



## *WTO Compliance and China's Intellectual Property Regime*

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### *Timeline*

- Open Door Policy – 2001
- Report of the Working Party on the Accession of China (October 2001)
- Protocol on the Accession of the People's Republic of China (WTO Decision of 10 November 2001)



## *Timeline*

- Transitional Review Mechanism of China's accession to the WTO (Protocol: section 18)
- Request for information pursuant to Article 63.3 of the TRIPs Agreement (25 October 2005) USA, Switzerland, Japan
- Dispute Resolution Action led by US in the WTO: Measures Affecting the Protection and Enforcement of Intellectual Property Rights (WT/DS362)

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## *Article 63: Transparency*

- 1. 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, or where such publication is not practicable made publicly available, in a national language, in such a manner as to enable governments and right holders to become acquainted with them...

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## *Article 63.3 TRIPS*

- 3. Each Member shall be prepared to supply, in response to a written request from another Member, information of the sort referred to in paragraph 1. A Member, having 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, may also request in writing to be given access to or be informed in sufficient detail of such specific judicial decisions or administrative rulings or bilateral agreements.

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## *US & Japan Requests*

- ◆ **For details primarily targeting the IPR cases identified by China in its report to the WTO for the period 2001 -2004 and first half of 2005:**
  - Legal basis
  - Remedies, Provisional Measures, and Repeat Infringers
  - Location, Year, and Competent Authority
  - Transfer of Cases to Criminal Authorities
  - Nationals of Other Members/Countries
  - Product

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## *Swiss Request*

- **Once again concerning enforcement of IPR but specifically:**
- Implementation of Legal Provisions
- ✚ Remedies and Provisional Measures
- Institutional aspects

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## *Initial Response of China*

- ✚ China's initial response provided further resistance including arguing that the request for information regarding IPR enforcement cases identified by China for the period 2001 to 2004 in China's own documentation to the TRIPS Council was not sufficiently specific as required under Article 63.3 of the TRIPS Agreement.

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## *Response to Request to Clarify*

- Each of the United States, Switzerland and Japan noted in their response to China's request for clarification that no further specificity was required as China had already identified the cases to the TRIPS Council in successive reviews and particularly in China's white paper distributed to the Council immediately prior to the Article 63.3 Requests.

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## *Result?*

- China invited the United States to participate in constructive discussions to improve IPR enforcement transparency in March 2006
- The result has been the provision of "previously unavailable IPR criminal prosecution data" and a commitment to provide IPR enforcement statistics to the public in both Chinese and English
- ✚ While not a complete response to 63.3, *China's Action Plan of IPR Protection 2006* did suggest further work would be undertaken to satisfy those requests

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## *Dispute Resolution Decision*

- First sentence of Article 4 of the Copyright Law is inconsistent with China's obligations under Article 41.1 of the TRIPS and Article 5(1) of the Berne Convention (1971), as incorporated by Article 9.1 of the TRIPS Agreement:
  - *Works the publication or distribution of which is prohibited by law shall not be protected by this Law.*

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## *Customs measures*

- Determined that the remedies under Art 59 TRIPS don't apply to goods being exported
- Further, the US did not make out that the customs measures were inconsistent with Art 59 as it incorporates the first sentence of Art 46 – namely, permitting the infringing goods to be “disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder” or be destroyed.

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## *Customs Measures*

- However, the customs measures were considered inconsistent with Art 59 as regards to the fourth sentence of Art 46, namely “In regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in exceptional cases, to permit release of the goods into the channels of commerce.”

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## *Criminal Actions*

- The US did not make out that the criminal thresholds for infringement were inconsistent with the requirements of Art 61 of TRIPS, namely “Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy *on a commercial scale*.”

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## *Result?*

- Review in March
- China has claimed to have satisfied the requirements of the Panel
- Indeed, the Copyright Law is in the process/has been amended