



A new dispute concerning the TRIPS agreement: The United States and China in the WTO

Alpana Roy*

On 10 April last year, the United States filed a complaint against China in the Dispute Settlement Body of the World Trade Organization with respect to the protection and enforcement of intellectual property rights. The United States has requested 'consultations' with China on four separate matters: the threshold requirements for criminal procedures and penalties in Chinese law; the disposal of goods confiscated by Chinese customs authorities that infringe intellectual property rights; the issue of copyright and related rights protection for works that have not been authorised for publication or distribution within China; and the unavailability of criminal procedures and penalties for persons engaged in unauthorised reproduction or unauthorised distribution of copyrighted works. Despite widespread allegations of intellectual property piracy, this is the first official complaint which has been lodged against China in the WTO with respect to its obligations under the TRIPS Agreement. A dispute settlement panel has now been established to investigate the complaint. This article will briefly outline the complaint against China, and will also revisit the controversial TRIPS Agreement — which is now in its thirteenth year of operation.

Introduction

The recent complaint filed against China by the United States in the Dispute Settlement Body (DSB) of the World Trade Organization (WTO) on 10 April last year has again created widespread interest in the Agreement on Trade-Related Aspects of Intellectual Property Rights (or TRIPS) and the issue of intellectual property enforcement in China.¹ Despite widespread allegations of intellectual property piracy, this is the first official complaint

* Faculty of Law, University of Technology Sydney.

¹ See, eg, S Hirsch, 'China, Russia Head List Of Pirates', *The Washington Times*, 1 May 2007, at <<http://washingtontimes.com/business/20070430-095029-3208r.htm>> (accessed 21 May 2007); 'Canada seeks to join WTO talks over product piracy in China', *International Herald Tribune*, 25 April 2007, at <<http://www.iht.com/articles/ap/2007/04/25/america/NA-GEN-Canada-WTO-China-Piracy.php>> (accessed 21 May 2007); 'US puts China, Russia on copyright piracy watch list', *Los Angeles Times*, 1 May 2007, at <<http://www.latimes.com/business/la-fi-piracy1may01,1,4774907.story?coll=la-mininav-business&ctrack=1&cset=true>> (accessed 21 May 2007); 'China Says US Complaints To WTO Could Hurt Trade Ties', *The Wall Street Journal*, 25 April 2007, at <http://online.wsj.com/article/SB117741580882780350.html?mod=googlenews_wsj> (accessed 21 May 2007); 'Russia and China Top US Piracy Watch List', *The Moscow Times*, 2 May 2007, at <<http://www.themoscowtimes.com/stories/2007/05/02/043.html>> (accessed 21 May 2007); 'US targeting China, Russia, 10 others for copyright piracy', *The Boston Globe*, 1 May 2007, at <http://www.boston.com/business/globe/articles/2007/05/01/us_targeting_china_russia_10_others_for_copyright_piracy/> (accessed 21 May 2007); 'US piracy complaints against China will seriously damage cooperation: Vice Premier', *People's Daily*, 24 April 2007, at <http://english.people.com.cn/200704/24/eng20070424_369386.html> (accessed 21 May 2007); 'China warns US

which has been lodged against China in the WTO with respect to its obligations under the TRIPS Agreement. A panel was established by the DSB in mid December last year to examine the complaint. Several other members of the WTO — namely, Argentina, Australia, Brazil, Canada, the European Communities, India, Japan, Korea, Mexico, Chinese Taipei, Thailand and Turkey — have reserved their rights to participate in the panel proceedings as third parties.

The new dispute has refocused attention on the controversial TRIPS Agreement, now in its thirteenth year of operation. This article will revisit the TRIPS Agreement in more detail and briefly outline the US complaint against China, which is currently pending in the DSB of the WTO.²

Background to the current international intellectual property system: from GATT to the WTO

The TRIPS Agreement was established as part of the WTO regime that came into operation on 1 January 1995.³ Prior to the establishment of the WTO, the General Agreement on Tariffs and Trade (GATT) was the international body responsible for administering global trade rules. The ‘GATT years’ of the multilateral trade system primarily dealt with trade issues in manufactured goods. The aim of GATT was to remove trade barriers and limit government policies that distorted international trade flows.⁴ Despite the WTO superseding

against piracy’, *The Times of India*, 24 April 2007, <http://timesofindia.indiatimes.com/World/China/China_warns_US_against_piracy/articleshow/1951589.cms> (accessed 21 May 2007); D Palmer, ‘US blasts piracy in China, Russia, Canada’, *The China Post*, 19 May 2007, at <<http://www.chinapost.com.tw/news/archives/business/2007519/110040.htm>> (accessed 21 May 2007); B Klapper, ‘Canada To Join WTO’s China Piracy Case’, *Forbes*, 25 April 2007, at <<http://www.forbes.com/feeds/ap/2007/04/25/ap3651868.html>> (accessed 21 May 2007).

2 It is beyond the scope of this article to provide a detailed contextual analysis of the background to the complaint. For further discussion on intellectual property enforcement in China, see W P Alford, *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization*, Stanford University Press, Stanford, 1995; W Alford, ‘Don’t Stop Thinking About . . . Yesterday: Why There Was No Indigenous Counterpart to Intellectual Property Law in Imperial China’ (1993) 7 *Jnl of Chinese Law* 3; A Gregory, ‘Chinese Trademark law and the TRIPs Agreement — Confucius meets the WTO’ in D Cass, G Barker and B Williams (Eds), *China and the World Trading System: Entering the New Millennium*, Cambridge University Press, Cambridge, 2003, pp 321–44; D Stewart and B Williams, ‘The impact of China’s WTO membership on the review of the TRIPs Agreement’ in Cass, Barker and Williams, *ibid*, pp 363–83; A Taubman, ‘TRIPs goes East: China’s Interests and International Trade in Intellectual Property’ in Cass, Barker and Williams, *ibid*, pp 345–62; J Wickeri, ‘Copyright in the Chinese Context’ in P Altbach (Ed), *Copyright and Development: Inequality in the Information Age*, Bellagio Publishing Network Research and Information Center, Chestnut Hill, 1995, pp 73–91.

