), available at <http://english.peopledaily.com.cn/constitution/constitution.html> (the 1982 Constitution was amended in 2004 for the fourth time).

131. See M. Ulric Killion, *China's Amended Constitution: Quest for Liberty and Independent Judicial Review*, 4 WASH. U. GLOB. STUD. L. REV. 43, 74–77 (2005) (describing how the Chinese Communist Party's supremacy restricts the development of independent judicial review); Peerenboom, *supra* note 20, 214–215 (arguing that courts are beholden to the local people's congresses and are deferent to adjudication committees on controversial cases); Nanping Liu, *A Vulnerable Justice: Finality of Civil Judgments in China*, 13 COLUM. J. ASIAN L. 35, 77–78 (1999) [hereinafter Nanping Liu, *A Vulnerable Justice*] (noting that the People's Procuratorate may protest court decisions and order a retrial).

132. The enumerated powers of the Standing Committee of the National People's Congress include the power "[t]o interpret the Constitution and supervise its enforcement" and "[t]o interpret statutes." XIAN FA art. 67, §§ 1, 4. The positive grant of power to the Standing Committee under Articles 67(1) and 67(4) of the Constitution has negative implications for the power of the judiciary. See Killion, *supra* note 131, at 70 ("Expanding Chinese courts' power of judicial review to include the power to interpret the Constitution and laws of China . . . directly contravenes articles 67(1) and 67(4) of the 1982 Constitution . . .").

133. Yu, *Post-WTO China*, *supra* note 13, at 914–918. Yu argues that the development and transformation of intellectual property law in China was at least in part organic. The millennium amendments to the Chinese copyright, trademark, and patent laws were as much a response to internal market stimuli as conforming to WTO standards. *Id.*

134. See Sylvia Ostry, *China and the WTO: The Transparency Issue*, 3 UCLA J. INT'L L. & FOR. AFF. 1, 14 (1998) ("[T]here is no clear separation of powers in China—only a separation of functions. There cannot be, therefore, an independent judiciary. This is entrenched in the provisions of the new (1982) Constitution.").

Chinese Communist Party.<sup>135</sup> There has been some decentralization of control within the party,<sup>136</sup> but this apportioning of political power has only contributed to local protectionism.<sup>137</sup> In the context of IPR protection, this problem is acute where “Chinese provincial authorities, ‘far away over the mountains,’ benefit financially or politically from the proceeds of piracy or, instead, turn a blind eye to powerful local interests that do.”<sup>138</sup>

There is no comprehensive and searchable system for reporting judicial decisions in China.<sup>139</sup> The Supreme People’s Court publishes the Gazette of the Supreme People’s Court of the People’s Republic of China, but it only contains selected and highly edited cases.<sup>140</sup> Lower court decisions may appear in the Gazette, but they are subject to revision by the high court.<sup>141</sup> The scarcity of published decisions in part reflects the fact that

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135. Stanley Lubman, *Bird in a Cage: Chinese Law Reform After Twenty Years*, 20 NW. J. INT’L L. & BUS. 383, 394–395 (2000) (“Courts are still expected to follow policy as it is articulated by the CCP.”).

136. *Id.* at 385.

137. *Id.* at 395.

138. Joseph A. Massey, *The Emperor is Far Away: China’s Enforcement of Intellectual Property Rights Protection, 1986–2006*, 7 CHI. J. INT’L L. 231, 232–233 (2006) (“[P]iracy in China is no longer primarily the result of the Beijing government’s own actions. Rather, the major continuing issue has been Beijing’s failure to get its laws and international obligations adequately and effectively enforced.”).

139. Benjamin Liebman, *China’s Network Justice*, 8 CHI. J. INT’L L. 257, 289 (2007) (“There is no formal system for publication of cases in China, nor is there a mechanism for searching the cases that are made publicly available.”).

140. Karen Halverson, *China’s WTO Accession: Economic, Legal, and Political Implications*, 27 B.C. INT’L & COMP. L. REV. 319, 360 (2004) (“Since 1985, the SPC has . . . published its decisions, or selected and revised versions of lower court decisions . . .”); Brent T. Yonehara, Comment, *Enter the Dragon: China’s WTO Accession, Film Piracy and Prospects for the Enforcement of Copyright Laws*, 9 UCLA ENT. L. REV. 389, 409 (2002) (“[T]he only opinions published are those that the Supreme People’s Court deems relevant, and there is no precise standard to determine which opinion is deemed a relevant case for publication.”); Nanping Liu, “Legal Precedents” with Chinese Characteristics: Published Cases in the Gazette of the Supreme People’s Court, 5 J. CHINESE L. 107, 115–116 (1991) [hereinafter Nanping Liu, “Legal Precedents”] (“The Court does not simply publish verbatim what it regards as the important opinions of lower courts. Instead, the Court, after selecting desirable cases, will substantially edit or rewrite most of the selected cases in order to make them understood and followed the way the Court wants.”). The Supreme People’s Court maintains a Web site that posts cases published in the Gazette, which is available at <http://www.court.gov.cn>.

141. Halverson, *supra* note 140, at 360; Nanping Liu, “Legal Precedents”, *supra* note 140, at 115 (“Most of the cases reported in the Gazette are from decisions of lower courts, which reach the Supreme Court through ‘the internal reporting channel.’”).

the Chinese legal system does not recognize cases as a source of law.<sup>142</sup> Many legal scholars on China's judiciary, however, believe that cases should be treated as authoritative.<sup>143</sup> Some progressive Chinese judges are taking the initiative to bind themselves to higher court decisions.<sup>144</sup> But, regardless of whether cases serve as precedent, judicial opinions offer guidance on how the courts are applying the law.<sup>145</sup> To the extent that certain Chinese judicial decisions indicate the way in which courts might rule in the future, it would be useful for litigants to have access to such decisions.<sup>146</sup> Furthermore, public access to judicial decisions could help elevate the level of judicial ethics.<sup>147</sup>

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142. See Lin, *supra* note 63, at 309 (“[O]ne must bear in mind that the [sic] China has followed a continental legal system model in which court decisions did not have binding precedential value.”).

