ANNEX B

SUBMISSIONS OF CHINA

ANNEX B–1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF CHINA

I. INTRODUCTION

1. The United States falls far short of meeting its burden of showing that China is noncompliant with its obligations under the *Agreement on Trade-Related Aspects of Intellectual Property Rights* ("TRIPS"). In its first written submission, the United States has consistently mischaracterized Chinese law and practice. The United States has also sought to expand significantly the scope of Members' obligations under TRIPS; and it has disregarded the very first paragraph of the Agreement: "Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal systems."

2. In its *Claim One* (Section IV of the US Submission), the United States has failed to demonstrate that China's criminal law is inconsistent with China's obligations under TRIPS. The US argument is based on a formulation of TRIPS Article 61 that was expressly rejected at the time TRIPS was negotiated. Contrary to the US claim, China faithfully complies with its obligations under TRIPS by providing criminal procedures and penalties for willful counterfeiting and piracy that are appropriate within the commercial context and legal structures of China.

3. In its *Claim Two* (Section V of the US Submission), the United States misstates China's TRIPS obligations, mischaracterizes Chinese Customs' practices, and accordingly, has failed to demonstrate that Chinese Customs deals with seized infringing goods in a manner that is inconsistent with TRIPS Article 59.

4. In its *Claim Three* (Section VI of the US Submission), the US argument is based on fundamental errors in the understanding of Chinese copyright law. The United States' chief concern in its third claim – and its central misunderstanding – is that China's laws do not provide automatic and immediate copyright protection. The US claim collapses when this error is corrected.

5. Further in regard to its Claim Three, the United States fails to make a *prima facie* case as to assertions in its pleadings relating to TRIPS Article 3 (national treatment) and Article 14 (related rights).

II. CHINA'S CRIMINAL THRESHOLDS ARE CONSISTENT WITH CHINA'S OBLIGATIONS UNDER TRIPS ARTICLES. 61 AND 41.1

A. CHINA'S INTELLECTUAL PROPERTY ENFORCEMENT REGIME

6. China has three legal regimes for the enforcement of intellectual property rights: criminal, administrative and civil enforcement. China employs all three regimes in its efforts to combat counterfeiting and piracy. Criminal measures are used against counterfeiting and piracy when those acts are undertaken on a sufficient scale to exceed China's thresholds for criminal enforcement and China also takes government action against activity through its administrative law enforcement system. Alongside these two forms of government action, China makes civil enforcement rights available to intellectual property rights holders.

1. China has imposed criminal sanctions on willful trademark counterfeiting and copyright piracy on a commercial scale

7. China presents a detailed description of its criminal law regime for intellectual property. China explains each of the criminal laws that concern intellectual property infringement, the specific thresholds of activity that trigger criminal sanctions under each law, and the calculation of these thresholds. China further explains that criminal penalties are available in instances of unfinished products or indicia of commercial scale infringement; and that Chinese law allows for private individuals to initiate criminal action.

8. In the course of describing this legal regime, China endeavors to address and correct numerous US misstatements and mischaracterizations. In describing Chinese criminal law, the United States has misrepresented the scope of China's "illegal business operation volume" threshold for criminal activity, ignoring the fact that Chinese authorities include evidence of infringing goods at other warehouses, in transportation, and already sold. The United States has disregarded China's cumulative calculation of criminal thresholds over the multiple years of the criminal activity. It has ignored the alternative nature of the thresholds under several of China's laws, which is to say that infringement triggers criminal enforcement if it meets any one of the criminal thresholds. Finally, the United States has wrongly claimed that China may not administer criminal penalties for unfinished products and indicia of infringement, when Chinese law clearly provides otherwise.

2. China employs an administrative enforcement regime that imposes significant deterrence on Intellectual Property infringement beneathcCriminal thresholds

9. China describes the government administrative enforcement regime that operates separately from the criminal law, and is not subject to the minimum thresholds of criminal law. China's administrative enforcement system is a unique feature of China's legal structure that does not have a parallel in most Western systems, including the US legal system. Contrary to the US assertion that the thresholds in Chinese criminal law create "a safe harbor" for low-level intellectual property infringement, China in fact operates a government-led enforcement system to which infringement on any scale is subject. Low-level intellectual property infringers do not operate free of government-led enforcement in China.

3. The US assertions on infringement trends are unfounded

10. China addresses the US allegation that a high proportion of copyright infringement cases fall beneath the numerical thresholds and that infringers reduced their volume of copies to avoid criminal liability when the criminal thresholds were lowered. The dataset on which the United States relies comes from administrative raids carried out at the request of the right-holders themselves: its probative relevance is unclear, and in any event, the data does not support the US assertions of statistical trends.

B. THE UNITED STATES BEARS AN ESPECIALLY HIGH BURDEN OF PROOF IN ADVANCING THE CLAIM THAT CHINA FAILS TO MEET ITS ARTICLE 61 OBLIGATION

11. As the complaining party, the United States bears the burden of proof in advancing the argument that China's criminal enforcement regime does not comply with the obligation articulated in TRIPS Article 61. In this particular instance, however, the United States bears a significantly higher burden than it would normally encounter. That is because the United States is advancing a claim – that Members of TRIPS must enact criminal laws that meet highly specific international standards – that cuts decisively against the tradition and norms of international law.

12. International organizations accord great deference to national authorities in criminal law matters. A review of international law shows that states have traditionally regarded criminal law as the exclusive domain of sovereign jurisdiction; where sovereign governments are subject to international commitments concerning criminal law, these commitments afford significant discretion to governments regarding implementation; and international courts have been exceedingly reluctant to impose specific criminal standards on states.

13. In light of prevailing international law, the United States must not merely show that its proposed interpretation of the TRIPS Article 61 obligation is correct by ordinary standards. It must also persuade this panel that the parties to TRIPS agreed to an obligation to reform their criminal laws of such specificity that it is a sharp departure from the practice of every country in every other international forum that relates to national criminal laws.

C. TRIPS ARTICLE 61 REQUIRES THAT MEMBERS SET FORTH CRIMINAL THRESHOLDS FOR COUNTERFEITING AND PIRACY WITHIN THE BROAD AND DISCRETIONARY MEANING OF "COMMERCIAL SCALE"

14. TRIPS Article 61 declares that "Members shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale." The core of the dispute between the United States and China is the meaning and scope of "commercial scale". The United States advances a proposed definition that is inconsistent with the ordinary meaning and that was expressly rejected by the TRIPS negotiators.

15. The obligation set forth in Article 61 is that Members impose criminal penalties for willful infringement that involves a significant magnitude of activity, as appropriate within the commercial context and legal structures of the Member. China meets this obligation.

1. The ordinary meaning of "commercial scale" is not any scale of activity undertaken for financial gain

16. The United States sets forth a deeply flawed definition of "commercial scale". The United States argues that the ordinary meaning of "commercial scale" may be adduced by combining the ordinary meaning of "commercial" ("interested in financial return") and "scale" ("magnitude, extent, or degree"). By this synthesis, the United States claims, the term "commercial scale" has two distinct meanings and would capture two classes of activity: first, "commercial scale" would capture any activity that has the purpose of financial return. (That is, the single sale of an item for one US cent would constitute commercial scale activity). Second, "commercial scale" would also capture activities, "regardless of motive or purpose" that "are of a sufficient extent or magnitude to qualify as 'commercial scale' in the relevant market."