3 The full text of the TRIPS Agreement is available at <http://www.wto.org/english/docs_e/legal_e/legal_e.htm#TRIPs> (accessed 23 July 2007).

4 For further information on GATT, see generally *Understanding the WTO: Basics: The GATT years: from Havana to Marrakesh*, World Trade Organization (WTO), at <http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm> (accessed 19 August 2004).

GATT, there is a clear commitment in the WTO Agreement to follow previous GATT 'decisions, procedures and customary practices'.⁵

The WTO is now the body responsible for administering the multilateral trading system between states.⁶ The WTO is a fully evolved international organisation with legal personality.⁷ Nations acceding to the WTO Agreement also automatically become subject to the annexed agreements. There are four annexes to the WTO Agreement, but only the first three are mandatory for all contracting parties.⁸ The first annex comprises of the Multilateral Agreements on Trade in Goods (agreements made up of GATT 1994); the General Agreement on Trade in Services (GATS); and Trade-Related Aspects of Intellectual Property Rights (TRIPS). The second annex is the Dispute Settlement Understanding. The third annex is the Trade Policy Review Mechanism. Finally, the fourth annex comprises of the Plurilateral Trade Agreements.⁹

The WTO and the TRIPS Agreement were established during the Uruguay Round of multilateral trade negotiations, which commenced in 1986. The Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations was signed by members of GATT in Marrakesh on 15 April 1994. The Uruguay Round was the eighth round of proceedings since the establishment of GATT in 1947.¹⁰ The Uruguay Round expanded the scope of areas traditionally covered under GATT, and the most significant achievement of the round was the extension of trade rules to new subject areas — namely, intellectual property and trade in services. These two new subject areas resulted in two new agreements, which were negotiated as part of the Round: the Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the General Agreement on Trade in Services (GATS).¹¹ The ministerial declaration which launched the Uruguay Trade Round listed TRIPS as a subject for negotiation, mainly due to pressure by the major intellectual property stakeholders — in broad terms, the northern states (particularly the United States) and multinational corporations.¹² Indeed, by the end of the

5 See Art XVI of the WTO Agreement, at <http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm#articleXVI> (accessed 19 August 2004).

6 See generally *What is the WTO?*, WTO, at <http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm#intro> (accessed 18 August 2004).

7 See Art VIII of the Agreement Establishing the World Trade Organization (the WTO Agreement), at <http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm#articleVIII> (accessed 18 August 2004).

8 See Art XII of the WTO Agreement, at <http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm#articleXII> (accessed 18 August 2004).

9 These annexes can be accessed at <http://www.wto.org/english/docs_e/legal_e/legal_e.htm> (accessed 18 August 2004).

10 See *Gatt Rounds*, Nadir Organisation, at <<http://www.nadir.org/nadir/initiativ/agp/free/wto/rounds.htm>> (accessed 18 August 2004); *Understanding the WTO: Basics: The Uruguay Round*, WTO, at <http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm> (accessed 19 August 2004); *The WTO in Brief, Part 1: The multilateral trading system- past, present and future*, WTO, at <http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr01_e.htm> (accessed 18 August 2004).

11 See generally WTO, *Understanding the WTO: Basics: The Uruguay Round*, above n 10.

12 For an interesting discussion on the pivotal role played by multinational corporations in the

1980s, the enormous revenue to be made from intellectual property products was becoming increasingly clear. For this reason, intellectual property owners were keen to integrate intellectual property rights with global trade and accordingly argued that these rights should become the subject of multilateral trade negotiations.¹³ In practical terms, this meant moving intellectual property into GATT, and away from the World Intellectual Property Organisation (WIPO).¹⁴ While countries traditionally opposed to strong rights in intellectual property, such as India, Brazil and other southern states, initially resisted GATT's jurisdiction to deal with intellectual property matters, they eventually agreed to accept the terms of the TRIPS Agreement due to two major incentives: immediate concessions on agricultural products and textiles, and the future possibility of greater foreign direct investment (FDI).¹⁵ Sell suggests that while the original aim of linking intellectual property rights to the international trade regime was simply to strengthen global anti-counterfeiting measures, the US government ultimately lobbied for a far wider-reaching agreement due to pressure from a powerful group of multinational corporations.¹⁶

While China was not a party to GATT during the negotiation of the TRIPS Agreement, it did participate in the Uruguay Round of Trade Negotiations.¹⁷ During the talks, China argued that it should be admitted with 'developing country' status in order to receive the benefits of delayed implementation of the TRIPS Agreement.¹⁸ However, the United States challenged China's application, arguing that 'China was capable of curtailing IP rights violations and should be admitted with developed-country status'.¹⁹

Situating intellectual property rights firmly within the WTO has meant that for the very first time intellectual property has become inextricably linked to the global multilateral trading system. Gana very usefully identifies four major themes that emerge from situating intellectual property rights within the global trade arena:

TRIPS negotiations, see S K Sell, *Private Power, Public Law: the Globalization of Intellectual Property Rights*, Cambridge University Press, Cambridge, 2003.

13 See generally D Matthews, *Globalising Intellectual Property Rights: the TRIPs Agreement*, Routledge, London and New York, 2002, pp 7–28; S K Sell, 'Intellectual Property Protection and Antitrust in the Developing World: Crisis, Coercion, and Choice' (1995) 49(2) *International Organization* 315 at 322.

14 WIPO is the UN's administering body for international intellectual property and is based on the system of one country per vote. Commentators such as Harms J suggest that WIPO is generally not as popular among northern states because of its more 'democratic structure' and countries are unable to use trade sanctions (or the 'carrot and stick approach') of TRIPS and the WTO. See L T C Harms, 'Offering Cake for the South (Editorial)' (2000) *EIPR* 451 at 452. Pretorius also suggests that the United States was the most influential player in GATT and was keen (along with other northern states) to move intellectual property negotiations into GATT because of the weak Southern presence. See W Pretorius, 'TRIPS and Developing Countries: How Level is the Playing Field?' in P Drahos and R Mayne (Eds), *Global Intellectual Property Rights — Knowledge, Access and Development*, Palgrave Macmillan, Hampshire, 2002, p 184.