143. See Liebman, *supra* note 139, at 289 (“China is officially a civil law system and does not formally recognize court precedent as such. As with other civil law systems, however, written cases and formal guidance from higher courts do play an important role.”) (footnote omitted); Lin, *supra* note 63, at 300 (“The latest round of debate within the Chinese legal community indicates that there is now a general consensus that at least some court decisions should be treated as binding precedents for lower courts.”); Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U. L. REV. 131, 220, n.446 (2001) [hereinafter Yu, *China in the Twenty-First Century*] (“The fact seems to be that Chinese court decisions have elements of both common-law and civil law. When the author raised that point with President [of the Supreme People's Court of China] Ren Jianxin and asked which he thought dominated, President Ren's answer in reflection was—‘Neither, it is Chinese law with Chinese characteristics.’ And so it is; but nevertheless those ‘Chinese characteristics’ seem to carry with them decisions which have *de facto* binding and precedential effect.”) (quoting RONALD C. BROWN, UNDERSTANDING CHINESE COURT AND LEGAL PROCESS: LAW WITH CHINESE CHARACTERISTICS 82 (1997)). Cf. Nanping Liu, “Legal Precedents”, *supra* note 140, at 117 (“[A]n intentional vagueness has been injected into the force of published cases in the Gazette due to the statement [by the Court's spokesman] that reported cases are intended ‘to provide guidance to lower courts.’”).

144. See Lin, *supra* note 63, at 300–303.

145. Eu Jin Chua, *The Law of the People's Republic of China: An Introduction for International Investors*, 7 CHI. J. INT'L L. 133, 136 (2006) (“Although there is no system of binding case precedent in China, such written decisions can at least provide guidance to the public and legal practitioners.”).

146. See UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT—THE INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT, RESOURCE BOOK ON TRIPS AND DEVELOPMENT 640–642 (2004) [hereinafter RESOURCE BOOK] (“[J]udicial decisions are an important indication of the approach a society takes toward the protection of IP and the extent to which rights holders' interests prevail or not over the general interest in the availability of IPR-affected goods or services.”); Yu, *China in the Twenty-First Century*, *supra* note 143, at 220 (“[T]he United States can encourage and assist the Chinese courts . . . to publish their decisions (in both English and Chinese) to guide the general public and foreign businesses.”).

147. Lin, *supra* note 63, at 310.

The courts in China have historically been held in low esteem.<sup>148</sup> Nevertheless, Chinese citizens have begun to accept litigation as a viable alternative for dispute settlement.<sup>149</sup> Many foreign companies, however, have been reluctant to test the local system.<sup>150</sup> In a survey of U.S. and British companies doing business in China, litigation was perceived as the least reliable way to resolve IPR disputes, as compared with consultation and commercial settlement.<sup>151</sup> The USTR “continues to hear complaints of a lack of consistent, uniform and fair enforcement of China’s IPR laws and regulations in the civil courts.”<sup>152</sup> The inadequacy of China’s courts is a critical concern in addressing weak overall IPR enforcement, not only because certain types of cases, such as patent infringement, must rely on civil enforcement, but also because private right holders must turn to civil actions in response to weak criminal enforcement.<sup>153</sup>

### III. ADDRESSING ENFORCEMENT PROBLEMS IN CHINA

Even if China’s enforcement procedures meet TRIPS standards, some action is required to ensure more than token enforcement in practice.<sup>154</sup> In other words, the enforcement procedures must be enforced.<sup>155</sup> The trade-based approach of TRIPS provides access to the DSB of the WTO to enforce IPR commitments among members.<sup>156</sup> This was a major innovation for the international protection of IPRs.<sup>157</sup> The United States now seeks to enlist the coercive power of the DSB by undertaking the current challenge to China’s IPR enforcement in the WTO. An exploration of the U.S. strategy, however, reveals some limitations for TRIPS enforcement within the DSB framework.

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148. Peerenboom, *supra* note 20, at 216.

149. Lubman, *supra* note 135, at 387.

150. See YANG, *DOING BUSINESS IN CHINA*, *supra* note 19, at 215.

151. *Id.* at 215–216. See also Chua, *supra* note 145, at 149 (“Given the relative uncertainty of engaging the Chinese judiciary, foreign investors have sought to use arbitration as the preferred means of dispute resolution in China. Chinese arbitral institutions such as CIETAC [China International Economic and Trade Arbitration Commission] continue to display the desire to improve and provide a viable alternative to relying on the Chinese courts . . .”).

152. 2007 SPECIAL REPORT, *supra* note 2, at 21; 2006 SPECIAL REPORT, *supra* note 108, at 21.

153. See 2006 SPECIAL REPORT, *supra* note 108, at 20–21.

154. See Reichman, *Enforcing the Enforcement Procedures*, *supra* note 61, at 339.

155. *Id.* at 344.

156. See TRIPS art. 64(1).

157. GERVAIS, *supra* note 38, at 69.



*A. The U.S. Case*

In accord with the predominant rhetoric of the USTR over the past few years, the first claim the United States submitted in its request for a DSB panel is as follows:

[A]s a result of [China's] thresholds . . . there are cases of willful trademark counterfeiting and copyright piracy on a commercial scale in which China has not provided for criminal procedures and penalties . . . [and] cases . . . for which the remedies of imprisonment and/or monetary fine sufficient to provide a deterrent are not available in China. . . . Furthermore, . . . as a result of the thresholds . . . China fails to ensure that enforcement procedures as specified in Part III of the TRIPS Agreement are available under its law so as to permit effective action against any act of willful trademark counterfeiting or copyright piracy on a commercial scale.

