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1 ARTICLE 61

1.1 Text of Article 61

Article 61

Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully and on a commercial scale.

1.2 General

1. In *China - Intellectual Property Rights*, the Panel considered the overall nature and scope the provisions under Article 61. As to the *nature* of these provisions the Panel stated:

"In the Panel's view, the general obligation in Article 41.1 confirms that Article 61 contains obligations, as one of the specific provisions on enforcement procedures in Part III."¹

2. The Panel in *China – Intellectual Property Rights*, then made the following general statement with respect to the *scope* of Article 61:

"Therefore, the standard of compliance with Article 61 is the minimum internationally agreed standard set out in that Article. The minimum standard in Article 61 does not defer to China's domestic practice on the definition of criminal liability and sanctions for other wrongful acts in areas not subject to international obligations under the TRIPS Agreement, unless it so states. For example, the second sentence refers to 'crimes of a corresponding gravity' which might refer to domestic practice in other areas. However, the *first* sentence of Article 61 does not make any such reference.

...

Part III of the TRIPS Agreement distinguishes between the treatment of wilful trademark counterfeiting and copyright piracy on a commercial scale, on the one hand, and all other infringements of intellectual property rights, on the other hand, in that only the former are subject to an obligation regarding criminal procedures and penalties. This indicates the shared view of the negotiators that the former are the

¹ Panel Report, *China – Intellectual Property Rights*, para. 7.505. See also paras. 7.513 and 7.515.

most blatant and egregious acts of infringement. This view must inform the interpretation of Article 61."²

3. The Panel in *China – Intellectual Property Rights* also clarified that Article 61 does not address issues of "evidence" or "proceedings":

"In any event, the Panel considers that the United States' allegation regarding physical evidence relates to the evidence sufficient to initiate a criminal prosecution more than to the definition of the crime itself. Article 61 of the TRIPS Agreement does not address evidence. The first sentence of Article 61 addresses the infringing activity in respect of which the minimum standards must apply. Evidence, including in criminal procedures, is mentioned in Article 41.3, but that provision has no bearing on this claim.

Section 5 of Part III of the TRIPS Agreement, on criminal procedures, can be contrasted with Section 2, on civil and administrative procedures and remedies, which makes mention of evidence in Article 42 and contains a dedicated provision addressing certain specific issues regarding evidence in Article 43. Even Article 43 does not address the detailed issue of sufficiency of evidence. Rather, Section 2 leaves such questions to the judicial authorities who weigh that issue in the exercise of their authority to order the remedies set out in Articles 44 to 46. Given the brevity of Section 5, which devotes two sentences to acts of infringement and two sentences to remedies (or penalties), it would be surprising if it was intended to create a broader obligation addressing issues of evidence and procedure. The terms used in Article 61 do not suggest that it was so intended. The different phrasing of the obligation to 'provide ... to be applied' in the first sentence does not have a bearing on this issue."³

1.3 The first sentence of Article 61

1.3.1 General

4. The Panel in *China – Intellectual Property Rights* made various clarifications with respect to the scope of the first sentence of Article 61. The Panel first made the following general statement:

"The terms of the obligation in the first sentence of Article 61 of the TRIPS Agreement are that Members shall 'provide for criminal procedures and penalties to be applied'. That obligation applies to 'wilful trademark counterfeiting or copyright piracy on a commercial scale'. Within that scope, there are no exceptions. The obligation applies to *all* acts of wilful trademark counterfeiting or copyright piracy on a commercial scale."⁴

5. The Panel in *China – Intellectual Property Rights* then clarified that the first sentence of Article 61 contains no fewer than four limitations on the obligation that it sets forth and that these limitations define the scope of the relevant obligation and are not exceptions⁵ :

"The first limitation is that the obligation applies to trademarks and copyright rather than to all intellectual property rights covered by the TRIPS Agreement. The fourth sentence of Article 61 gives Members the option to criminalize other infringements of intellectual property rights, in particular where they are committed wilfully and on a commercial scale. Despite the potential gravity of such infringements, Article 61 creates no obligation to criminalize them. ...

The second limitation in the first sentence of Article 61, which is related to the first, is that it applies to counterfeiting and piracy rather than to all infringements of trademarks and copyright. ... This limitation, like the first, indicates an intention to reduce the scope of the obligation. ...

² Panel Report, *China – Intellectual Property Rights*, paras. 7.514 and 7.528.