15 See G Lea, 'Digital Millennium or Digital Dominion? The effect of IPRs in Software on Developing Countries' in Drahos and Mayne, above n 14, p 152.

16 Sell, above n 12.

17 Gregory, above n 2, p 323.

18 Ibid.

19 Ibid.

- (i) Easier 'monitoring' of intellectual property through the organisational structure of the WTO;
- (ii) the transformation of private (individual) rights into public (state) rights — only sovereign states may bring a claim under the WTO's dispute settlement mechanisms (which means that states must represent their citizens with respect to disputes);
- (iii) the 'internationalization' of intellectual property rights due to its position within the multilateral trading system; and
- (iv) the 'creation' and 'establishment' of a global intellectual property system.²⁰

As TRIPS forms part of the WTO apparatus, the agreement links intellectual property rights with the dispute settlement mechanism at the WTO, and disputes arising under TRIPS are governed by the WTO's central dispute resolution process (see Art 64(1) of the agreement). Indeed, one of the major functions of the WTO is dispute settlement.²¹ Under procedures laid down in its dispute resolution process, the WTO can authorise retaliatory trade sanctions if members fail to comply with their obligations within a reasonable period of time.

It is hardly surprising that the United States, as the leading stakeholder in global intellectual property ownership, has actively used the WTO dispute resolution process since the implementation of the TRIPS Agreement, and has filed more TRIPS complaints than all WTO member countries combined. Apart from its recent complaint against China, cases have been filed against several countries, including: Argentina, Brazil, Canada, Denmark, European Communities, Greece, India, Ireland, Japan, Pakistan, Portugal, and Sweden.²²

The TRIPS provisions

The TRIPS Agreement creates minimum standards for intellectual property rights, which members of the WTO are required to implement through national legislation. The agreement imposes two kinds of obligation on states to comply with international standards. First, WTO members are required to apply the main provisions of several multilateral treaties, such as the Berne and Paris Conventions. Second, TRIPS itself prescribes a number of minimum standards for intellectual property protection. For example, copyright protection for computer programs (Art 10) and patent protection for

20 R L Gana, 'Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property' (1995) XXIV *Denver Jnl of International Law and Policy* 109 at 123–4.

21 See Art III(3) of the WTO Agreement, at *Uruguay Round Agreement: Marrakesh Agreement establishing the World Trade Organization*, WTO <http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm#articleIII> (accessed 24 August 2004). See generally *Uruguay Round Agreement: Understanding on Rules and Procedures Governing the Settlement of Disputes*, WTO, at <http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm> (accessed 24 August 2004); *Understanding the WTO: Settling Disputes*, WTO, at <http://www.wto.org/english/thewto_e/whatis_e/tif_e/tif_e.htm#disputes> (accessed 24 August 2004).

22 These disputes are available on the WTO website. See WTO, *Dispute Settlement: The Disputes (Index of Dispute Issues)*, 2007, WTO, at <http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm#section_211_us_omnibus_appropriations_act> (accessed 24 September 2007).

microbiological processes (Art 27.3(b)). Thus, the TRIPS Agreement only contains *minimum* standards and although the agreement will certainly contribute to a certain degree of harmonisation in intellectual property law, it does not itself constitute a uniform law on the matter.

Under TRIPS, WTO members are obliged to give effect to a set of basic minimum rules covering copyright, trademarks, patents, layout-designs of integrated circuits, geographical indications, industrial designs and protection of undisclosed information. There are also uniform remedies available for the enforcement of these rights.²³

The definition of what is meant by 'intellectual property' in the TRIPS Agreement does not differ substantially from the definition provided in other international agreements such as WIPO and the Paris Convention. In TRIPS, 'intellectual property rights' include:

- copyright and related rights (Arts 9–14);
- trademarks, including service marks (Arts 15–21);
- geographical indications (Arts 22–24);
- industrial designs (Arts 25–26);
- patents (Arts 27–34);
- layout-designs (topographies) of integrated circuits (Arts 35–38); and
- undisclosed information, including trade secrets (Art 39).

Article 40 of TRIPS also addresses the issue of control of anti-competitive practices in contractual licences, to allow members to legislate to control abuses of intellectual property rights that have an adverse effect on competition in a market.

The general goals of TRIPS are set out in the Preamble and include: the reduction of distortions and impediments to international trade; promotion of effective protection for intellectual property rights; and ensuring that measures to protect intellectual property rights do not become barriers to legitimate trade.

The formal objectives of TRIPS are found in Art 7 of the Agreement. Article 7 states that the protection and enforcement of intellectual property rights should contribute to: the promotion of technological innovation; the transfer and dissemination of technology; the mutual advantage of producers and users of technological knowledge in a manner conducive to social and economic welfare; and a balance of rights and obligations.

The general provisions and basic principles of TRIPS are found in Arts 1–8. A reading of these provisions clearly indicate that the concept of intellectual property is essentially approached from a trade and commerce perspective, and intellectual property subject matters are seen as private property interests to be enforced principally through private civil action. The TRIPS Agreement also builds upon (and extends) the existing intellectual property laws contained in the WIPO treaties: the Treaty on Intellectual Property in Respect of Integrated Circuits, and the Berne, Paris, and Rome Conventions. For example, with respect to copyright, TRIPS extends the protection embodied in

²³ For a useful guide to the TRIPS provisions, see M Blakeney, *Trade-Related Aspects of Intellectual Property Rights: a Concise Guide to the TRIPS Agreement*, Sweet & Maxwell, London, 1996; D Gervais, *The TRIPS Agreement: Drafting History and Analysis*, Sweet & Maxwell, London, 2003.