China's measures thus appear to be inconsistent with China's obligations under Articles 61 and 41.1 of the TRIPS Agreement.<sup>158</sup>

The United States also claims that "China's measures for disposing of confiscated goods that infringe intellectual property rights appear to be inconsistent with China's obligations under the TRIPS Agreement," specifically Article 59, which is based on the principles in Article 46.<sup>159</sup> The final U.S. claim is that China's copyright law denies copyright protection to "works whose publication or distribution in China is prohibited," so on this ground too China is in violation of Articles 41(1) and 61.<sup>160</sup> Two of these three claims are based on combining Article 41(1) and Article 61. This is the strategy most commentators anticipated<sup>161</sup> because it takes into account the problems toward which the USTR has directed the most criticism.<sup>162</sup> Therefore, the following analysis concentrates on the claims involving Articles 41(1) and 61.

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158. Request for a Panel, *supra* note 73.

159. *Id.* "[C]ompetent authorities shall have the authority to order the destruction or disposal of infringing goods in accordance with the principles set out in Article 46." TRIPS art. 59. Under Article 46, goods are to be "disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder," and goods may be destroyed "unless this would be contrary to existing constitutional requirements." TRIPS art. 46.

160. Request for a Panel, *supra* note 73.

161. See, e.g., Yu, *Post-WTO China*, *supra* note 13, at 934; Slate, *supra* note 105, at 673; Hughes Statement, *supra* note 13, at 5-6.

162. 2007 SPECIAL REPORT, *supra* note 2, at 19.

*B. What Does "Permit Effective Action" Mean?*

The possible key to achieving enforcement of China's TRIPS enforcement provisions in the pending U.S. case is the clause "Members shall ensure that enforcement procedures . . . are available under their law so as to permit effective action against any act of infringement of intellectual property rights" in Article 41(1).<sup>163</sup> The relationship, however, between each of the enforcement procedures in Articles 42–61 and the words "permit effective action" is ambiguous. It is not clear whether "permit effective action" is a standard for evaluating members' procedures for practical compliance with the corresponding TRIPS obligations, or a requirement for administrators to exercise the enforcement procedures to some minimum degree.<sup>164</sup> Thus, to determine how to apply Article 41(1), a DSB panel must address this inquiry: does Article 41(1) only require members to draft enforcement procedures that, if applied in any cases of infringement, would produce effective results, or to actually apply their enforcement procedures in cases of infringement so that acts of infringement are, in sum, effectively addressed, or both; and, in either case, what criteria are necessary to prove a member's failure to permit effective action?

One scholar suggests that Article 41(1) allows for facial challenges to members' laws and a somewhat broader category of challenges based on "administrative, police, and judicial practices," but that it is not susceptible to an interpretation that would allow general lack of enforcement claims.<sup>165</sup> A requirement for members to exercise their enforcement provisions to some minimum degree does seem at odds with the passive phrasing of "permit effective action." But if China, for example, never

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163. See TRIPS art. 41(1). See also Hughes Statement, *supra* note 13; *supra* Part I.B.2.

164. In the TRIPS enforcement cases to date, no DSB panel has had to decide how to interpret Article 41(1). These cases never reached a DSB panel because they were decided by mutually agreed solution. See TRIPS Enforcement Cases, *supra* note 10. See also Hughes Statement, *supra* note 13, at 6 ("[T]here is no precedent at the WTO for how to interpret these international treaty obligations to provide 'effective' enforcement procedures for intellectual property.").

165. See Hughes Statement, *supra* note 13, at 8–11. An example of a facial challenge is: "thresholds . . . for criminal prosecution are so high as to leave substantial amounts of obviously 'commercial' activity invulnerable to criminal prosecution, [thus] the law [is], on its face, incompatible with Article 61." *Id.* at 8. A slightly broader challenge that Hughes finds permissible under Article 41(1) is to use evidence of IPR enforcement practices to demonstrate that the application of IPR law amounts to less than effective action. See *id.* at 9–10. Hughes comments that a complaint based on overall weak enforcement would fall under one of the currently barred categories of non-violation or situation complaints. *Id.* at 11. Thus he assumes that a requirement to use enforcement procedures is not ingrained in the text of Article 41(1).

exercised its enforcement procedures—if the government declined to prosecute criminal cases, and judges and administrators ignored proper adjudicatory procedures—they would soon become dead letters and membership in TRIPS would be merely symbolic. TRIPS would be a more elaborate regime than its predecessors, but it would still be ineffective—a system that could compel adoption of enforcement procedures but could not compel their use.<sup>166</sup> This need not be, however, as there are interpretive arguments a DSB panel could employ to breathe life into Article 41(1).

The principle of effective interpretation, which has been applied in the WTO context, imparts that each TRIPS provision should be given effect if possible.<sup>167</sup> In light of this principle, the phrase “permit effective action” must mean something more than a superficial, or even evidentiary, test to apply to members’ enforcement procedures. The enforcement procedures have built-in standards for members’ laws to meet. For example, Article 61 requires remedies for criminal acts of infringement that “provide a deterrent”<sup>168</sup> and Article 45 empowers judicial authorities to order civil damages “adequate to compensate” right holders.<sup>169</sup> The words “permit effective action,” if intended to modify Articles 42–61, do not add anything to the standards contained therein. If the procedural action in question is to provide a deterrent, no more is gained by requiring an “effective” deterrent. Any remedy that is not effective would not be considered a deterrent, so the word “effective” in such an interpretation is merely superfluous. But a remedy that is considered a deterrent would not have effect if it were not applied at all. Thus, an effective interpretation would give independent force to “permit effective action” as an implicit requirement to utilize the enforcement procedures.

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166. This would be true, assuming Article 41(1) does not require application of enforcement procedures, unless the TRIPS Council lifted the moratorium on non-violation and situation complaints. See *supra* note 84 and accompanying text.