³ Panel Report, *China – Intellectual Property Rights*, paras. 7.650-7.651.

⁴ Panel Report, *China – Intellectual Property Rights*, para. 7.516.

⁵ Panel Report, *China – Intellectual Property Rights*, para. 7.518.

...

The third limitation in the first sentence of Article 61 is indicated by the word 'wilful' that precedes the words 'trademark counterfeiting or copyright piracy'. This word functions as a qualifier indicating that trademark counterfeiting or copyright piracy is not subject to the obligation in the first sentence of Article 61 unless it is 'wilful'. This word, focussing on the infringer's intent, reflects the criminal nature of the enforcement procedures at issue. It is absent from Section 4 of Part III, even though that Section is similarly limited, as a minimum, to counterfeit trademark goods and pirated copyright goods. The penalties for criminal acts, such as imprisonment, fines and forfeiture of property, are relatively grave, as reflected in the second sentence of Article 61. There is no obligation to make such penalties available with respect to acts of infringement committed without the requisite intent.

The fourth limitation in the first sentence of Article 61 is indicated by the phrase 'on a commercial scale' that follows the words 'trademark counterfeiting or copyright piracy'. This phrase, like the word 'wilful', appears to qualify both 'trademark counterfeiting' and 'copyright piracy'. The limitation to cases on a commercial scale, like the limitation to cases of wilfulness, stands in contrast to all other specific obligations on enforcement in Part III of the TRIPS Agreement."⁶

6. Bearing the above limitations in mind, the Panel in *China – Intellectual Property Rights* reached the following conclusions with respect to the scope of the phrase "wilful trademark counterfeiting or copyright piracy on a commercial scale":

"The principal interpretative point in dispute is the meaning of the phrase 'on a commercial scale'. This phrase functions in context as a qualifier, indicating that wilful trademark counterfeiting or copyright piracy is included in the scope of the obligation provided that it also satisfies the condition of being 'on a commercial scale'. Accordingly, certain acts of wilful trademark counterfeiting or copyright piracy are excluded from the scope of the first sentence of Article 61.

Despite the fact that trademark counterfeiting and copyright piracy infringe the rights of right holders, and despite the fact that they can be grave, the two qualifications of wilfulness and 'on a commercial scale' indicate that Article 61 does not require Members to provide for criminal procedures and penalties to be applied to such counterfeiting and piracy *per se* unless they satisfy certain additional criteria. This is highlighted by the fourth sentence of Article 61, which allows Members to provide for criminal procedures and penalties to be applied in other cases of infringement, 'in particular' where they are committed wilfully and on a commercial scale. This indicates that the negotiators considered cases of wilful infringement on a commercial scale to represent a subset of cases of infringement, comprising the graver cases. This is useful context for interpreting the first sentence of Article 61, even though it does not refer to 'infringement' in general, because the first sentence refers to both 'counterfeiting' and 'piracy' and wilfulness and commercial scale, evidently to limit the cases of infringement in different ways. Therefore, the text of Article 61 indicates that it must not be assumed that the nature of counterfeiting and piracy *per se* is such that Members are obliged to provide for the application of *criminal* procedures and penalties."⁷

1.3.2 "trademark counterfeiting or copyright piracy"

7. The Panel in *China – Intellectual Property Rights* clarified the meaning of the terms "trademark counterfeiting" and "copyright piracy" in Article 61 by comparing them with the similar terms "counterfeit trademark goods" and "pirated copyright goods" which are defined in footnote 14 to Article 51:

"The terms 'trademark counterfeiting' and 'copyright piracy' are not defined in the TRIPS Agreement. They are distinct from the concepts of 'trademark infringement'

⁶ Panel Report, *China – Intellectual Property Rights*, para. 7.518-7.519 and 7.523-7.524.

⁷ Panel Report, *China – Intellectual Property Rights*, paras. 7.525-7.526.

and 'copyright infringement'. They are similar to the terms 'counterfeit trademark goods' and 'pirated copyright goods' which are defined for the purposes of the TRIPS Agreement⁸ in footnote 14 ...

...