the Berne Convention to include computer programs and compilations of data, and also rental rights to holders of copyrighted computer programs (see Arts 10 and 11). Interestingly, Lea points out that the TRIPS Agreement is often referred to as 'Convention plus', as it requires its signatories to extend the protection offered by the existing intellectual property treaties *even if* the signatory is not a signatory to the relevant treaty or treaties.²⁴

Gana usefully identifies four important differences between the international system of intellectual property protection under treaties such as the Berne and Paris Conventions and the Universal Copyright Convention, and the 'internationalisation' of intellectual property under TRIPS.²⁵ Gana explains that the 'internationalization' of intellectual property protection is 'the universal mode or "global model" of intellectual property law made mandatory by the provisions of the TRIPS agreement'. Firstly, TRIPS is a more prescriptive agreement as it establishes substantive rules which dictate what must be protected and how, while the other treaties focus more on the scope of protection. All of the international agreements establish basic minimum standards for intellectual property protection, however the TRIPS Agreement prescribes more substantive and procedural rules, including mechanisms for enforcement and also sanctions. Secondly, TRIPS is primarily focused on economic and trade considerations, while the other treaties are also concerned with broader issues such as natural rights philosophy and recognise the intrinsic value in creating. For example, Gana notes that unlike the TRIPS Agreement, the Berne Convention recognises 'moral rights'. Thirdly, as a WTO Agreement, TRIPS is a mandatory requirement for nations participating within the multilateral trading system. The other treaties are not actually based on any such pre-condition. This means that the goals of the other treaties may be achieved through bilateral agreements, making it unnecessary for a country to adopt a multilateral approach if a bilateral arrangement is more useful. Moreover, unlike the other treaties, TRIPS is equipped with a formal dispute resolution mechanism as a WTO Agreement. This means that in the event of a dispute over TRIPS, the WTO may make 'substantive law' in settling the dispute, unlike the institutions administering the other treaties, which do not have any independent authority to 'make law'. Moreover, as the Berne and Paris Conventions are administered by the WIPO, they must defer any conflict regarding the interpretation of the treaties to the International Court of Justice. Indeed, the institutions administering these treaties (ie, the WIPO and UNESCO) may only be involved in dispute resolution at the request of the two contracting parties.²⁶ Finally, Gana suggests that there are significant differences between the institutional structure of the WTO and the organisations administering the other treaties, with the WTO providing a more rigid framework for intellectual property protection.

The TRIPS Agreement adopts the principle of 'national treatment' for intellectual property rights in Arts 3 and 5, which forbid discrimination between a member's own nationals and nationals of other members. The

²⁴ Lea, above n 15, p 152.

²⁵ See Gana, above n 20, at 120–3 n 46.

²⁶ See generally *Treaties and Contracting Parties*, WIPO, at <<http://www.wipo.int/treaties/en/index.html>> (accessed 23 August 2004).

agreement also introduces the WTO principle of Most Favoured Nation Treatment (MFN)²⁷ to the international intellectual property rights system (see Arts 4 and 5). The agreement provides for reservations under certain conditions. However, Art 72 states that reservations which are not specifically provided for in the agreement may not be entered into without the consent of other members.

Article 1 of TRIPS provides that members may choose their own legal mechanisms for implementing the agreement. Indeed, the agreement leaves considerable scope for states to tailor national laws and policies to suit their own needs. Generally, the WTO Agreements establish standards against which national regulation should be evaluated, rather than detailed rules for implementation into national law. To illustrate, Art 1(1) of the TRIPS Agreement states that the 'method of implementing' TRIPS provisions can be freely determined within the 'own legal system and practice' of each nation. It is important to note that there are considerable differences between national intellectual property systems, particularly between those based on the common law, and those based on the civil law. These differences seem to be particularly noticeable in the field of copyright and neighbouring rights, trademarks and trade secrets protection. Members may adopt measures consistent with the agreement necessary to protect public health and other sectors of vital importance to their development (Art 8(1)), and take appropriate measures to prevent abuse of intellectual property rights that unreasonably affect trade or the transfer of technology (Art 8(2)).

Part III (Arts 41–61) of the TRIPS Agreement deals with the enforcement of intellectual property rights. The enforcement provisions contain the civil, judicial and administrative procedures that members must provide in order to enable foreign and national intellectual property holders to enforce their rights.

Article 41 of TRIPS outlines the general obligations expected of members under the agreement. The enforcement measures are to be 'fair and equitable' (Arts 41(2), 42), and provide 'expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements' (Art 41(1)). Article 46 provides that judicial authorities in member states shall have the authority to dispose of, or destroy, infringing goods (including infringing implements) outside the channels of commerce in a way which minimises risks of further infringements. However, there is no obligation to establish a specific judicial system or provide additional resources for the enforcement of intellectual property rights (Art 41(5)).

TRIPS requires states to adopt both civil *and* criminal penalties for intellectual property infringement (see Arts 41–49, 61). Requirements include provisions on evidence (Art 43), injunctions (Art 44), damages (Art 45), right of information (Art 47), indemnification of the defendant (Art 48), administrative procedures (Art 49), and provisional measures (Art 50).

There are also special requirements related to border measures (Arts 51–60), with provisions on suspension of release by customs authorities

²⁷ MFN forbids discrimination between nationals of other members: ie, when a member extends a benefit to the nationals of another country, they must extend that benefit to the nationals of all other members (with exceptions): see Art 4 of TRIPS.

(Art 51), application (Art 52), security or equivalent assurance (Art 53), notice and duration of suspension (Arts 54 and 55), indemnification of the importer and of the owner of the goods (Art 56), right of inspection and information (Art 57), ex officio action (Art 58) and de minimis imports (Art 60). In addition, Art 59 provides that with respect to counterfeit trademark goods, the relevant authorities shall not permit infringing goods to be re-exported in an unaltered state, or subjected to a different customs procedure.

Article 61 provides that criminal procedures and penalties are to be applied in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale (and criminal procedures and penalties *may* be applied in other cases of wilful intellectual property infringement on a commercial scale). Members are to provide remedies, which include imprisonment, monetary fines and the seizure and destruction of the infringing goods and implements.