167. See Michael Lennard, *Navigating by the Stars: Interpreting the WTO Agreements*, 5 J. INT'L ECON. L. 17, 58 (2002) (“The principle of effective interpretation or ‘*l’effet utile*’ . . . reflects the general rule of interpretation which requires that a treaty be interpreted to give meaning and effect to all the terms of the treaty. For instance, one provision should not be given an interpretation that will result in nullifying the effect of another provision of the same treaty.”) (quoting Panel Report, *Canada—Term of Patent Protection*, n.30, WT/DS170/R (May 5, 2000)).

168. TRIPS art. 61.

169. TRIPS art. 45.

The Vienna Convention on the Law of Treaties, which has also been applied by DSB panels,<sup>170</sup> guides one to interpret the provisions of an agreement “in their context and in the light of its objective and purpose.”<sup>171</sup> The meaning of Article 41(1) is equivocal, so it is proper to look to the purpose of TRIPS in the first instance.<sup>172</sup> One statement of the purpose of TRIPS, and perhaps the most fundamental, is “to promote effective and adequate protection of intellectual property rights.”<sup>173</sup> An interpretation of Article 41(1) that finds a requirement to exercise enforcement procedures promotes IPR protection more than an interpretation to the contrary. Also, without such a requirement, the civil procedures in Articles 43–48 would be rendered inert. These articles all employ the language “the judicial authorities shall have the authority” with respect to ordering certain actions, for example, to produce evidence, to desist from infringing activity, to pay damages, and to dispose of infringing goods.<sup>174</sup> By itself, this language allows complete discretion of a member’s judiciary to implement TRIPS civil procedures. Without more, for instance, some minimum level of commitment to use these procedures where appropriate, TRIPS civil procedures could not provide the bite so many commentators attribute to the Agreement.<sup>175</sup> Therefore, to read Article 41(1) in light of the purpose of TRIPS, and to also take account of the context of Article 41(1) in relation to Articles 43–48, one must favor an interpretation that activates Articles 43–48. Again, such an interpretation would be a minimum requirement for governments to use their enforcement procedures. While this interpretation would provide

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170. See Appellate Body Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, para. 114, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *U.S. Shrimp Case*].

171. Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

172. See *U.S. Shrimp Case*, *supra* note 170, para. 114 (“Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought.”).

173. TRIPS pmb1.

174. TRIPS arts. 43–48.

175. See, e.g., Ralph Oman, *Copyright Piracy in China*, 5 J. MARSHALL REV. INTELL. PROP. L. 583, 585 (2006) (“The [enforcement and dispute settlement provisions] give teeth, for the first time, to the settlement of IP disputes between member countries.”); Shira Perlmutter, *Future Directions in International Copyright*, 16 CARDOZO ARTS & ENT. L.J. 369, 375 (1998) (“[TRIPS] sets out a long list of detailed enforcement mechanisms . . . [a]nd . . . it utilizes the WTO dispute resolution system, giving teeth to the treaty’s requirements.”); Reichman, *Enforcing the Enforcement Procedures*, *supra* note 61, at 339 (“[T]he enforcement and dispute-settlement provisions of the TRIPS Agreement put teeth into the pre-existing intellectual property conventions . . .”).

the United States much greater latitude in challenging China's IPR enforcement, it is yet to be revealed whether the DSB will interpret Article 41(1) as such.

*C. Shortcomings of the U.S. Approach*

It does not appear that the United States is poised to urge the DSB panel to adopt the broad interpretation of Article 41(1) proposed above. Particularly, the first U.S. claim argues that “*as a result of the thresholds . . . China fails to ensure that enforcement procedures . . . are available under its law so as to permit effective action*” and thus “*China's measures . . . appear to be inconsistent with . . . Articles 61 and 41.1.*”<sup>176</sup> If the United States relies solely on these narrow arguments, it preemptively restricts its case's potential. If the United States chooses to argue that China fails to adequately use TRIPS enforcement provisions, however, the DSB could determine that this failure is not a matter of compliance with Article 41(1), but rather a frustration of the purpose of the agreement. Because such claims fall outside the category of violation complaints, the DSB could not address that issue.<sup>177</sup> This would not mean, however, that the DSB offers no recourse for enforcement-based claims. The combined power of the enforcement procedures and dispute settlement mechanism is what set TRIPS apart from prior international intellectual property agreements.<sup>178</sup> That power would only be suited, however, to challenge domestic law, rather than domestic inaction.<sup>179</sup> Indeed, the U.S. claims do identify the specific provisions of Chinese law intended to implement the TRIPS obligations that the United States con-

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176. Request for a Panel, *supra* note 73.

177. If lack of enforcement in China only amounted to a general dissatisfaction based on expected TRIPS benefits, rather than a compliance problem, there would be no recourse to the DSB. Such disappointments could only be addressed through non-violation and situation complaints, which are currently barred. *See supra* note 84 and accompanying text. In China's case, complaints based on the failure to take action may not even amount to a non-violation complaint, which would need to identify “*the application . . . of any measure*” that frustrated the agreement. *See* GATT art. XXIII(1)(b) (emphasis added). Complaints based on the failure to take any measures may thus only qualify under the never-used category of situation complaints. *See supra* note 84. *See also* Hughes Statement, *supra* note 13, at 11 (noting that if the moratorium on non-violation and situation complaints were lifted, “the United States might be able to show that its benefits as a WTO Member—access to the Chinese market—have been impaired by judicial regulations or practices (‘any measure’ under ‘b’) or simply by the general non-enforcement of IP (‘any other situation’ under ‘c’)”) (quoting GATT art. XXIII(1)).

178. *See* Reichman, *Enforcing the Enforcement Procedures*, *supra* note 61, at 338–339.

179. *See* Hughes Statement, *supra* note 13, at 8–9.

siders unmet.<sup>180</sup> In attacking these provisions, the United States will verify that China's laws are in compliance with TRIPS, but it will achieve only nominal enforcement.