The terms used in the first sentence of Article 61 denote classes of acts or activity whilst the terms used in footnote 14 denote classes of goods only. This reflects the fact that Article 61 provides for criminal enforcement against infringing acts whilst Section 4 of Part III (in which the terms defined in footnote 14 are used) provides for enforcement at the border against infringing goods. The definitions in footnote 14 also refer to the law of the country of 'importation' whilst Article 61 relates to the law of the Member to which the obligation applies – generally speaking, the law of the Member where the infringing act occurs. Subject to these observations, the Panel considers that the definitions in footnote 14 are relevant in understanding the terms used in Article 61."⁹

1.3.3 "on a commercial scale"

8. In *China – Intellectual Property Rights*, based on the evidence of presented to it, the Panel clarified the meaning of the term "on a commercial scale" in Article 51 as follows:

"[A] 'commercial scale' is the magnitude or extent of typical or usual commercial activity. Therefore, counterfeiting or piracy 'on a commercial scale' refers to counterfeiting or piracy carried on at the magnitude or extent of typical or usual commercial activity with respect to a given product in a given market. The magnitude or extent of typical or usual commercial activity with respect to a given product in a given market forms a benchmark by which to assess the obligation in the first sentence of Article 61. It follows that what constitutes a commercial scale for counterfeiting or piracy of a particular product in a particular market will depend on the magnitude or extent that is typical or usual with respect to such a product in such a market, which may be small or large. The magnitude or extent of typical or usual commercial activity relates, in the longer term, to profitability."¹⁰

The Panel observes that what is typical or usual in commerce is a flexible concept. The immediate context in the second sentence of Article 61, which is closely related to the first, refers to the similarly flexible concepts of 'deterrent' and 'corresponding gravity'. Neither these terms nor 'commercial scale' are precise but all depend on circumstances, which vary according to the differing forms of commerce and of counterfeiting and piracy to which these obligations apply."¹¹

9. The Panel in *China – Intellectual Property Rights* stated that the terms in first sentence of Article 61, in particular the term "commercial" within "on a commercial scale", is "technology-neutral" and it hence applies to various forms of commerce and means of infringement:

"The Panel emphasizes that the terms used in the first sentence of Article 61, in particular 'commercial', are technology-neutral. A 'commercial scale' can apply to various forms of commerce and, hence, adapt, various means of infringement. The specific forms of commerce are not static but adapt to changing forms of competition due to technological development and the evolution of marketing practices. The Panel sees no reason why those forms of commerce should be limited to the forms of commerce that existed at the time of negotiation of the TRIPS Agreement. Accordingly, the application of the term 'commercial scale' can adjust to different situations, and refer

⁸ (footnote original) The terms "counterfeit trademark goods" and "pirated copyright goods" are used not only in Section 4 of Part III but also in Article 69 of the TRIPS Agreement. The identical term "counterfeit trademark goods" is also used in Article 46.

⁹ Panel Report, *China – Intellectual Property Rights*, para. 7.521. See also para. 7.520, 7.572.

¹⁰ (footnote original) This finding is without prejudice to the qualitative aspect of "commercial scale" considered with respect to the second limb of this claim.

¹¹ Panel Report, *China – Intellectual Property Rights*, paras. 7.577-7.578.

to a different relative magnitude or extent, degree or proportion, depending on the facts.¹² However, subsequent technological developments do not alter the considerations relevant to the interpretation of the terms used in Article 61."¹³

10. The Panel in *China – Intellectual Property Rights* made the following clarifications with respect to the burden of proving that the method used by a Member to implement the provision of "on a commercial scale" is not consistent with Article 61:

"The Panel notes that it is the standard in the treaty obligation that varies as applied to different fact situations, and not necessarily the means by which Members choose to implement that standard. ...

[The third sentence of Article 1.1 of the TRIPS Agreement] confirms that the TRIPS Agreement does not mandate specific forms of legislation. The Panel may not simply assume that a Member must give its authorities wide discretion to determine what is on a commercial scale in any given case, and may not simply assume that thresholds, including numerical tests, are inconsistent with the relative benchmark in the first sentence of Article 61 of the TRIPS Agreement. As long as a Member in fact provides for criminal procedures and penalties to be applied in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale, it will comply with this obligation. If it is alleged that a Member's method of implementation does not so provide in such cases, that allegation must be proven with evidence. Therefore, the Panel will assess whether the evidence shows that China fails to provide for criminal procedures and penalties to be applied in any such cases."¹⁴

11. The Panel in *China – Intellectual Property Rights* also clarified that the assessment of whether a measure conforms with the relative standard of Article 61 has to be made in respect to the market of the Member whose measure is being assessed:

"The Panel needs to consider the specific conditions applying in China's marketplace in assessing whether the measures in question, which exclude certain acts of infringement from particular liability, conform to the relative standard in Article 61. This applies *a fortiori* as the relative standard is set in terms of what is "on a commercial scale", which varies not only by market but also by product within the same market."¹⁵

1.4 "to be applied"

12. In *Saudi Arabia – Intellectual Property Rights*, the meaning of the phrase to "provide for criminal procedures and penalties to be applied" in the first sentence of Article 61 arose as a general interpretative issue. The Panel considered that criminalization through formal written law would not be sufficient to satisfy the obligation in the first sentence of Article 61, and that it would be necessary to examine evidence of the application of such a law:

"In the Panel's view, the obligation in the first sentence of Article 61 of the TRIPS Agreement is not automatically discharged through the creation of a formal written law that provides for the criminalization of wilful commercial-scale piracy without regard to whether and, if so, how the written law is applied in practice. In cases where a Member has not taken actions that could lead to the application of criminal procedures and penalties against wilful commercial-scale piracy, an assessment of compliance with Article 61 must consider the evidence available to the authorities and other relevant circumstances. Naturally, the onus would rest on the complaining Member to establish that, notwithstanding that another Member's written law provides for criminal penalties and procedures to be applied to cases of wilful

¹² (footnote original) The United States' concern regarding the volume of distribution by means of digital technology and the Internet is therefore relevant to the assessment of a "commercial scale": see United States' rebuttal submission, para. 112.

¹³ Panel Report, *China – Intellectual Property Rights*, para. 7.657.

¹⁴ Panel Report, *China – Intellectual Property Rights*, paras. 7.601-7.602.

¹⁵ Panel Report, *China – Intellectual Property Rights*, para. 7.602. See also paras. 7.604-7.605.

copyright piracy, that Member has acted inconsistently with Article 61 in relation to the manner in which its authorities have applied the law."¹⁶

13. The Panel considered that the interpretation above was consistent with the ordinary meaning of the verb "apply", the context surrounding this term, and the object and purpose of the TRIPS Agreement.¹⁷

14. Beginning with the ordinary meaning of this verb, the Panel considered that the definition of the verb "apply" would suggest that Members have an obligation to put criminal procedures and penalties into practical operation.¹⁸

15. As to the context, the Panel considered that the phrase "to be applied" can further be defined in relation to relevant phrases in Articles 41.1, 42, 44, 45, and 46 of the TRIPS Agreement:

"It is important to consider Article 61 in the context of the whole of the TRIPS Agreement and the distinctions that it draws. The Panel agrees with Qatar that the phrase 'to be applied' in Article 61 can be contrasted with the use of the phrase 'shall make available' in Article 42.¹⁹ The phrase can also be contrasted with the phrase 'shall have the authority' in Articles 44, 45 and 46 of the TRIPS Agreement, and with the more general phrase, in Article 41.1, that requires Members to ensure that enforcement procedures as specified in Part III 'are available'. This difference in terminology, including in particular the difference in terminology between Article 61 ('shall provide for ... to be applied') and Article 42 ('shall make available') reflects and is explained by an important structural difference between civil and criminal procedures. While IP rights are 'private rights'²⁰ that generally require right holders themselves to assert their rights, only States are entitled to enforce criminal law procedures and penalties.

Certain other elements of the context of Article 61 are difficult to reconcile with the view that the obligation in the first sentence of Article 61 requires nothing more of Members than that they formally 'write down criminal procedures and penalties in their criminal laws' without regard to whether and, if so, how they are applied. Article 1.1, first sentence, speaks in broader and more general terms of each Member being required to 'give effect' to TRIPS provisions; and, in its third sentence, refers more widely to the implementation of obligations in a Member's 'legal system and practice'. Likewise, the general obligation under Article 41.1 is that Members shall ensure that enforcement procedures as specified in Part III are available under their law 'so as to permit effective action' against any act of infringement of IP rights covered by the TRIPS Agreement."²¹

16. Finally, the Panel considered that a restrictive interpretation of the phrase "to be applied" would be inconsistent with the object and purpose of the TRIPS Agreement:

"The Panel considers that a restrictive interpretation of the terms 'shall provide for criminal procedures and penalties to be applied' would also be at odds with the object and purpose of Article 61. The object and purpose of Article 61 includes singling out what negotiators of the TRIPS Agreement understood to be the two 'most blatant and egregious acts of infringement' and '[t]his view must inform the interpretation of Article 61.' A restrictive interpretation of the obligation in the first sentence of Article 61 would also be difficult to reconcile with the TRIPS Agreement's overall object and purpose of 'provid[ing] effective and appropriate means for the

¹⁶ Panel Report, *Saudi Arabia – Intellectual Property Rights*, para. 7.207.