All members were given transition periods to comply with TRIPS under Arts 65 and 66. Industrialised economies of the north were required to fully comply by 1 January 1996. All members were required to comply with the NT and MFN principles by 1 January 1996. 'Developing' and 'transition' economies were required to comply by 1 January 2000, and 'least developed' economies by 1 January 2005. However, under Art 66, 'least-developed country members' may apply (and have applied) for extensions of this period. In late November 2005, WTO members agreed to extend the transition period for 'least-developed countries', allowing them until 1 July 2013 to provide protection for copyright, trademarks, patents, and other intellectual property rights under TRIPS.²⁸ These countries had already been given until 2016 to protect pharmaceutical patents.²⁹ Article 68 establishes the Council for TRIPS, and states that it is responsible for monitoring the implementation of the TRIPS Agreement. The council is also responsible for assisting members with any dispute settlement procedures.

The case against China: WT/DS362/1³⁰

As noted in the introduction, on 10 April last year, the United States filed a complaint against China in the DSB of the WTO with respect to the protection and enforcement of intellectual property rights. The United States requests 'consultations' with China on four separate matters: the threshold requirements for criminal procedures and penalties in Chinese law; the disposal of goods confiscated by Chinese customs authorities that infringe intellectual property rights; the issue of copyright and related rights protection for works that have not been authorised for publication or distribution within China; and the unavailability of criminal procedures and penalties for persons engaged in unauthorised reproduction or unauthorised distribution of

²⁸ See *Members OK Amendment to Make Health Flexibility Permanent*, 6 December 2005, WTO, (2005 Press Releases: 426) at <http://www.wto.org/english/news_e/pres05_e/pr426_e.htm> (accessed 11 December 2005).

²⁹ Ibid.

³⁰ The document is available online. See *China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights — Request for Consultations by the United States*, WTO Doc WT/DS362/1 (2007), *Disputes concerning the TRIPS Agreement*, WTO, at <http://www.wto.org/english/tratop_e/trips_e/intel5_e.htm> (accessed 14 May 2007).

copyrighted works. Canada,³¹ the European Communities,³² Japan³³ and Mexico³⁴ have also requested to join the consultations, which China has agreed to.³⁵ The United States requested the DSB to establish a panel to examine these matters,³⁶ and a panel was composed on 13 December 2007.³⁷

One of the most common concerns about China's accession to the WTO has been that it will not be able to effectively implement TRIPS.³⁸ Nevertheless, as a member of the WTO, China will now be required to comply with all aspects of the TRIPS Agreement. Given the recent history of the United States as global watchdog in matters relating to intellectual property enforcement, it is not at all surprising that it has been particularly vocal about intellectual property infringement in China. The United States has initiated four intellectual property-related trade agreements (in 1979, 1992, 1995 and 1996), and has also used its notorious s 301 provision of the US Trade Act 1974 against China.³⁹

It is interesting to note that until very recently, China's intellectual property laws were inconsistent with Western jurisprudence, even though China led the world in the invention of printing and several other significant technological achievements.⁴⁰ As Gregory states:

31 WTO Doc WT/DS362/4, *China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights: Request to Join Consultations — Communication from Canada*, available online, see above n 30.

32 WTO Doc WT/DS362/3, *China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights: Request to Join Consultations Communication from the European Communities*, available online, see above n 30.

33 WTO Doc WT/DS362/2, *China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights: Request to Join Consultations — Communication from Japan*, available online, see above n 30.

34 WTO Doc WT/DS362/5, *China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights: Request to Join Consultations — Communication from Mexico*, available online, see above n 30.

35 WTO Doc WT/DS362/6, *China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights: Acceptance by China of the Requests to Join Consultations*, available online, see above n 30.

36 WTO Doc WT/DS362/7, *China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights: Request for the Establishment of a Panel by the United States*, available online (accessed 24 September 2007), see above n 30.

37 WTO Doc WT/DS362/8, *China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights: Constitution of the Panel Established at the Request of the United States: Note by the Secretariat*, available online (accessed 4 February 2008), see above n 30.

38 Gregory, above n 2, p 321.

39 *Ibid*, pp 323–4. Section 301 has been used by the United States as a powerful unilateral national trade enforcement tool to withdraw the benefits of trade agreements, and also impose duties on goods from foreign countries that either deny equitable market access or adequate intellectual property enforcement. The Trade Act 1974 authorised the United States Trade Representative (USTR) to administer s 301 procedures. Sections 301–310 of the Trade Act 1974 (as amended) established procedures for US firms and industry associations to file petitions which must be followed up by the USTR. Under s 301(a), the USTR is required to take action if it finds a breach of a trade agreement or of 'the international legal rights of the US'; under s 301(b) the USTR has a discretion to act against acts or policies of a foreign state it finds to be 'unreasonable or discriminatory' and a burden or restriction on US commerce. See further Sell, above n 12, pp 36, 77.

40 See Alford, above n 2.

The intellectual property laws of imperial China were far from the contemporary capitalist ideal. In fact, IP rights are something foreign to Chinese culture. Confucian teachings encourage learning by copying, in stark contrast to contemporary principles of intellectual property rights. This philosophy resounds throughout Chinese culture. The ancient art form of calligraphy is taught by copying the style of the great masters. It is not until a person has perfected the style of another that they are ready to develop their own unique style. Andrew McCall noted that in China 'the greatest compliment that authors can receive is having someone copy their works'. Whilst this is true for most creators, this attitude makes intellectual property enforcement in China all the more difficult.⁴¹