17. The US interpretation is inconsistent with the plain meaning of Article 61. The interpretation violates the principle that Article 61 must be read so as to give full effect to all words of the provision. The US definition also wrongly presumes that the meaning of the phrase "commercial scale" is nothing more than the sum of "commercial" and "scale".

18. In fact, a careful review of the common usage of the phrase shows that "commercial scale" refers to a significant magnitude of infringement activity. The World Intellectual Property Organization Committee of Experts on Measures Against Counterfeiting and Piracy set forth a definition of "commercial scale" in February 1988 that made abundantly clear that the phrase was intended to be a broad and flexible standard and also that it was designed to cover more than simply the "will to make profit". Other uses of "commercial scale" in GATT documents and by the United States Government itself support this interpretation of the phrase.

2. The context of Article 61 shows that Members never intended to bind themselves with specific, concrete standards for National Criminal Law

19. Following the *Vienna Convention on the Law of Treaties* ("Vienna Convention"), TRIPS Article 61 must be read in accordance with its context. Several elements of this deserve consideration.

20. First, TRIPS does not define what constitutes substantive infringement. Where both the scope of rights and the definition of the act that constitutes infringement is left to each country to define, it strains reasonable interpretation to find a specific, concrete threshold at which this undefined act must constitute a crime. At a minimum, there should be clear evidence that the parties agreed to such an odd structure. No such clear evidence exists.

21. Second, the lack of specificity in the language of Article 61 stands in sharp contrast to the specific provisions that are laid out in Articles. 42 through 48 of TRIPS. It also stands to contrast to the specific provisions set forth in the *Agreement on Implementation of Article VI of the GATT* and *Agreement on Subsidies and Countervailing Measures.* Where the negotiating parties wished to impose detailed and concrete obligations, they expressed that requirement of specificity in clear terms.

22. Finally, Article 61 must be understood in the context of Article 1.1, which sets out the "Nature and Scope of Obligations" for the entire agreement; and Article 41.5, which sets forth the "General Obligations" for "Enforcement of Intellectual Property Rights" in Part III of TRIPS. Articles 1.1 and 41.5 demonstrate that Members refused to accept TRIPS as an agreement that would force them into legal harmonization. On the contrary, they insisted on their rights to carry out enforcement in accordance with their own legal traditions and subject to the specific context – such as constraints on enforcement resources – of their respective circumstances. These Articles underscore not only that Article 61 should be read broadly, but that "commercial scale" was intentionally vague – and left undefined – precisely because a large bloc of Members would never have accepted a more specific and intrusive obligation.

3. The proposed US definition is inconsistent with the object and purpose of TRIPS

23. The Vienna Convention provides that a treaty must be interpreted "in the light of its object and purpose." The object and purpose of TRIPS, laid out clearly in the Preamble to the Agreement, are to enhance international trade though the protection of intellectual property within the framework of Members' legal norms and resource constraints. The object and purpose underscore that TRIPS Article 61 should not be read to harmonize legal systems across Members or to disregard Members' interests in developing criminal measures that reflect its own legal norms and public interests.

4. The subsequent actions of Members – including the United States – reveal that they understood "Commercial Scale" to impose only a broad and high standard

24. Members have consistently failed to interpret "commercial scale" to mean any activity undertaken for a commercial purpose. The experiences of the Canadian Government and the European Community show that they did not understand "commercial scale" to simply cover any activity undertaken for a commercial purpose.

25. The practice of the United States in its subsequent bilateral free trade agreements has been to define carefully "commercial scale" to cover any action for financial gain. There would be no reason to negotiate this definition with countries that already are subject to the TRIPS obligations, if the terms already had this meaning in TRIPS. On the contrary, the US insistence on developing a stricter definition in the bilateral context underscores that "commercial scale" as set forth in TRIPS is a broad concept that permits considerable national discretion. It is an acknowledgement that the United States

failed to secure in the TRIPS Article 61 negotiations the obligation that it nonetheless seeks to impose here.

5. The negotiating record shows that the parties understood "Commercial Scale" to set forth a broad standard to cover significant infringement activity

26. The negotiating record of TRIPS demonstrates convincingly that the "commercial scale" standard was proposed and adopted as a clear alternative to the formulation now advanced by the United States. The real TRIPS standard was understood to be broad and flexible and also to target counterfeiting and piracy of a significant scale. The negotiating parties, on multiple occasions, considered and rejected the formulation that criminal penalties apply to any counterfeiting or piracy conducted for commercial gain.

D. CHINA HAS IMPLEMENTED ITS ARTICLE 61 OBLIGATION TO IMPOSE CRIMINAL MEASURES AGAINST WILLFUL COUNTERFEITING AND PIRACY ON A COMMERCIAL SCALE

27. The "commercial scale" standard under TRIPS Article 61 is a broad standard, subject to national discretion and local conditions. The Panel, in considering whether China has fulfilled its obligation, should judge whether the criminal thresholds employed by Chinese law fall within the legitimate range of "commercial scale" and within the legitimate scope of sovereign discretion. Given the broad nature of the "commercial scale" standard and the importance of deference to national discretion, China respectfully proposes that the Panel determine whether China's law imposes criminal penalties for willful infringement that involves a significant magnitude of activity and that is appropriate within the commercial context and legal structures of China. China imposes criminal penalties for infringement activity that exceeds the thresholds set forth in its law. This leaves two issues for the Panel's consideration: are the criminal thresholds appropriate within the structure of Chinese law? And are the thresholds reasonable in the context of commerce within China?

1. The Panel should conclude that China's criminal thresholds are appropriate in light of the structure of China's criminal law

28. China employs thresholds across a range of commercial crimes, reflecting China's allocation and prioritization of criminal enforcement, prosecution and judicial resources. Consistent with its obligations under Article 61 and its rights under Article 41.5, China has set forth criminal measures for intellectual property infringement that are proportional to other commercial crimes.

29. The United States would require China to up-end its criminal law regime. It would require that China all but eliminate thresholds – according to the US formulation of "financial gain," the threshold would be RMB1 – and consequently create an unworkable regime of criminal law enforcement, and prioritize the criminal enforcement of intellectual property offenses over that of other extremely serious crimes, such as currency counterfeiting and bribery. This would be an audacious departure from the deference to national law and respect for the allocation of enforcement resources envisioned in TRIPS.

30. China has acted in good faith to implement its Article 61 obligation. China's criminal thresholds for counterfeiting and piracy are reasonable and appropriate in the context of its legal structures and its other laws on commercial crimes.

2. China's criminal thresholds are appropriate in light of the scale of commerce within China

31. The criminal thresholds are reasonable not just in terms of China's legal structure, but also in terms of the scale of commerce in China, a reasonable reference point for gauging a Member's

"commercial scale" thresholds. It is appropriate – in light of the meaning of "commercial scale" under TRIPS – for a Member to set thresholds that are related to the indicators of a sustainable commercial enterprise.

32. China has set forth an illegal business volume threshold – just one of several alternative criminal thresholds – that is significantly below the level at which even the smallest commercial enterprises operate in China. China has chosen its criminal thresholds not so as to minimize its obligations under TRIPS, but because in its sovereign judgment these thresholds best capture the points at which intellectual property infringement imperils the public order and warrants criminal enforcement.