Even if the DSB decided that the U.S. claims under Article 41(1), however argued, were properly before it, the standard that enforcement procedures "permit effective action" is extremely vague,<sup>181</sup> which makes the result unpredictable. The absence of DSB interpretations regarding TRIPS enforcement claims makes it difficult to gauge the merits of the case against China. WTO members have brought over 360 cases to the DSB since 1995, but only four have been related to TRIPS enforcement.<sup>182</sup> The few enforcement cases to date gave no indication how the DSB would interpret the effective action requirement because each was settled before reaching a DSB panel.<sup>183</sup> If the facts the United States presents show no intent to disregard the enforcement standard, however it is construed, the DSB is likely to rule in favor of China because TRIPS guarantees deference to the "differences in national legal systems."<sup>184</sup>

The standard of proof required for an Article 41(1) violation might be difficult to meet, except perhaps for a strictly facial challenge, because a complainant must "prove a *negative*, i.e. that there is no IP enforcement sufficient to 'permit effective action' and so as to 'constitute a deterrent to further infringements.'"<sup>185</sup> At the very least, proof that the enforcement procedures are not permitting effective action seems to require

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180. See Request for a Panel, *supra* note 73.

181. See J.H. Reichman & David Lange, *Bargaining Around the TRIPS Agreement: The Case for Ongoing Public-Private Initiatives to Facilitate Worldwide Intellectual Property Transactions*, 9 DUKE J. COMP. & INT'L L. 11, 35 (1998) ("[T]he enforcement provisions are crafted as broad legal standards, rather than as narrow rules, and their inherent ambiguity will make it harder for mediators or dispute-settlement panels to pin down clear-cut violations of international law.").

182. Index of Disputes Issues, *supra* note 10. The United States was the complainant in each of these cases. The two cases brought most recently were against Greece and the European Communities for the same claim related to broadcasting copyrighted motion pictures and television programs in Greece. *Id.*

183. See TRIPS Enforcement Cases, *supra* note 10.

184. See Reichman & Lange, *supra* note 181, at 35–36 ("[T]he TRIPS Agreement expressly mandates respect for . . . 'differences in national legal systems.' These differences, coupled with the ambiguities of the procedural standards as drafted, invite decision-makers to take local circumstances into account when seeking to evaluate actual or potential conflicts between states. . . . In close cases, countries may claim that the weak level of enforcement meted out to a particular subject matter stems from doubts about the requisite scope of protection required under the substantive standards, and not from culpable laxity in applying the enforcement procedures as such.") (quoting the TRIPS Preamble) (footnote omitted).

185. Hughes Statement, *supra* note 13, at 12.

broad evidence of inadequate enforcement.<sup>186</sup> The dispute settlement mechanism was not intended to be a forum for members to bring individual claims for their citizens. One commentator compares the Appellate Body of the DSB to the U.S. Supreme Court in that neither is designed to resolve the multitude of infractions occurring within its jurisdiction.<sup>187</sup> Although this analogy is not perfect, it exemplifies the type of role the DSB is meant to serve. The DSB would likely not be persuaded by a claim asserting a lack of “effective” enforcement based on a single incident, or even several incidents. Furthermore, members are expected to use judgment and exercise self-restraint when considering a case before the DSB,<sup>188</sup> which may suggest a duty to gather compelling evidence.

In October 2005, the USTR requested information from China pursuant to Article 63(3) on certain enforcement statistics.<sup>189</sup> Article 63(3) allows a member to obtain information regarding particular judicial decisions or administrative rulings.<sup>190</sup> The USTR request appeared to be an attempt to gather evidence for a potential complaint, which was applauded by U.S. industry as a critical first step to attacking copyright piracy in China.<sup>191</sup> China, however, asserted there was no legal basis for the U.S. request and refused to provide any information.<sup>192</sup> Under Article 63(3), members may only request information related to “specific” cases and rulings in which they have an interest.<sup>193</sup> Thus, because the U.S. re-

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186. If an implementing domestic law complied with the corresponding TRIPS provision on its face, then it is logical that some significant amount of evidence would be required to show the law was not permitting effective action.

187. Abbott, *Toward a New Era*, *supra* note 28, at 84.

188. YANG, MERCURIO & LI, *supra* note 68, at 25–26.

189. USTR, Clarifications Requested by the United States Concerning IPR Enforcement in Specific Cases in China (Oct. 25, 2005), *available at* [http://www.ustr.gov/assets/Document\\_Library/Reports\\_Publications/2005/asset\\_upload\\_file115\\_8232.pdf](http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/asset_upload_file115_8232.pdf) [hereinafter Request Letter] (signed by Peter F. Allgeier, Ambassador).

190. TRIPS art. 63(3). A member must have “reason to believe that a specific judicial decision or administrative ruling or bilateral agreement in the area of intellectual property rights affects its rights under this Agreement . . .” in order to obtain such information. *Id.*

191. International Intellectual Property Alliance, Statement of the International Intellectual Property Alliance on USTR’s TRIPS Article 63.3 Request to the People’s Republic of China on Copyright Enforcement (Oct. 26, 2005), *available at* <http://www.iipa.com/pdf/IIPA%20China%20TRIPS%2063%20press%20release%20FINAL%2010262005.pdf>.

192. *See New WTO Probe*, *supra* note 6. The Chinese delegate at a TRIPS Council meeting claimed the U.S. request was too broad and that only information about specific cases could be requested. *See id.*

193. *See supra* note 190.

quest was very broad,<sup>194</sup> China's denial of information may have been justified.

Given China's defiant attitude toward such requests, the United States, now looking to present evidence to the DSB panel, may have to identify many cases of weak enforcement practices in which it had an interest in order to make requests for information under Article 63(3) that China will comply with. This could prove a daunting task and impede the ability of the United States to prove its claims. If China remained unresponsive to Article 63(3) requests, the United States could initiate a case against China for failure to comply with Article 63(3), but this would greatly delay any decision in the current U.S. case.