Wickeri suggests that copyright protection in China has had a 'chequered' past.⁴² For most of the twentieth century, copyright regimes in China have either been short-lived, or indeed, non-existent. For example, the Qing dynasty adopted some intellectual property laws in 1910, however these laws ceased to exist with the fall of the dynasty in 1911. In 1928, a new copyright law was enacted by the Kuomintang, however the law was then abrogated with the victory of the communists. After 1949, the idea of intellectual property as 'private' property came under attack (as did other forms of private property).⁴³ Michael Pendleton suggested in 1986 that China may be able to implement a copyright regime based more on its own history, rather than adopting a purely Western approach to copyright protection.⁴⁴ However, due to intense international pressure, China eventually acceded to both the Berne Convention and the Universal Copyright Convention in October 1992.⁴⁵

Due to the importance of trade considerations, China has been very keen to reform its laws so that they are compatible with international frameworks. There seems to have been an ideological shift in China towards accepting various forms of rights in private ownership due to the economic necessities of global trade. Gregory suggests that the:

adoption of the open door policy in 1979 marked the start of a fundamental shift not only in Chinese economic policy, but also in individual rights. There was a shift away from collectivism to promoting productivity through individual rewards. The importance of foreign investment was realized and, at the substantial urging of international trading partners, China began implementing new IP-related legal protection.⁴⁶

Despite the introduction of various laws, 'IPR infringement is unquestionably widespread in China'.⁴⁷ While authorities have generally responded with prompt action for cases of intellectual property infringement involving foreign investors or companies,⁴⁸ litigation in China remains a 'risky exercise' due to 'lack of judicial expertise and independence, the

41 Gregory, above n 2, pp 324–5.

42 Wickeri, above n 2, p 73.

43 Ibid.

44 M Pendleton, *Intellectual Property Law in the People's Republic of China: a Guide to Patents, Trade Marks and Technology Transfer*, Butterworths, Singapore, 1986, p 41.

45 L Owen, 'Copyright — Benefit or Obstacle?' in P Altbach (Ed), *Copyright and Development: Inequality in the Information Age*, Bellagio Publishing Network Research and Information Center, Chestnut Hill, 1995, pp 93–4.

46 Gregory, above n 2, p 325.

47 Taubman, above n 2, p 345.

48 Wickeri, above n 2, pp 74–5, 77.

unpredictability of trial outcomes and the lack of known IP enforcement policies'.⁴⁹ Gregory argues that criminal penalties have been 'inadequate' due to lack of enforcement measures, and there is the additional problem of judgments for foreign parties not being met.⁵⁰ As noted above, there are also various cultural, social, economic, political and structural barriers to intellectual protection in China.⁵¹

Nevertheless, despite these numerous impediments to the enforcement of intellectual property rights in China, it is useful to keep in mind that the Western concept of 'intellectual property' is a new phenomenon in China's very long history. As Stewart and Williams observe:

China has only recently begun to regard intellectual property law as an important part of its legal infrastructure. For example, the Patent Law was only introduced in 1984 and the Copyright Law in 1990. It was also only as the WTO accession negotiation reached its latter stages that the Chinese government began to accord any priority to enforcement of IP law.⁵²

China's accession to the WTO, and the subsequent case against China in the DSB (WT/DS362/1), signals the beginning of a new era in Chinese intellectual property law. Whatever the result of the dispute in the WTO, it will not be insignificant. Further information on the complaint against China by the United States follows.

Thresholds for criminal procedures and penalties

The United States contends that China is in breach of its obligations under Arts 41.1 and 61 of the TRIPS Agreement due to the thresholds that must be met in order for criminal procedures and penalties to apply to commercial scale trademark counterfeiting and copyright piracy. The United States has pointed to specific concerns with Arts 213, 214, 215, 217, 218 and 220 of China's Criminal Law,⁵³ and measures adopted by the courts and procuratorate,⁵⁴ including related measures.⁵⁵

49 Gregory, above n 2, pp 329–30.

50 Ibid, p 331.

51 Ibid, pp 327–9; Alford, above n 2.

52 Stewart and Williams, above n 2, p 364.

53 Adopted at the Second Session of the Fifth National People's Congress on 1 July 1979, and revised at the Fifth Session of the Eighth National People's Congress on 14 March 1997 (Criminal Law). See WTO Doc WT/DS362/1 (2007), above n 30, p 1.

54 Such as the Interpretation by the Supreme People's Court and the Supreme People's Procuratorate on Several Issues of Concrete Application of Law in Handling Criminal Cases of Infringing Intellectual Property (adopted at the 1331st Session of the Judicial Committee of the Supreme People's Court on 2 November 2004, and the 28th Session of the Tenth Procuratorial Committee of the Supreme People's Procuratorate on 11 November 2004 and to be effective as of 22 December 2004) (the December 2004 Judicial Interpretation), and the Interpretation by the Supreme People's Court and the Supreme People's Procuratorate on Several Issues of Concrete Application of Law in Handling Criminal Cases of Infringing Intellectual Property (II) (adopted at the 1422nd Session of the Judicial Committee of the Supreme People's Court and the 75th Session of the Tenth Procuratorial Committee of the Supreme People's Procuratorate on 4 April 2007 and to be effective on 5 April 2007) (the April 2007 Judicial Interpretation). See WTO Doc WT/DS362/1 (2007), above n 30, p 1.

55 These include the Explanation on Certain Questions Related to the Concrete Application of Law in Hearing Cases of Crimes of Illegal Publication Fa Se (1998) No 30 (adopted by the Adjudication Committee of the Supreme People's Court at its 1032nd meeting on

In its complaint, the United States has outlined that while Arts 213, 214 and 215 of China's Criminal Law state that certain acts of trademark counterfeiting may be subject to criminal procedures and penalties, these are only available 'if the circumstances are serious' or 'if the circumstances are especially serious' (under Arts 213 and 215), or 'if the amount of sales is relatively large' or 'if the amount of sales is huge' (under Art 214).⁵⁶ Furthermore, while Arts 217 and 218 state that certain acts of copyright piracy may be subject to criminal procedures and penalties, these are only available 'if the amount of illegal gains is relatively large, or if there are other serious circumstances' or 'if the amount of illegal gains is huge or if there are other especially serious circumstances' (under Art 217), or 'if the amount of illegal gains is huge' (under Art 218).⁵⁷ Article 220 also provides that these procedures and penalties are available (for the above crimes) if committed by a 'unit', as opposed to natural persons.⁵⁸ The United States argues that the thresholds for the terms 'serious', 'especially serious', 'relatively large' and 'huge'⁵⁹ are defined such that the value calculated is 'the price of the infringing goods as opposed to the price of the corresponding legitimate goods that determines the "illegal business volume"'.⁶⁰ Accordingly, the lower the price of the infringing goods, the more an infringer can sell without reaching the thresholds provided for in the Criminal Law. For these reasons, the United States contends that the thresholds appear to be inconsistent with China's obligations under Arts 41.1 and 61 of the TRIPS Agreement.