3. The Panel should not consider the novel obligations that the United States seeks to impose on China

33. In assessing whether China has implemented its legitimate obligations to set forth appropriate criminal laws, the Panel should disregard the unfounded obligations that the United States seeks to impose on China. First, China does not have an obligation to consider the commercial impact of infringement. Under TRIPS, criminal enforcement is required if the infringing activity is on a commercial scale, not if the impact of the infringing activity is on a commercial scale.

34. Second, China does not have an obligation to relax or change its evidentiary standards. The United States argues that because certain evidence of infringement – such as the volume of goods stored in warehouses or already sold – may not always be available to Chinese authorities, then, for that reason, the criminal thresholds are overly high. In fact, China fully complies with its TRIPS obligation by setting forth a reasonable "commercial scale" standard for the application of criminal procedures and penalties. TRIPS imposes a substantive legal obligation and China meets it. The evidentiary procedures that China employs in determining whether or not certain infringement meets this commercial scale have no legal relevance.

E. CHINA FULFILLS ITS OBLIGATIONS UNDER THE SECOND SENTENCE OF ARTICLE 61 AND ARTICLE 41.1 TO AFFORD REMEDIES AND PROCEDURES PURSUANT TO THE FIRST SENTENCE OF ARTICLE 61

35. The United States argues that China also breaches the second sentence of Article 61 and Article 41.1. However, both these provisions are conditional on the first sentence of Article 61. Unless the United States can demonstrate that China breaches its obligations under the first sentence of Article 61, it cannot demonstrate that China also breaches its obligations under the second sentence of Article 61 and Article 41.1. Having failed at the former task, the United States fails at the latter.

III. CHINA'S MEASURES FOR THE DISPOSITION OF INFRINGING GOODS SEIZED BY CUSTOMS ARE CONSISTENT WITH CHINA'S OBLIGATIONS UNDER TRIPS ARTICLE 59

36. In its Claim Two, the United States alleges that Chinese Customs' legal framework for dealing with seized infringing goods is inconsistent with TRIPS. Specifically, the United States argues that Chinese Customs does not have the authority to order the disposal of infringing goods outside the channels of commerce in such a way as to avoid harm to the right-holder ("disposal authority"), or to order the destruction of such goods ("destruction authority"). The US argument is based, in part, on a misstatement of China's law concerning the disposition of infringing goods; and, in part, on the faulty premise that Chinese Customs lacks the authority to destroy infringing goods if destruction is not the government's preferred method of disposition.

37. China fully satisfies its TRIPS obligations: Chinese Customs has the required disposal authority, reflected in its power both to allow the donation of infringing goods to social welfare organizations as well as to allow the sale of such goods to their right-holders. Chinese Customs also has destruction authority, as evident in its discretionary power to determine whether infringing goods qualify for destruction. China notes that, while TRIPS requires that Chinese Customs have the appropriate disposition authority, TRIPS does not limit Customs to dealing with infringing goods only by the means set forth in TRIPS.

A. CHINESE CUSTOMS' DISPOSITION OF INFRINGING GOODS

38. China presents detailed descriptions of the four alternative disposition methods available under Chinese law to the General Administration of Customs of the People's Republic of China ("Customs"). First, Customs has the authority to donate infringing goods to social welfare organizations, if it determines that the goods are suitable for such purposes and do not pose health or safety risks; Customs has the legal responsibility of ensuring that donated goods are exclusively used by social welfare organizations and that they are exclusively used for social welfare purposes. Second, Customs has the authority to enter into a voluntary sale of the infringing goods to their right-holders. Right-holders may choose to purchase infringing goods where, for example, these seized goods are determined to be overruns illicitly produced by a licensed manufacturer, and are therefore identical to the licensed goods. Third, Customs has the authority to publicly auction infringing goods, if Customs has decided that the first two disposition methods are not available, and also if it has formally solicited comments from the right-holders, determined that the goods do not pose health or safety risks, and concluded that the auction is cost-effective, and removed all infringing features. Finally, Customs has the authority to destroy infringing goods, if it has determined that the other disposition methods are not available.

B. CHINA COMPLIES WITH TRIPS ARTICLE 59 BECAUSE IT PROVIDES BOTH DISPOSAL AND DESTRUCTION AUTHORITY

39. TRIPS Article 59 (which incorporates the first sentence of Article 46) requires that China's Customs have the authority to order that infringing goods be "disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder, or… destroyed."

40. Article 59 does not require that China limit Customs' disposition methods to disposal outside the channels of commerce and to destruction. Customs must have the authority to use both such methods, but Article 59 does not impose the obligation to use solely those authorities. The standard for compliance with Article 59 is that, first, Customs has the authority to dispose of infringing goods outside the channels of commerce in such a way as to avoid harm to the right-holder and, second, Customs has the authority to destroy infringing goods. China's Customs, contrary to US allegations, possesses both disposal authority and destruction authority.

1. China's Customs has the authority to dispose of infringing goods outside the channels of commerce while avoiding harm to the interests of the right-holder

41. China's Customs has the authority to order that infringing goods be "disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder," by virtue of its power to sell infringing goods to their right-holders and, independently, by virtue of its power to donate infringing goods to social welfare organizations. In both circumstances, Customs has the authority to dispose of the infringing goods outside the open market while paying due regard to interests of the right-holders.

2. China's Customs has the authority to destroy infringing goods

42. China's Customs possesses the authority to order the destruction of infringing goods, as referenced in TRIPS Article 46 and incorporated in Article 59. Chinese law sets forth criteria for the disposition of infringing goods by Customs. These criteria reflect an official preference for the use of other disposition methods, but Customs has the legal discretion to determine whether the criteria are met and therefore which disposition method is appropriate.

43. The US first written submission itself, as well as US and other Member practice, makes it clear that "authority" was never intended to be absolute and unconditional. The sequencing of disposition methods, coupled with Customs' discretion to determine whether the relevant criteria have been met, is consistent with a grant of destruction authority.

44. Indeed, Customs chose to destroy 58 per cent of the total value of infringing goods between 2005 and 2007. This is demonstrative proof that the putative hierarchy of disposition options does not hinder Customs' ability to order destruction of infringing goods.

C. CHINESE CUSTOMS' USE OF PUBLIC AUCTION IS WHOLLY CONSISTENT WITH ITS OBLIGATIONS UNDER TRIPS

45. The United States alleges that Chinese Customs' public auction of infringing goods breaches Article 59. While TRIPS Article 59 requires that Customs have both disposal authority and destruction authority, it does not limit Customs to those two methods of disposition. TRIPS does not forbid the use of public auction. And in practice, Customs rarely uses public auction. This method of disposition accounts for only 2 per cent of the total value of infringing goods.

1. TRIPS Article 59 does not require Members to limit the disposition of infringing goods to disposal outside the channels of commerce or destruction

46. The plain meaning of "authority," plus Member practice on the disposition of infringing goods, and the negotiating history of Article 59, all underscore the fact that although Members must afford to their customs agencies both disposal authority and destruction authority, they are in no way required to limit their customs agencies to disposal outside the channels of commerce and to destruction. Customs' authority to publicly auction infringing goods is wholly consistent with Article 59.