¹⁷ Panel Report, *Saudi Arabia – Intellectual Property Rights*, para. 7.208.

¹⁸ Panel Report, *Saudi Arabia – Intellectual Property Rights*, para. 7.208.

¹⁹ (footnote original) Furthermore, in the context of discussing Article 42, the Appellate Body has explained that "the ordinary meaning of the term 'make available' suggests that 'right holders' are entitled under Article 42 to have access to civil judicial procedures that are effective in bringing about the enforcement of their rights covered by the Agreement". (Appellate Body Report, *US – Section 211 Appropriations Act*, para. 215 (referring to Panel Report, *US – Section 211 Appropriations Act*, para. 8.95). (emphasis added))

²⁰ (footnote original) Preamble to the TRIPS Agreement, fourth recital.

²¹ Panel Report, *Saudi Arabia – Intellectual Property Rights*, paras. 7.209-7.210.

enforcement' of trade-related IP rights, as reflected in subparagraph (c) of the second recital of the preamble."²²

17. After having examined the positions of the parties and third parties with respect to the obligation in Article 61 to "provide for criminal procedures and penalties to be applied", the Panel declined to examine further the scope of this obligation in the abstract:

"The parties and a number of third parties provided views on the scope of the obligation in Article 61 to provide for criminal procedures and penalties 'to be applied'. The Panel notes that both parties, and third parties that expressed a view, agree with the view that Article 61 does not contain an obligation on Members to investigate and prosecute *all* suspected cases of wilful 'trademark counterfeiting' and 'copyright piracy' on a commercial scale. The Panel accepts that view. However, the parties and third parties held diverging views about the implications of accepting that premise. Some third parties reasoned that, if there is no obligation to investigate and prosecute all suspected cases of 'trademark counterfeiting' and 'copyright piracy' on a commercial scale, then it follows that the absence of any express guidance or criteria in the text of Article 61 as to which kinds of circumstances would compel a Member's authorities to investigate and prosecute a particular set of allegations is an indication that no such obligation exists. Certain other third parties presented arguments that eschew an all-or-nothing approach, referring for instance to situations of 'constant' or 'systematic' non-enforcement potentially giving rise to a violation of the obligation in the first sentence of Article 61.

The Panel does not consider it necessary to determine further, in the abstract, the scope of the obligation to 'provide for criminal procedures and penalties to be applied'. Having found that Qatar has established a *prima facie* case that beoutQ is operated by individuals or entities subject to the criminal jurisdiction of Saudi Arabia, the Panel turns to the textual elements of Article 61 of the TRIPS Agreement to assess whether: (a) the conduct identified of beoutQ amounts to 'wilful ... copyright piracy on a commercial scale', and (b) Saudi Arabia has implemented its obligation to 'provide for criminal procedures and penalties to be applied' in the circumstances of this case."²³

18. After developing its interpretation of the obligation in the first sentence of Article 61, the Panel applied this obligation to the facts on the record. First, the Panel concluded that the conduct of the broadcast pirate at issue amounted to "copyright piracy on a commercial scale". The Panel reached this conclusion after having examined voluminous evidence on the record demonstrating the activities of the copyright pirate.²⁴

19. Second, the Panel considered that beoutQ's conduct was properly characterized as "wilful ... copyright piracy on a commercial scale", taking into account "the infringer's intent":

"An entity such as beoutQ, whose sole operation consists of providing illegally pirated content and does so on a commercial scale, is not infringing on third-party copyright in a manner that could be characterized as unintentional, accidental, or inadvertent."²⁵

20. Third, the Panel turned to the question of whether Saudi Arabia has "provide[d] for criminal procedures and penalties to be applied" with respect to the "wilful ... copyright piracy on a commercial scale".²⁶ The Panel considered that the respondent had not applied criminal procedures and penalties and had engaged in the promotion of public gatherings with screenings of unauthorized broadcasts by the copyright pirate of World Cup matches:

"The Panel has found that Qatar has established a *prima facie* case that beoutQ is operated by individuals or entities subject to the criminal jurisdiction of Saudi Arabia. The Panel has also found that beIN and other foreign right holders repeatedly sent

²² Panel Report, *Saudi Arabia – Intellectual Property Rights*, para. 7.211.