Disposal of goods confiscated by Chinese customs authorities which infringe intellectual property rights

The second area of concern for the United States is Art 27 of the Regulations of the People's Republic of China for Customs Protection of Intellectual Property Rights (Customs IPR Regulations),⁶¹ and Art 30 of the Implementing Measures of Customs of the People's Republic of China on Customs Protection of Intellectual Property Rights (Customs IPR Implementing Measures),⁶² including related measures.⁶³

11 December 1998, and to be effective as of 23 December 1998), and the Prosecution Guidelines for Criminal Cases Jointly Issued by the Supreme People's Procuratorate and the Ministry of Public Safety (on 18 April 2001). See WTO Doc WT/DS362/1 (2007), above n 30, p 2.

56 See WTO Doc WT/DS362/1 (2007), above n 30, p 2.

57 Ibid.

58 Ibid.

59 Note that these terms are not defined in the Criminal Law itself, but in the December 2004 Judicial Interpretation and the April 2007 Judicial Interpretation by reference to 'illegal business volume'.

60 WTO Doc WT/DS362/1 (2007), above n 30, p 2.

61 Adopted at the 30th Ordinary Meeting of the State Council on 26 November 2003, published by the State Council on 2 December 2003, and effective from 1 March 2004. See WTO Doc WT/DS362/1 (2007), above n 30, p 3.

62 Adopted at an Administration Affairs Meeting of the General Administration of Customs on 22 April 2004, issued by the General Administration of Customs with Order No 114 on 25 May 2004, and effective from 1 July 2004. See WTO Doc WT/DS362/1 (2007), above n 30, p 3.

63 These include the Law of the People's Republic of China on Administrative Penalty,

The United States submits that the requirement under Art 27 of the Customs IPR Regulations and Art 30 of the Customs IPR Implementing Measures that infringing goods confiscated by Chinese customs authorities be released into the channels of commerce is inconsistent with China's obligations under the TRIPS Agreement.⁶⁴ In its complaint, the United States elaborates further that 'the customs authorities often appear to be required to give priority to disposal options that would allow such goods to enter the channels of commerce (for instance, through auctioning the goods after removing their infringing features). Only if the infringing features cannot be removed must the goods be destroyed.'⁶⁵ For these reasons, the United States contends that China is in breach of its obligations under Arts 46 and 59 of the TRIPS Agreement.⁶⁶

Lack of copyright and related rights protection and enforcement for works that have not been authorised for publication or distribution within China

The third request concerns the lack of copyright and related rights protection and enforcement for creative works of authorship, sound recordings and performances that have not been authorised for publication or distribution within China.⁶⁷ The United States contends that works that are required to undergo forms of pre-publication or pre-distribution review before entering China are not protected by copyright laws before the review is complete and publication and distribution has been authorised. The United States also submits that the measures at issue seem to provide different pre-distribution and pre-authorisation review processes for the works, sound recordings and performances of Chinese nationals and foreign nationals. Specific concerns for the United States include China's Copyright Law (particularly Art 4);⁶⁸ Criminal Law, the Regulations on the Administration of the Publishing Industry, Broadcasting, Audiovisual Products, Films, and Telecommunications;⁶⁹ Administrative Regulations on Audiovisual Products,⁷⁰ Publishing,⁷¹ and Electronic Publications;⁷² the Measures for the

particularly Art 53 (adopted at the Fourth Session of the Eighth National People's Congress on 17 March 1996, proclaimed by Order No 63 of the President of the People's Republic of China on 17 March 1996, and effective at 1 October 1996). See WTO Doc WT/DS362/1 (2007), above n 30, p 3.

64 See WTO Doc WT/DS362/1 (2007), above n 30, p 3.

65 Ibid.

66 Ibid.

67 Ibid.

68 Adopted at the 15th Session of the Standing Committee of the Seventh National People's Congress on 7 September 1990, and amended according to the Decision on the Revision of the Copyright Law of the People's Republic of China, adopted at the 24th Session of the Standing Committee of the Ninth National People's Congress on 27 October 2001. See WTO Doc WT/DS362/1 (2007), above n 30, p 4.

69 See WTO Doc WT/DS362/1 (2007), above n 30, p 4.

70 State Council Order No 341, adopted at the 50th executive meeting of the State Council on 12 December 2001, promulgated on 25 December 2001. See WTO Doc WT/DS362/1 (2007), above n 30, p 4.

71 State Council Order No 343, adopted at the 50th executive meeting of the State Council on 12 December 2001, promulgated on 25 December 2001. See WTO Doc WT/DS362/1 (2007), above n 30, p 4.

Administration of Import of Audio and Video Products;⁷³ the Procedures for Examination and Approval for Publishing Finished Electronic Publication Items Licensed by a Foreign Copyright Owner,⁷⁴ and Importation of Finished Electronic Publication Items by Electronic Publication Importation Entities;⁷⁵ the Procedures for Recording of Imported Publications;⁷⁶ Interim Regulations on Internet Culture Administration;⁷⁷ and opinions on the Development and Regulation of Network Music.⁷⁸ For these reasons, the United States contends that China is in breach of its obligations under Arts 3.1, 9.1 (with respect to China's obligations to comply with Art 5(1) and 5(2) of the Berne Convention)⁷⁹ and Arts 14 and 41.1 of the TRIPS Agreement.