2. Public Auction is consistent with the guiding principles of Articles 46 and 59

47. The two stated principles of Article 46 (and therefore Article 59) is "to create an effective deterrent to infringement" and to "avoid any harm caused to the right holder." Public auction is consistent with both these principles. First, infringers whose goods are auctioned are left in exactly the same position as if the goods had been destroyed: in both instances the infringers lose the goods without any compensation. Moreover, Customs' use of a reserve price at the auctions ensures that infringers do not have the opportunity to purchase the seized goods at the public auction at an unreasonably low cost and use these goods in furtherance of counterfeiting activity. Second, right-holders have a legal, formal right to comment prior to any public auction; this procedure helps Customs to determine that a good would be inappropriate for public auction, and thereby helps avoid harm to the right-holders.

D. CHINA DISCHARGES ANY LEGAL OBLIGATIONS ASSOCIATED WITH THE FOURTH SENTENCE OF TRIPS ARTICLE 46

48. The United States contends that China also breaches TRIPS in so far as Customs' use of public auction – one of four available disposition methods – "is inconsistent with the principle in the fourth sentence of Article 46." While the United States appears to advance two different versions of this argument, neither is credible.

49. If the United States argues, as it does in the "Introduction" to its first written submission, that the fourth sentence of Article 46 means that Customs must have the authority to keep infringing goods outside the channels of commerce, the foregoing sections demonstrate that Customs has this authority.

50. If the United States argues that the fourth sentence of Article 46 imposes a ban on the return of trademark-infringing goods to the channels of commerce, then it fails to show that the fourth sentence of Article 46 is incorporated into Article 59 and (therefore imposes an obligation on Customs), and further fails to show that Customs has breached the obligation expressed in the first sentence of Article 46.

1. The fourth sentence of Article 46 is not incorporated into Article 59 and therefore does not apply to China's Customs

51. The plain text of TRIPS suggests that the fourth sentence of Article 46 does not apply to Article 59. The parties to TRIPS considered the treatment of counterfeit trademark goods by customs authorities and dealt with it specifically in Article 59. If the parties had intended further obligations they would have listed them there.

2. If the fourth sentence of Article 46 is incorporated into Article 59 and does impose an independent obligation, China is compliant

52. Even if the fourth sentence of Article 46 were incorrectly read to set forth an independent obligation on Customs authorities, China's Customs would fulfill this obligation.

53. First, Chinese Customs has an obligation to remove all infringing features, not just the trademarks, from the seized goods. Second, in addition to removing the trademark, Customs must formally solicit comments from the right-holder. Formal comment is a meaningful step, which allows right-holders to identify specific concerns – such as any safety threats that the goods pose, or the presence of proprietary design features that cannot be removed – and allows Customs to determine that an auction would not be appropriate. Customs has the legal discretion to reject public auction after consulting with the right-holders.

IV. CHINA'S MEASURES FOR THE PROTECTION AND ENFORCEMENT OF COPYRIGHT AND RELATED RIGHTS ARE CONSISTENT WITH CHINA'S CBLIGATIONS UNDER TRIPS

A. OVERVIEW

54. China maintains government review and approval processes with respect to the publication and distribution within China of a variety of works, including films and DVD releases. In general terms, a work subject to these processes may be published or distributed only if the required authorization is obtained. The United States does not object to the existence of these processes, nor could it. This sovereign right is an inherent, reserved power – acknowledged by international law as referenced in Article 17 of the Berne Convention for the Protection of Literary and Artistic Rights

("Berne Convention"), and expressly incorporated into the WTO structure through Article 9.1 of the TRIPS Agreement.

55. The US Claim Three, which deals with these mechanisms, is based on a fundamental misstatement of Chinese law.

56. First, the vast majority of the US claim is based on the erroneous allegation that works that have not completed government content review, including works not yet submitted for review and works awaiting review, are denied copyright protection. They are not denied copyright protection. Chinese law protects copyright from the time a work is created. Article 2 of the Copyright Law of the People's Republic of China ("Copyright Law"), which goes unmentioned in the US first written submission, grants full copyright protection both prior to and during authorization review. It does so by expressly incorporating into Chinese law the rights conferred under international agreements including both the Berne Convention and the TRIPS Agreement.

57. Second, the United States contends that works that fail content review are denied copyright protection under Article 4.1. This also is false. The content review process operates independently of Copyright Law Article 4.1. The only result of a finding of prohibited content through the content review process is a denial of authority to publish. Such a finding does not lead to a denial of copyright, and China is not aware that a finding in a content review process has ever led to a denial of copyright protection. The remainder of the US claim fails for this reason.

B. THE US CLAIM RESTS ON A MISSTATEMENT OF CHINESE LAW

1. Contrary to the US claim, copyright protection under Chinese law attaches to works upon creation, and is not dependent upon content review

58. While publication for certain types of works within China requires content review, copyright in such works vests upon creation and is independent of publication. While such works are pending review they enjoy the full panoply of copyright.

59. Under Article 2 of China's Copyright Law, foreign authors from TRIPS Member states enjoy automatic protection of copyright upon completion of a work, as does any Chinese citizen. This protection applies equally to works that have not been submitted for review and to works that are pending review, and indeed regardless of whether the work is officially published in China at all. The US contention that copyright protection is in any way contingent on content review is simply wrong as a matter of law.

2. Contrary to the US claim, prohibition of publication as a result of content review does not trigger denial of copyright

60. The second principle error of the United States lies in its contention regarding the legal effect of denial of a license to publish or distribute a work. The United States asserts that such denial leads also to a denial of copyright under Article 4.1 of the Copyright Law. In fact, this is not the case. The content review process operates independently of Article 4.1, and the only result of a finding of prohibited content in that process is a denial of authority to publish. Nothing in that finding leads to a denial of copyright.

61. The administration of content review, on the one hand, and the administration of the copyright laws, on the other hand, are separate, independent processes. Content review is conducted by administrative agencies under the State Council, not the courts. In contrast, copyright is enforced by the Chinese judicial system, and by the National Copyright Administration of China ("NCAC")

and its local affiliates. Neither of these bodies responsible for copyright is bound by administrative agency findings in the content review processes.

62. The United States erroneously tries to link the vesting of copyright with the successful completion of review. But the result of content review is a license enabling distribution, not an award of copyright. Under Article 2 of the Copyright Law of the People's Republic of China, in full compliance with Berne Article 5(2), copyright vests automatically and is recognized without administrative formality.

63. Content review is an independent and unrelated process that does not determine whether a work is copyrighted.

C. CHINA PROTECTS COPYRIGHT IRRESPECTIVE OF CONTENT REVIEW PROCESSES

64. The United States draws four conclusions from its erroneous interpretation of Chinese law. The United States alleges that China does not protect copyright for (1) works that have not been submitted for content review, (2) works that are pending content review, (3) unedited versions of works that have been edited to pass content review, and (4) works that have failed content review. In reality, none of these assertions is correct. China in fact protects works regardless of a work's status under content review.

1. China's right to conduct content review is not in question

65. The United States does not challenge China's right to conduct content review, and such a challenge would not be successful. The sovereign right of governments to regulate and even prohibit the content of works clearly authorizes China's content review mechanisms.

66. Berne Article 17 provides:

> "The provisions of this Convention cannot in any way affect the right of the Government of each country of the Union to control, or to prohibit by legislation or by regulation, the circulation, presentation, or exhibition of any work or production . . . ."