²³ Panel Report, *Saudi Arabia – Intellectual Property Rights*, paras. 7.212-7.213.

²⁴ Panel Report, *Saudi Arabia – Intellectual Property Rights*, paras. 7.215-7.216.

²⁵ Panel Report, *Saudi Arabia – Intellectual Property Rights*, para. 7.217.

²⁶ Panel Report, *Saudi Arabia – Intellectual Property Rights*, para. 7.218.

detailed information to the Saudi authorities to inform them of beoutQ's alleged piracy, and the extensive evidentiary basis for concluding that beoutQ is operated by individuals or entities subject to the criminal jurisdiction of Saudi Arabia. Additionally, the Panel has found that, while taking no action to apply criminal procedures and penalties to beoutQ, Saudi authorities engaged in the promotion of public gatherings with screenings of beoutQ's unauthorized broadcasts of 2018 World Cup matches."²⁷

21. In the context of this discussion, the Panel also noted the seizures of set-top cable boxes sold by the copyright pirate conducted by the respondent's government. The Panel considered that such seizures did not discharge the obligation of the respondent under Article 61 to provide for criminal procedures and penalties to be applied against beoutQ for its copyright piracy on a commercial scale:

"The Panel notes Saudi Arabia's assertions, as reflected in certain media reports, that its authorities have taken actions to seize beoutQ's STBs, thus acknowledging that beoutQ is engaging in illegal activities. Leaving aside Qatar's submissions about the lack of any evidence to sustain Saudi Arabia's assertions in this regard, Saudi Arabia did not suggest that any such seizures are 'criminal procedures and penalties' in the sense of Article 61, or that they relate to beoutQ's copyright piracy. Rather, Saudi Arabia stated that the basis for its authorities' seizures of beoutQ's STBs is the same basis upon which its authorities have seized beIN's STBs – namely, that they are not licensed. Accordingly, such seizures could not, in the Panel's view, have discharged Saudi Arabia's obligation under Article 61 to provide for criminal procedures and penalties to be applied against beoutQ for its copyright piracy on a commercial scale.

Having considered all of the evidence before it, the Panel concludes that Qatar has discharged its burden of establishing that, notwithstanding that Saudi Arabia's written law may provide for criminal penalties and procedures to be applied to cases of wilful copyright piracy on a commercial scale, its authorities have acted inconsistently with the obligation in the first sentence of Article 61 to 'provide for criminal procedures and penalties to be applied' to the operations of beoutQ. The Panel therefore concludes that Saudi Arabia has acted inconsistently with Article 61 of the TRIPS Agreement."²⁸

1.5 Relationship with other provisions of the TRIPS Agreement

22. The Panel in *China – Intellectual Property Rights* addressed the language of Article 60 to reject the view that "on a commercial scale" in Article 61 is a *de minimis* provision:

"As to the view that 'on a commercial scale' is basically a *de minimis* provision, the Panel need look no further than the preceding provision, Article 60, to see how the negotiators addressed that issue. Article 60 forms part of Section 4 on special requirements related to border measures and serves an analogous purpose to the phrase 'on a commercial scale' in Article 61 in that both define the lower end of infringement at which a particular type of enforcement procedure must be available. However, the terms of each are quite different: Article 60 defines *de minimis* infringement in terms of volume ('small quantities'), nature ('of a non-commercial nature') and circumstances ('in travellers' personal luggage or sent in small consignments'). Had the negotiators wanted to exclude only *de minimis* infringement from the minimum standard of Article 61, they had a model in Article 60, or they could have used words such as 'except for minor or personal use'. However, they did not. Instead, Article 61 refers to size ('scale') qualified only by the word 'commercial'. This indicates that the negotiators intended something different from *de minimis*. Article 60 also indicates that the negotiators did not equate small with non-commercial, confirming that a 'commercial' scale is not necessarily small-scale nor large-scale."²⁹

²⁷ Panel Report, *Saudi Arabia – Intellectual Property Rights*, para. 7.219.

²⁸ Panel Report, *Saudi Arabia – Intellectual Property Rights*, paras. 7.220-7.221.

²⁹ Panel Report, *China – Intellectual Property Rights*, para. 7.553.

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