The theme of deference to national implementation of TRIPS standards stated in the agreement's preamble and somewhat more specifically rendered in Article 41(5) also poses an obstacle to the U.S. case. "[Part III] does not . . . 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."<sup>195</sup> With respect to criminal enforcement under Article 61, this deference seems to allow China complete discretion to prosecute cases of willful counterfeiting and piracy.

Another limiting factor for the U.S. case is that it focuses primarily on lack of criminal enforcement in China, with the exception of the claim relating to disposal of infringing goods, which targets customs practices.<sup>196</sup> Even a successful action under Article 61 would not provide a complete solution to inadequate enforcement. Criminal prosecution is only required for certain cases of trademark and copyright misappropriation—the most “blatant and egregious forms of infringing activity.”<sup>197</sup> In all other cases, private right owners must rely entirely on civil procedures to obtain remedies for infringement. As noted above, China has focused attention on the courts for settling IPR disputes.<sup>198</sup> In light of the shortcomings of China's judicial system—corruption, local protectionism, and

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194. See Request Letter, *supra* note 189 (“China has identified numbers of specific judicial decisions and administrative rulings . . . reflecting the application of criminal, administrative, and civil remedies for IPR infringement in various public statements. . . . I am attaching to this letter a list of six clarifications requested by my government concerning the specific cases identified by China for the years 2001 through 2004, as well as any comparable cases that China may have identified for that period or during 2005.”).

195. TRIPS pmbl., art. 41(5).

196. See *supra* notes 158–160 and accompanying text.

197. Adrian Otten & Hannu Wagner, *Compliance with TRIPS: The Emerging World View*, 29 VAND. J. TRANSNAT'L L. 391, 404 (1996) (identifying the distinction between criminal offenses and other infringing activity subject to civil actions under TRIPS).

198. See *supra* Part II.C.



political control<sup>199</sup>—the United States could potentially bring a complaint against China under one of Articles 42–49, relating to civil procedures.<sup>200</sup> Either Article 41(1) or Article 41(2), which requires procedures to be “fair and equitable,”<sup>201</sup> might be used in combination with any of Articles 42–49 to challenge compliance of civil proceedings in China with TRIPS standards.

Any potential complaint involving the inadequacy of civil judicial enforcement, however, is also limited by Article 41(5), which states: “[Part III] does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general . . . .”<sup>202</sup> The agreement was intended to create standards that the varied judicial systems of the world could meet.<sup>203</sup> Thus, a DSB panel might be reluctant to condemn any specific procedures China has implemented with respect to its obligations under TRIPS civil procedure provisions.

#### IV. IMPROVING TRIPS ENFORCEMENT THROUGH TRANSPARENCY

As discussed above, there are several obstacles to a successful WTO complaint based on Article 41(1) and any of the TRIPS enforcement procedures in Articles 42–61: a complaint alleging the failure to use TRIPS enforcement procedures to some minimum degree might be characterized as a non-violation or situation complaint, the vague standard of “effective action” makes the outcome of a DSB ruling uncertain, proving a lack of “effective action” seems to require gathering broad evidence (in either a case targeting a member’s IPR enforcement practices or a member’s lack of action to enforce its IPR enforcement laws), and TRIPS respects members’ allocation of prosecutorial resources and existing judicial systems based on Article 41(5).<sup>204</sup> A solution for improving IPR enforcement in China must circumvent these limitations.

##### *A. A Path to Better Enforcement*

The United States should consider a WTO case against China under Article 63(1) based on China’s failure to meet the judicial decisions pub-

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199. *See id.*

200. *See supra* Part I.B.2.

201. *See* TRIPS art. 41(2).

202. TRIPS art. 41(5).

203. Members are given flexibility in determining how to implement TRIPS provisions because of differences in domestic legal frameworks. *See* Frequently Asked Questions About TRIPS in the WTO, [http://www.wto.org/english/tratop\\_e/trips\\_e/tripfq\\_e.htm#IdenticalRules](http://www.wto.org/english/tratop_e/trips_e/tripfq_e.htm#IdenticalRules).

204. *Supra* Part III.C.

lishing requirement. If a DSB panel found that China was not in compliance with Article 63(1), and China remedied its violation of that provision, mere compliance with the procedural publication requirement would have its own substantive effects that would lead to better enforcement.

As mentioned above, market forces helped propel China's legal reform.<sup>205</sup> Those same forces would impel change in the judicial system if more information were available in the judicial information marketplace.<sup>206</sup> A successful challenge to China's judiciary under Article 63(1) transparency would produce better knowledge of how judges are applying the law, and would possibly identify when corruption and political influence have been determinative in particular cases.<sup>207</sup> As one commentator asserted, "sunlight is the best disinfectant."<sup>208</sup> In such an environment, more businesses would be likely to pursue a remedy in court for alleged infringements.<sup>209</sup> With improved transparency, increased challenges in China's courts would exert upward pressure on the political powers to reform the operation of the judicial system to adapt to the needs of litigants.<sup>210</sup>

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205. See *supra* note 133 and accompanying text.

206. See Liebman, *supra* note 139, at 311 ("The criticism born of greater informational freedom can correct injustice, prevent corruption, and otherwise ensure a more fair legal system."). A complementary effect of the spread of more information on judicial decision-making is an increase in consistency in the application of the law. See *id.* Liebman, in confronting the lack of information available even to judges, argues:

The easier it is for judges to communicate, the easier it is to develop a consistent set of rules across the country. Cheaper communications make it easier for courts to apply the law consistently—a major and often overlooked problem (at least in Western writing on Chinese law). That, in turn, gives judges the power to appeal to the potent principle that similar cases should be decided similarly.

*Id.* (footnote omitted).

207. See Lin, *supra* note 63, at 309–310.

208. *Id.* (quoting DANIEL C.K. CHOW, *THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA* 211–212 (2003)).