67. Thus, all rights granted to authors under the Berne Convention are limited by Berne Article 17. The plain meaning of Berne Article 17, and of official WIPO commentary, as well as every treatise on the topic, supports this view. This recognition is carried into TRIPS Article 9.1, which adopts Berne Article 17.

68. Moreover, the power to protect the public wellbeing is inherent and incidental to sovereignty. Article 17 of the Berne Convention is not an exhaustive codification of the sovereign right to censor, but instead merely references this power, stating that the Convention's provisions cannot in any way limit this sovereign privilege.

2. China protects copyright in works that have not been submitted for review and works that are currently pending content review

69. The first two points of contention raised by the United States involve works that have not been submitted for content review, and works that are pending content review.

70. Copyright vests in a work prior to any consideration being given to content review processes, and is not delayed to await the conclusion of those processes. This conclusion is demonstrated not only by legal analysis, but also by actual practice in China.

71. China presents actual cases demonstrating that its law operates unequivocally to grant copyright protection to works that are pending content review, and for works that have not yet been submitted for content review, and for works that do not require such review.

72. China respectfully notes that the US first written submission provides neither a legal analysis nor any valid examples to support its claim with respect to the supposed lack of protection of copyright in works that have not been submitted or that are currently pending review. In contrast, China has provided both.

3. China protects the copyright in unedited versions of works that have been edited in content review, and in works that have failed content review

73. The third and fourth elements of the US allegation are that copyright is denied to the unedited version of works that are found, in the publication review process, to contain prohibited content, and that copyright is denied to works that have failed the content review process.

74. Neither US allegation is correct. On the contrary, China demonstrates that, in the case of films, for example, works that fail content review, works that were edited to pass content review, and works that are un-reviewed are all protected by copyright enforcement actions initiated by the NCAC.

75. The United States has neglected to offer any legal analysis to support its interpretation of Chinese law, and also has failed to offer any example of copyright being denied to an unedited version or to a work that has failed content review. The United States has not provided to the Panel a single example of a case where a defendant in a copyright infringement action successfully has asserted a defence that the work did not enjoy copyright because it failed a content review process. China respectfully submits that its Supreme People's Court is not aware of a single instance in which such a defense has successfully been asserted.

D. SINCE CHINA DOES NOT FAIL TO PROTECT COPYRIGHT IN THE INSTANCES ALLEGED BY THE UNITED STATES, CHINA DOES NOT FAIL TO COMPLY WITH ITS OBLIGATIONS UNDER TRIPS

76. The entire second part of the US argument on Claim Three details the supposed international rights that are denied by China's alleged failure to protect copyright. As demonstrated above, the US allegations of copyright denial are false, being founded on a major error in understanding Chinese law. Since copyright is not denied, none of the rights enumerated in the second part of the US argument are in fact violated.

77. At paragraphs 215-219 of its first written submission, the United States alleges that a denial of copyright protection under Copyright Law Article 4.1 is an unauthorized "exclusion" of a class of works from copyright protection, and that such denial abrogates certain rights specified in those paragraphs that are guaranteed to authors by the Berne Convention. This claim does not survive the argument presented by China in its first written submission, which demonstrates that Article 4.1 simply does not act in the manner alleged by the United States. China respectfully submits that the US case fails because of a complete misapprehension of Chinese law in this regard. China further notes that to the extent that Article 4.1, independently of the content review process, might act to deny copyright protection to a work found by a court to be "prohibited by law" – a case the United States has not attempted to make – this act of prohibition is protected by Berne Convention Article 17. The denial of copyright protection in such a case, i.e. taking from an author the right to limit the distribution and use of a work whose distribution is completely banned, is a legal and material nullity. The economic rights accorded to authors and artists under the Berne Convention equate to a private right of censorship – rights that are preempted when there is supervening public prohibition as expressly authorized by Berne Article 17. The United States has not demonstrated that the failure to

protect copyright in such works further reduces any rights of authors beyond the act of prohibition itself.

78. At paragraphs 220-225 of its first written submission, the United States alleges that a content review process imposes a prohibited "formality" on the grant of copyright. This contention does not survive the argument presented by China in its first written submission, which demonstrates that recognition of copyright is in fact not contingent upon completion of any content review process, and therefore no formality is imposed.

79. At paragraphs 232-243 of its first written submission, the United States alleges that China fails to provide enforcement procedures in instances when copyright is denied. This claim also fails in light of the arguments presented by China, which show that copyright in fact is not denied as alleged by the United States.

E. THE UNITED STATES HAS FAILED TO PRESENT A PRIMA FACIE CASE TO SUPPORT EITHER ITS NATIONAL TREATMENT CLAIMS OR ITS RELATED RIGHTS CLAIMS, AND THE PANEL SHOULD ACCORDINGLY ENTER A FINDING IN FAVOUR OF CHINA ON THESE MATTERS

80. In its Panel request, the United States alleged a number of national treatment violations, subsidiary to its main allegations that Copyright Law Article 4.1 denies copyright in violation of TRIPS. Similarly, in its Panel request, the United States also alleged, again as a subsidiary matter, that Copyright Law Article 4.1 may deny related rights to performers and phonogram producers in violation of TRIPS Article 14.

81. The United States has failed in its first written submission to make a prima facie case to support either its national treatment claims or its related rights claims. China respectfully submits that in light of this fact, the Panel should rule in favour of China on each of these allegations.

1. The Appellate Body has repeatedly and unambiguously ruled that the initial burden of proof in establishing a prima facie case lies with the complaining party

82. The Appellate Body has been called upon several times to clarify the burden of proof in WTO dispute settlement proceedings. On each of these occasions the Appellate Body has confirmed that the burden of proving that a Member's law is non-compliant with WTO obligations rests wholly with the complaining party. The complaining party must both properly assert and prove its claim. If such proof is absent or deficient, then the respondent has no burden going forward.

2. The United States has failed to meet its burden

83. China submits that the Panel should deny the national treatment and related rights claims raised by the United States.

84. With regard to the alleged TRIPS Article 14 related rights violations, the United States has presented no evidence, and its allegations concerning related rights do not even amount to a properly pled claim. The United States admits as much in its submission.

85. With regard to the national treatment arguments, the US first written submission has neglected to assert any claim whatsoever and thus has seemingly abandoned those claims.

86. Since the United States has failed to establish a prima facie case, China respectfully requests that the Panel rule against the United States, finding that the United States has failed to make a case either that China's measures violate TRIPS Article 14, or that they deny national treatment.

87. Lastly, China respectfully notes that while the United States listed numerous separate measures its Request for Establishment of a Panel, it appears to have attempted to make a case in its first written submission with respect to only five of those measures. China accordingly requests that the Panel find that the United States has failed to assert a prima facie case with respect to the remaining measures, and to rule that the United States as a procedural matter has failed to establish any violation of TRIPS with respect to: Regulations on the Administration of Broadcasting; Regulations on the Administration of Telecommunication; Measures for the Administration of Import of Audio and Video Products; Procedures for Examination and Approval for Publishing Finished Electronic Publication Items Licensed by a Foreign Copyright Owner; Procedures for Examination and Approval of Importation of Finished Electronic Publication Items by Electronic Publication Importation Entities; Procedures for Recording of Imported Publications; Interim Regulations on Internet Culture Administration; and Several Opinions on the Development and Regulation of Network Music.