Lack of criminal procedures and penalties for unauthorised reproduction or distribution of copyrighted works

The final matter on which the United States seeks consultations with China concerns the coverage of criminal procedures and penalties for unauthorised reproduction or distribution of copyright protected works on a commercial scale. The United States contends that the unauthorised reproduction of copyrighted works that are not accompanied by unauthorised distribution may not be subject to criminal procedures and penalties. Similarly, the unauthorised distribution of copyrighted works that are not accompanied by unauthorised reproduction may also not be subject to criminal procedures and penalties in China. Specific laws at issue include the Criminal Law, in particular Art 217, and also any related measures (including implementing measures) and amendments.⁸⁰ For these reasons, the United States submits that China may again be in breach of its obligations under Arts 41.1 and 61 of the TRIPS Agreement.

72 Order No 11 of the General Administration of Press and Publication (30 December 1997). See WTO Doc WT/DS362/1 (2007), above n 30, p 4.

73 Decree No 23 of the Ministry of Culture and the General Administration of Customs (17 April 2002). See WTO Doc WT/DS362/1 (2007), above n 30, p 4.

74 General Administration of Press and Publication (27 December 2005) (Basis of Establishment: Decision on Establishing Administrative Licensing for Items Necessary to be Maintained for Administrative Examination and Approval by the State Council [State Council Order No 412]). See WTO Doc WT/DS362/1 (2007), above n 30, p 4.

75 General Administration of Press and Publication (27 December 2005) (Basis of Establishment: Decision on Establishing Administrative Licensing for Items Necessary to be Maintained for Administrative Examination and Approval by the State Council [State Council Order No 412]). See WTO Doc WT/DS362/1 (2007), above n 30, p 4.

76 General Administration of Press and Publication (27 December 2005) (Basis of Establishment: Art 45 of the Administration Regulations on Publication [State Council Order No. 343]). See WTO Doc WT/DS362/1 (2007), above n 30, p 4.

77 Promulgated in Order No 27 of the Ministry of Culture (10 May 2003), amended by Order No 32 of the Ministry of Culture (1 July 2004). See WTO Doc WT/DS362/1 (2007), above n 30, p 4.

78 Ministry of Culture (20 November 2006). See WTO Doc WT/DS362/1 (2007), above n 30, p 4.

79 Article 5(1) provides that foreign authors of protected works will enjoy the same rights granted to domestic authors, including rights specifically granted by the Berne Convention. Article 5(2) of the Berne Convention provides that these rights are not to be subject to any formality.

80 Article 217 establishes criminal procedures and penalties for certain acts of copyright piracy, including 'reproducing and distributing [*fu-zhi-faxing*] a written work, musical work, motion

By filing the case against China, the United States has now formally activated the dispute settlement procedures in the DSB of the WTO. Under this process, members are required to abide by the formal dispute settlement procedures and the United States must now await the determination of the panel with respect to whether China is in contravention of the TRIPS Agreement. If China and the United States are unable to settle the dispute under procedures of the DSB, the WTO Agreement permits the complainant country to implement trade sanctions (if authorised by the DSB).

Conclusion

The request for consultations by the United States has been the first complaint to be filed against China with respect to its obligations under the TRIPS Agreement, despite China being a member of the WTO since 11 December 2001.⁸¹ Given China's status as a major global trading economy, and producer and consumer of intellectual property products, the outcome of the dispute will be widely anticipated.

The complaint has also refocused attention on the TRIPS Agreement, which has received intense criticism since its inception in 1995.⁸² As a form of governmental regulation, TRIPS raises important questions about notions of sovereignty and extraterritoriality, as the agreement enables intellectual property owners to reach beyond jurisdictional boundaries to prevent the unauthorised use of their products.⁸³ As Aoki argues, traditional conceptions of sovereignty are eroded when the minimum standards of intellectual property protection are set by transnational regulatory regimes like the WTO.⁸⁴ The general trend towards the harmonisation of intellectual property laws for all member states of the WTO is also a major criticism of the TRIPS Agreement.⁸⁵ Nevertheless, it is a difficult task to realistically assess the impact of the 13 year old agreement due to various local variables, such as tax incentives, local infrastructure, currency and political stability, the accessibility of a skilled workforce, the size of the domestic market, and so on.⁸⁶ Despite concerns regarding TRIPS, the apparatus for the agreement has effectively been installed around the globe by both domestic and international

picture, television programme or other visual works, computer software or other works without permission of the copyright owner' and 'reproducing and distributing an audio or video recording produced by another person without permission of the producer'. The United States contends that the reference to someone 'selling' infringing works in Art 218 is different from the reference to 'distributing' in Art 217.

81 For further information on dispute cases against China in the WTO, see *China and the WTO*, WTO, at <http://www.wto.org/english/thewto_e/countries_e/china_e.htm> (accessed 22 July 2007).

82 See, eg, P Drahos, 'Global Property Rights in Information: the Story of TRIPS at the GATT' (1995) 13(1) *Prometheus* 6; Drahos and Mayne, above n 14; Gana, above n 20; Sell, above n 12.

83 C Arup, 'Competition over Competition Policy for International Trade and Intellectual Property' (1998) 16(3) *Prometheus* 367.

84 K Aoki, 'Neocolonialism, Anticommons Property and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection' (1998) 6 *Indiana Jnl of Global Legal Studies* 11.

85 P Drahos, 'Introduction' in Drahos and Mayne, above n 14, p 2.

86 Matthews, above n 13, pp 108–11.

institutions, and there are now 151 member states of the WTO.⁸⁷

Over the next few months, the complaint against China in the WTO will be closely followed by the international community as not only will the outcome have significant consequences for diplomatic and trade relations between two major world powers, it will also be important for assessing the effectiveness of the TRIPS Agreement as a tool for enforcing global intellectual property rights.

⁸⁷ For further information on member nations, see *Members and Observers*, WTO, at <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> (accessed 29 February 2008).