209. See *supra* note 25 and accompanying text.

210. One commentator, writing in anticipation of China's entrance into the WTO, suggested that litigating in Chinese courts was important for challenging the existing legal culture. Michael N. Schlesinger, *A Sleeping Giant Awakens: The Development of Intellectual Property Law in China*, 9 J. CHINESE L. 93, 139–140 (1995). Even after China's accession to the WTO, the courts remain an essential forum for pressing further reform, especially in view of the limitations of the WTO dispute settlement mechanism. See *supra* Part III.C.

The success of a challenge under Article 63(1) depends on the level of judicial transparency it requires, as determined by a DSB interpretation, and whether China's judicial system meets this level.

*B. Interpretation of Article 63(1)*

Article 63(1) limits the judicial publishing requirement to "final" decisions.<sup>211</sup> Based on its plain meaning, a "final" decision is one that is either issued by the highest court, or not subject to further appeal.<sup>212</sup> Although the definition of a final decision may seem clear, it may become more complicated in application to the relevant legal system.<sup>213</sup> In China, the finality of any judicial decision is debated because different branches of government may reexamine cases almost ad infinitum.<sup>214</sup> For Article 63(1) to have any effect in China, however, some level of judicial decision-making must be deemed to produce a "final decision."<sup>215</sup>

One commentator has proposed two different methods of imposing "finality" on Chinese court decisions for international legal purposes.<sup>216</sup> The first method is to allow China to determine which decisions are "legally effective," and to declare these decisions final.<sup>217</sup> Although this approach is flexible, and may be contoured to the Chinese judicial system, its application would be complex.<sup>218</sup> Furthermore, in the case of a publishing requirement, this discretionary approach would allow China to unduly restrict publication. A second method is to simply determine a level of "artificial" finality, for example by declaring that decisions of the Supreme People's Court are final.<sup>219</sup> This approach seems more reasonable, as it assures a uniform rule for publication, and does not allow for inter-

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211. TRIPS art. 63(1).

212. RESOURCE BOOK, *supra* note 146, at 642.

213. *Id.*

214. See Nanping Liu, *A Vulnerable Justice*, *supra* note 131.

215. See *id.* at 94.

[J]ustice in China is so vulnerable that many different persons or institutions may step in to challenge a decision of the court, and make the various "final" decisions meaningless. . . . However, such a game does not appear suitable or enjoyable for international players, particularly for jurisdictions that insist on finality of a judgement [sic] as part of the requirements for recognition and enforcement.

*Id.* For the purposes of Article 63(1), the concern is not with the enforceability of Chinese decisions, but whether a decision is publishable based on its finality status.

216. *Id.* at 91–96.

217. *Id.* at 92.

218. *Id.* at 92–93.

219. *Id.* at 94.

ference with the rule once it is established. In a WTO case, the DSB could simply determine this artificial level of finality based on the specific structure of the Chinese judicial system. Decisions in any IPR cases that have reached the Supreme People's Court and decisions by any IPR tribunal that may no longer be appealed to another court should be deemed "final," and should therefore be published.

Another issue with interpreting the publishing requirement is what content published judicial decisions must provide. Article 41(3) says decisions "shall preferably be in writing and reasoned,"<sup>220</sup> but these should be seen as more than just preferences. If decisions are to be published, this assumes they must be in writing. There also should be some reasoning provided in a written decision, because a decision without any reasoning is not useful even if it is published. One Shanghai court has taken the radical step of providing detailed reasoning in its opinions, including dissenting opinions.<sup>221</sup> In reference to the rationale behind this bold step, one commentator stated that "allowing the public to see how a court reaches its decision ultimately results in greater fairness of the judicial process and increases the public's trust in the system."<sup>222</sup> This judicial ethic could be adopted by a DSB panel in its interpretation of Article 63(1), which in turn would spread the practice of writing reasoned, published opinions throughout China's courts.

### *C. Practical Application of Article 63(1) and Implications of a Transparency Approach*

China does not meet the Article 63(1) transparency requirement for publishing judicial decisions, based on the reasonable interpretation of Article 63(1) presented above. The selective publishing of some decisions does not satisfy the imperative language in Article 63(1) that judicial decisions "shall be published."<sup>223</sup> Furthermore, the editing of lower court decisions disregards the essential purpose of publishing judicial decisions—to inform private right holders how the courts are applying the law.<sup>224</sup> The Chinese judicial system, although not truly independent,

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220. TRIPS art. 41(3).

221. Lin, *supra* note 63, at 309. See also RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 287 (2002) ("As in some civil law counties, written decisions in China have usually been fairly brief and generally did not contain dissents nor extensive discussion of the reasoning of the court. However, judges are now expected to include legal analysis and reasoning in their opinions. In some cases, judicial opinions have swelled to twenty or thirty pages.").

222. Lin, *supra* note 63, at 309.

223. See TRIPS art. 63(1).

224. See RESOURCE BOOK, *supra* note 146, at 641–642.

has the capability to implement a DSB decision requiring a system for reporting judicial decisions. In 2002, the Supreme People's Court issued two judicial interpretations: *Provisions on Certain Issues Related to Hearing of International Trade Administration Cases* and *Provisions on the Jurisdictional Matters Concerning Foreign-Related Civil and Commercial Disputes*.<sup>225</sup> These interpretations demonstrate the Court's authority to promulgate rules and its willingness to adopt WTO-promoted international norms.