V. CONCLUSION

88. For the reasons set forth in this submission, China respectfully requests that the Panel find China's measures to be consistent with China's obligations under the TRIPS Agreement. China respectfully submits that the United States has failed to meet its burden of proof with regard to many of China's measures, and has failed to show that any of China's measures are not in compliance with China's obligations.

ANNEX B-2

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF CHINA AT THE FIRST SUBSTANTIVE MEETING

I. INTRODUCTION

1. Thank you, Mr. Chairman and members of the Panel. The United States has set forth legal theories in this case that are highly flawed and that have little bearing on the intellectual property marketplace. China urges the Panel to reject all the US claims.

2. For China, it is not solely a handful of domestic laws at stake in this dispute – although of course this is extremely important. Beyond that, China believes that the balance of rights and obligations in TRIPS is also very much at stake in this dispute.

3. Developing Members repeatedly and emphatically stated that they would accept the obligations of TRIPS only – and only – with due deference to their norms, to their legal systems, and to their resource constraints. But the United States would simply ignore all of this. Willful blindness to the plain record of objections by the developing Members would ill-serve the WTO community as it seeks to negotiate the Doha round of agreements.

II. CLAIM ONE

4. Mr. Chairman and members of the Panel: please allow me to address the first claim by the United States. This first claim is that China's criminal law does not fulfill TRIPS Article 61. TRIPS Article 61 declares that "Members shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale."

5. The Panel is being urged to read the broad language "commercial scale" very strictly. China urges the Panel to consider this issue carefully in light of the traditional rules of interpretation, which recognize that countries do not lightly surrender sovereign powers. In particular, China urges the Panel to ask whether the United States has given it sufficient basis to believe that the parties meant "commercial scale" to impose a strict standard of criminal law.

6. In China, economic crimes are defined by establishing a threshold. Illegal activity that exceeds a certain scale is made subject to the criminal sanction. China has set the thresholds for intellectual property crimes at the same level as for similar commercial crimes.

7. Two very distinct aspects of the Chinese system have a bearing on how these thresholds are set. First, in China, private parties have the right to initiate criminal actions. This makes the threshold a very important matter in terms of the conservation of criminal enforcement resources. Second, China employs an administrative enforcement regime in parallel to the criminal system. This is an enforcement regime that does not appear to have a parallel amongst Western countries. Through administrative enforcement, the Chinese authorities can swiftly and effectively target infringement activity of any scale. Low-scale infringers do not have a "safe harbor". They are subject to vigorous administrative punishment. These low-scale infringers simply do not warrant vastly more time-consuming and costly criminal proceedings.

8. The United States reads "commercial scale" to mean commercial intent: any activity undertaken for financial gain. This is a significant misstatement. The negotiating parties explicitly

rejected a commercial intent standard when it was offered in the negotiations. Among the third parties, few agree with the US definition.

9. The US interpretation is not the ordinary meaning of "commercial scale". The United States never really confronts the ordinary meaning of the overall phrase "commercial scale". Instead, the United States tries to add together dictionary meanings of "commercial" and "scale".

10. The WIPO Committee made it clear that "commercial scale" is a broad standard that should be based on multiple factors and local circumstances. It does not delimit a rigid and definite threshold of activity. And "commercial scale" refers to a significant magnitude of activity. It was designed to cover cases where the "manufacture" of infringing goods should be criminal. This directly contradicts the US contention. "Commercial scale" does not mean any activity undertaken for financial gain. "The will to make profit" is only one of several factors to be considered.

11. This is the ordinary meaning of "commercial scale". It refers to a magnitude of activity. It is a broad standard, not precisely defined. It permits each Member's standard to reflect its own legal system and economic reality.

12. This is the same meaning that is found in older GATT documents – and indeed, in US laws. It is the meaning that the TRIPS negotiating parties considered as they debated whether to adopt a "commercial scale" standard and as they rejected the plain "commercial" standard.

13. China notes that the United States and the third parties have put forward widely divergent definitions of "commercial scale". Each party insists that its is the fair reading of the phrase. But the vast range of meanings itself shows that "commercial scale" does not refer to a specific standard. The standard is vague and open to interpretation.

14. The Appellate Body has held that if a term is vague or ambiguous, the Panel should adopt the interpretation that is less onerous and interferes less with a country's sovereignty. Article 61 touches on Members' domestic criminal law – the very core of national sovereignty. Here, more than any other domain, the Appellate Body must not assume lightly that Members intended the more burdensome, more intrusive meaning.

15. China also wishes to emphasize the particular contextual role of Article 1.1 and Article 41.5 of TRIPS. During the Uruguay Round negotiations, developing countries objected strenuously to new enforcement obligations that would prescribe rigid standards and would ignore principles of sovereignty. Developing countries prevailed, over opposition from the United States and others, on the inclusion of both Article 1.1 and Article 41.5.

16. This dispute will represent the first interpretation by the WTO of Articles 1.1 and 41.5 of the TRIPS. The Panel is being urged to read these provisions as having little or no effect. China urges the Panel to consider the policy balance that led to the incorporation of these provisions. China does not seek to avoid its obligations. But China urges the Panel to consider whether the United States has given it reason to find that these provisions simply have little or no meaning.

17. These provisions establish the context of Article 61. TRIPS cannot be read to require a Member to distort its legal system or to focus greater resources on intellectual property enforcement than on general law enforcement.

18. The conclusion should be clear. Article 61 of TRIPS requires that China set forth criminal measures against counterfeiting and piracy of a certain magnitude. It allows China reasonably to define that magnitude within its domestic legal structures and resource constraints. China has done precisely that. China has set forth criminal thresholds for intellectual property at a low scale of

commerce in a manner that is consistent with its thresholds across the range of commercial criminal law.

III. CLAIM TWO

19. Mr. Chairman and members of the Panel, let me now turn to the second claim by the United States. The United States alleges that, under Chinese law, China's Customs agency disposes of seized infringing goods in a manner that is inconsistent with TRIPS Article 59. This claim is also without merit.

20. TRIPS Article 46 and 59 together obligate Members to provide their Customs with authority to dispose of goods outside the channels of commerce in such a manner as to avoid harm to the right-holder, or to destroy the goods.

21. China's Customs has disposal authority in two different ways: by donating infringing goods to social welfare organizations and, alternatively, by entering into the voluntary sale of infringing goods to their right-holders. The United States rests its argument on whether these procedures are conducted in such a manner as to avoid harm to the right-holder.

22. While the United States repeatedly implies possible harms from China's donations to charity, its written submission does not identify so much as a single instance where the donation of an infringing good harmed a right-holder. The evidence before the panel is that Chinese Customs successfully donates infringing goods to social welfare organizations without any harm to the right-holders.

23. In the case of the sale of infringing goods to right-holders – which is far less frequent than donation of goods – the right-holder has an entirely voluntary choice as to whether to purchase the goods if doing so advanced its interests. China respectfully submits that this cannot harm the right-holder, and the United States offers no evidence to the contrary.

24. In regard to the destruction authority, Chinese Customs has the needed authority to destroy infringing goods. Chinese law sets forth a discretionary sequence of disposition methods that is entirely consistent with TRIPS. Chinese law prefers that infringing goods be donated or sold to their right-holders. And if those methods are not available, Chinese law prefers that infringing goods be sold at public auction. And if none of those methods is available, Chinese law provides that infringing goods be destroyed. Chinese Customs are fully vested with the authority to order destruction, and frequently exercise that authority. Indeed, the evidence before the panel makes clear that destruction frequently takes place – by value, 58 per cent of the seized infringing goods in China were destroyed over the most recent three year period.

25. The United States objects to the rare instances where Chinese Customs uses a public auction to dispose of infringing goods. The United States contends that public auction is inconsistent with China's obligation under Article 59 to provide both disposal authority and destruction authority. But this argument clearly fails because, under TRIPS, Chinese Customs must have the authority – but not the obligation – to dispose infringing goods or to destroy them. The text of Article 59 does not say "shall" order destruction or disposal, rather it expressly says "shall have the authority to" so order.

26. The United States also advances that China's limited use of public auctions violates the fourth sentence of Article 46. This sentence states that the simple removal of a counterfeit trademark is not sufficient to release goods back into the channels of commerce, other than in exceptional cases.

27. China questions whether the fourth sentence of Article 46 is incorporated into Article 59 – and therefore whether it applies to Chinese Customs.

28. But even if the fourth sentence of Article 46 were read to apply, Chinese Customs complies fully. The fourth sentence of Article 46 does not bar the release of seized counterfeit goods – it simply provides that the mere removal of the counterfeit mark is not normally sufficient. The purpose of Article 46 is to avoid a circumstance where infringers could cheaply reaffix counterfeit marks and continue their infringement activity. As China explained in its written submission, Customs does not merely remove the counterfeit mark: it removes all the infringing features; it formally solicits comments from the right-holders to provide procedural protection; and, most importantly, Customs uses a reserve price at a public auction to ensure that infringers do not have the opportunity to purchase the seized goods at an unreasonably low cost and reaffix counterfeit marks.

29. In sum, the public auction of seized infringing goods – a procedure that China uses for two percent of the value of such goods – is entirely consistent with Article 59.

IV. CLAIM THREE

30. Mr. Chairman and members of the Panel, I will now address the third claim of the United States. The United States claims that China breaches TRIPS by failing to provide automatic and immediate copyright protection to works, most particularly films and DVDs. On this claim, the point of dispute is not the interpretation of TRIPS. This is largely a dispute about the operation of Chinese law.

31. Under Chinese law, copyright in a work vests upon its creation. Copyright protection is not contingent on publication. Article 2 of China's Copyright Law explicitly incorporates the Berne Convention's protections and extends automatic protection of copyright to all authors from Berne Member states.

32. The United States failed to account for Article 2 in its written submission. Rather, the United States claims that Article 4.1 denies copyright protection to works until those works pass content review. China respectfully points out that this is not correct. China in fact does recognize and protect copyright in works as soon as those works are created.

33. China enforces several regulations that provide for content review of works, and in some cases does not permit publication until content has been approved. The United States does not dispute China's right to do this. Content review, and the right to prohibit the publication or distribution of works, is a sovereign privilege that is recognized by Article 17 of the Berne Convention.

34. As a result of the protections of Article 2, works that have not been submitted for content review still enjoy copyright protection. Works that are pending content review also enjoy copyright protection. For works that have been edited to pass content review, China will protect the copyright in the edited version of the work. This protection will include enforcement against copies of the unedited version of the work, which infringe the copyright in the edited version. The unedited versions also will be subject to enforcement for violation of the regulations governing publication and distribution, such as Film Regulations. For works that have failed content review, the extent of copyright protection in this case is an issue that does not commonly arise under Chinese law.

35. As a consequence, China respectfully submits that Article 4.1 is a legal instrument that has limited marketplace effect. Even in the event that a work is found to be prohibited by law, the denial of copyright protection is unlikely to deny any meaningful value to a copyright holder. The work is entirely prohibited and attempts to publish or distribute the work are subject to legal enforcement. The author's private right to censor what is already entirely banned would have little value.

36. Lastly, China also asks that the Panel note that several aspects of the US claim, as stated in its Panel request, were not briefed or substantiated by the United States in its first written submission.

These are the claims related to TRIPS Article 14 and the claims related to national treatment. Likewise, the United States failed to offer argument with respect to a number of Chinese measures that it referred to in its panel request. The Appellate Body has made clear that the complaining party bears the burden to support all claims by making a prima facie case in its written submission. China respectfully notes that the United States has failed to meet this burden in these instances. China respectfully asks the Panel to rule against the United States on its Article 14 and national treatment claims, and on the measures for which no support was offered.

V. CONCLUSION

37. In conclusion, China respectfully submits that the United States has failed to present a compelling case on any of its three claims. China very much hopes that this dispute will be laid to rest, and that China can return to working with all its trading partners to promote the beneficial protection of intellectual property.

ANNEX B-3

CLOSING ORAL STATEMENT OF CHINA AT THE FIRST SUBSTANTIVE MEETING

1. Mr. Chairman, members of the Panel: China would like to preface its formal closing statement by making a brief point of law regarding the interpretation of Article 61. Yesterday, some third parties expressed concern that China might ask this Panel to depart from the customary rules of interpretation of international agreements in the interpretation of TRIPS Article 61. China is making no such request, and believes that it can allay these concerns with a simple statement of its views.

2. China's point regarding the interpretation of Article 61 is as follows: First, China asks the Panel to recognize that the obligation in Article 61 involves criminal law, which is a core sovereign function. This is the first time that a WTO panel has been asked to interpret an obligation regarding criminal law.

3. Second, China asks the Panel to note that the standard in Article 61 is vague, and subject to interpretation. The wide variety of potential definitions that the Panel has heard in the last two days is striking evidence of this fact.

4. Third, China asks the Panel to note the well-accepted interpretive canon *in dubio mitius*. This canon holds that when a treaty standard is vague or ambiguous the Panel should choose the interpretation that imposes the least imposition on a country's sovereignty. The Panel should choose a more intrusive interpretation only where there is clear and specific evidence that a more intrusive interpretation was meant.

5. The logic behind this canon is that countries should not be assumed lightly to concede sovereignty. The Panel accordingly must find specific support for an interpretation that does involve an intrusive concession of sovereignty. China notes that the WTO Appellate Body expressly has adopted this canon of interpretation.

6. The international criminal law cited in China's first written submission makes clear that this canon has particular justification in the realm of criminal law. The United States has argued for a strict, intrusive application of Article 61. To support such a reading the United States must offer specific evidence that the parties intended that interpretation, as the canon of *in dubio mitius* requires. The United States has not done this, and in light of TRIPS provisions like Article 1.1 and 41.5, it is clear that the United States will be unable to do so.

7. This is the "burden" that China has described as resting on the United States. China is not referring to a factual burden of proof, but rather to the inability of the United States to provide the evidence to support its legal interpretation of Article 61.

8. China hopes that this puts to rest any possible misunderstanding of its argument on this point.

* * *

9. Mr. Chairman, members of the Panel: The People's Republic of China wishes to express its deep gratitude for your willingness to serve in this dispute and for the evident diligence with which you have approached your task. China also wishes very much to thank the WTO Secretariat Staff.