A case under Article 63(1) avoids the problems inherent in a case under Article 41(1) in combination with an enforcement procedure. The United States would directly challenge China's compliance with a specific provision, which meets the definition of a violation complaint and is within the competence of the DSB for disputes arising under TRIPS.<sup>226</sup> The requirement for judicial transparency is a rule, rather than a vague standard, and thus should be easier to apply. There is no extensive amount of evidence to gather in a complaint under Article 63(1)—all that is required is a comparison of China's efforts at a judicial publication system (primarily the Gazette) with what constitutes a proper Article 63(1) publishing system. A requirement to publish judicial decisions does not interfere with China's prerogative to choose the best way to implement TRIPS standards.<sup>227</sup> Transparency does not dictate what the law should be, just that it be known. The procedural requirement in Article 63(1) to publish judicial decisions does not violate the principle in Article 41(5) that members shall not be required to adopt a distinct judicial system under the agreement.<sup>228</sup> If Article 63(1) and Article 41(5) are to be read as consistent with each other,<sup>229</sup> judicial transparency cannot be interpreted to impose any offensive structural changes on the judicial system. In addition, a DSB panel would be likely to look favorably upon a transparency claim, given the fundamental importance of transparency within the WTO system.<sup>230</sup>

This transparency solution does not provide the immediate and direct results that a heavy-handed, top-down approach might achieve. It is an indirect and long-term solution that can stimulate organic changes in China's judiciary, a feature absent in an administrative decree or temporary crackdown on infringement. Unfortunately, this transparency strategy may prove to be a difficult sell to the USTR. It is not nearly as at-

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225. Wang, *supra* note 55, at 385–386.

226. See *supra* notes 83–84 and accompanying text.

227. TRIPS art. 1.

228. TRIPS art. 41(5).

229. See *supra* note 167.

230. See *supra* note 55.

tractive as a complaint that could get China to take action by increasing criminal prosecutions. The USTR, however, should see increased judicial transparency as another way to foster U.S. investment opportunities. Private investors are eager to engage in China's markets.<sup>231</sup> In the absence of full transparency, investors are deterred because they overestimate legal risks.<sup>232</sup> Greater transparency would increase private investment in China, and industry leaders in the United States should make this argument to persuade the USTR to clear the way for safe investments in China through increased judicial transparency.

#### CONCLUSION

Although still considered a developing country, China represents the largest potential market in the WTO.<sup>233</sup> Therefore, inadequate IPR enforcement in China has a large impact on the United States and other developed countries. Not only does weak IPR enforcement negatively affect private investment decisions and the level of success of any such investments, but it has broader implications for the trade relationship between the United States and China.<sup>234</sup> Greater IPR protection would help

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231. See, e.g., Wayne M. Morrison, *Congressional Research Service Issue Brief for Congress: China's Economic Conditions* 5 (Jan. 12, 2006) ("China's trade and investment reforms and incentives led to a surge in foreign direct investment (FDI) . . .").

232. See *Transparency Paper*, *supra* note 55, at para. 9.

Lack of transparency deters potential investors from entering markets. When companies are unsure about the existing legal regime on investment in a certain country, they tend to overestimate the risk associated with that country well beyond reality. And risk is costly. In general terms, the lack of information distorts economic decisions, including the decisions to invest in a certain activity or in a given country.

*Id.* (footnote omitted). See also Hughes Statement, *supra* note 13, at 4 ("[C]ontinuing lack of transparency cannot help but affect any outsider's conclusions about whether China is meeting its TRIPS enforcement obligations.").

233. 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, 446 (2002) ("China is the WTO's largest member . . ."); Morrison, *China-U.S. Trade Issues*, *supra* note 100, summary ("With a huge population and a rapidly expanding economy, China is a potentially huge market for U.S. exporters.").

234. See Jason Subler, *Portman Presses China on Market Access, IPR; Urges China to Be Active in Doha Talks*, PAT., TRADEMARK & COPYRIGHT J., vol. 71 No. 1745, Nov. 18, 2005 ("The piracy not only deprives U.S. companies of their ability to participate in the Chinese market, it also affects them worldwide," [USTR Robert Portman] asserted. "Piracy disproportionately affects U.S. exports, because they're often knowledge-based exports.").

balance trade between the United States and China.<sup>235</sup> Thus, the state of IPR protection is a primary concern for U.S. economic policy-makers.

Compliance with TRIPS should also be a primary concern for Chinese policy-makers because it offers the opportunity for China to become a mature technology-economy through technology transfer. China has already made great strides in revising its IPR laws and in establishing specialized courts; however, cultural practices remain a hindrance to IPR enforcement. Although TRIPS is just one instrument with which to exert pressure on China to improve enforcement practices, it has the potential to be the most far-reaching.

If the United States initiated a case against China in the DSB to increase judicial transparency based on Article 63(1) of TRIPS, private litigants would have a more predictable atmosphere in which to enforce their rights. This would be an incremental step in judicial reform, with broader implications of helping to create a more independent judiciary. The risk of not having a transparent and independent judicial system is losing the confidence of foreign investors, an outcome that would reduce technology-based investments and stall China's economic progress. A reasonable interpretation of Article 63(1) that requires China to implement a transparent and informative judicial reporting system, and compliance by China, would encourage investors and promote technology transfer. TRIPS is described as a set of minimum standards for IPR protection, and China offers a test case to determine whether these minimum standards will be met by more than minimum enforcement.

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235. Failure to protect IPRs, among other factors, contributes to the U.S. trade deficit. U.S.-CHINA ECON. AND SEC. REVIEW COMM'N, 110TH CONG., REPORT TO CONGRESS 2 (1st Sess. 2007). Indeed, the first clause of the TRIPS Preamble begins, "Desiring to reduce distortions and impediments to international trade." TRIPS pmbl. U.S. Census Bureau statistics indicate that the U.S. trade deficit with China reached \$232.5 billion in 2006. U.S.-CHINA ECON. AND SEC. REVIEW COMM'N, *supra*, at 2. *But cf. IPR Not a Main Factor Affecting Sino-US Trade Balance*, NEWS GUANGDONG, Apr. 4, 2006, <http://www.newsgd.com/news/china1/200604120011.htm> ("China's Minister of Commerce, Bo Xilai, . . . denied [IPR] protection was the main factor in the trade imbalance with the United States . . . . He said it was exaggerating to say that China's insufficient IPR protection had greatly affected US interests in bilateral trade.").

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