10. China takes this dispute very seriously. It has brought to Geneva a sizeable and senior delegation of officials; and it has prepared thoroughly for this meeting. China intends to devote considerable attention and energy to addressing the Panel's questions.

11. For China, it is not solely a handful of domestic laws at stake in this dispute – although of course this is extremely important. Beyond that, China believes that the balance of rights and obligations in TRIPS is also very much at stake in this dispute.

12. China considers that the Panel faces several very important tasks, including tasks for which there are few precedents.

13. One task is the first interpretation by the WTO of an obligation involving criminal law. The Panel is being urged to read the broad language "commercial scale" very strictly. China urges the Panel to consider this issue carefully in light of the traditional rules of interpretation, which recognize that countries do not lightly surrender sovereign powers. In particular, China urges the Panel to ask whether the United States has given it sufficient basis to believe that the parties meant "commercial scale" to impose a strict standard of criminal law.

14. Another task is the first interpretation by the WTO of Articles 1.1 and 41.5 of the TRIPS. The Panel is being urged to read these provisions as having little or no effect. China urges the Panel to consider the policy balance that led to the incorporation of these provisions. China does not seek to avoid its obligations. But China urges the Panel to consider whether the United States has given it reason to find that these provisions simply have little or no meaning.

15. Another task is to determine whether Article 46 of the TRIPS is drafted so as to require Members to afford their customs agencies unfettered authority to destroy infringing goods before they can be donated, without any harm to a right holder, to a charity. China continues to be perplexed by the US position. On the one hand, the United States appears to believe that Chinese Customs ought to have absolute and unconstrained authority on matters of destruction. On the other hand, the United States criticizes Chinese Customs as insufficiently constrained on matters of disposal outside the channels of commerce.

16. The United States desires that China condition donation to charity on, for example, the determination that the goods are not defective. China in fact provides such a condition by law. But the Panel no doubt recognizes that the condition that goods only be donated if they are non-defective is a constraint on Customs authority. It is a constraint in exactly the same way that the condition that goods only be destroyed if they fail to meet certain criteria. Similarly, the United States provides in its own law – and commends to China – that donation of seized goods be conditioned on the approval of the right-holder. The United States gives the appearance of approving the conditions for authority that it likes and rejecting the conditions for authority that it does not.

17. A final task for the Panel is to assess Chinese copyright law in light of the Berne Convention and the TRIPS. Here there are two very important issues that the Panel should consider. First is the protection of copyright provided by Article 2 of China's copyright law. This provision incorporates into Chinese law the protections of Article 5 of the Berne Convention. Proper consideration of Article 2 will resolve most of the dispute over Chinese law. Second, the Panel should consider carefully the right to prohibit publication that is recognized by Article 17 of the Berne Convention. The Panel should ask whether there is any logic to require protection of copyright where a work has been completely prohibited by government action that is authorized by international law.

18. Mr. Chairman, members of the Panel: this concludes our statement. China thanks you again and looks forward to responding to your questions in writing.

ANNEX B–4

EXECUTIVE SUMMARY OF THE REBUTTAL SUBMISSION OF CHINA

I. INTRODUCTION

1. In this dispute, the United States has asked this Panel to dramatically expand the scope of legal obligations under TRIPS, creating obligations to which the drafters never agreed and encroaching on areas of sovereignty which Members never ceded. This submission demonstrates the proper interpretation of TRIPS in accordance with the rules for interpretation under the Vienna Convention.

2. At the same time, the United States has consistently mischaracterized China's legal regime. In many cases, the United States has failed to make a *prima facie* case that China's laws are inconsistent with TRIPS.

3. In its Claim One, the United States has failed to recognize the scope of China's criminal enforcement against intellectual property infringement; and it has failed to demonstrate that TRIPS Article 61 imposes on Members an obligation to apply criminal measures to low-level infringement. In fact, China's criminal law regime, properly understood, fully complies with TRIPS Article 61, properly understood.

4. In its Claim Two, the United States has failed to demonstrate that China's legal framework for Customs' disposal of seized goods is inconsistent with TRIPS Arts. 46 and 59. Chinese Customs has the power to dispose of seized goods outside the channels of commerce in such a way as to avoid harm to the right-holder; and it has the appropriate authority to destroy seized goods, recognizing that authority was never envisioned in TRIPS to be absolute and unconditional. Chinese Customs also meets the obligation of the 4th sentence of Article 46 – if indeed it applies to Article 59 at all – by taking substantial steps to ensure that infringers cannot cheaply recover their infringing goods.

5. In its Claim Three, the United States has failed to present a prima facie case that Article 4.1 of China's Copyright Law does not protect the copyrights of works at various stages of content review. The United States has only the flawed argument that Article 4.1 violates TRIPS on its face, but this argument fails: international law, and in particular Article 17 of the Berne Convention, clearly recognizes the sovereign power to prohibit works.

II. CLAIM ONE: CHINA'S CRIMINAL THRESHOLDS ARE CONSISTENT WITH CHINA'S OBLIGATIONS UNDER TRIPS

6. The United States claims that China breaches TRIPS Article 61 by failing to apply criminal procedures and penalties to willful counterfeiting and infringement on a commercial scale. The United States fails to understand China's criminal law regime; it fails to properly interpret the legal obligation set forth by TRIPS Article 61; and, consequently, it fails to recognize that China's criminal law regime has faithfully implemented the incumbent Article 61 obligation.

7. Throughout these proceedings, the United States has demonstrated a limited understanding of China's legal system. China identified a series of US errors in China's first written submission. While the United States appears to have corrected certain errors that it had earlier made – such as the scope of the illegal business volume threshold or the alternative nature of criminal thresholds – it has

repeated certain errors and introduced new ones. Certain third parties also have mischaracterized Chinese law.

A. CHINA'S INTELLECTUAL PROPERTY ENFORCEMENT REGIME

8. China addresses a series of US mischaracterizations of Chinese law with respect to its intellectual property regime, including elements of its substantive criminal law, general (derivative) criminal law and administrative law.

1. Chinese criminal law sets forth flexible and wide-ranging thresholds for criminal prosecution

(a) China's substantive criminal laws regarding Intellectual Property

9. China presents a detailed description of its criminal laws governing intellectual property. The United States and other parties have routinely mischaracterized Chinese substantive criminal law.

10. First, China's criminal thresholds are not rigid, but cover a wide range of activity. Chinese criminal law employs alternative thresholds, which serve to capture different metrics. The illegal business operation volume threshold, in particular, is a flexible standard that potentially captures both a small number of high-value products and a large number of low-value products – just as certain third parties request. Moreover, Chinese criminal law has adapted to new technology, such as by deeming internet dissemination to constitute reproduction or distribution under Article 217 of the Criminal Law.

11. Second, China calculates its criminal thresholds by considering evidence over the entire duration of the infringing act, which might last several years. Most of the hypothetical examples used by the United States and third parties improperly condense the period of infringement. There is scarcely an example that the United States has offered in these proceedings that does not depend on ignoring the appropriate period of infringement. Relatedly, China registers its surprise that the United States would complain that the application of administrative penalties wipe the slate clean – since the only alternative for China would be to forego administrative enforcement against low-scale infringement.

12. Third, Chinese criminal law considers unfinished products and reliable indicia of criminal infringement. China further explains two cases previously provided, which demonstrate that courts took notice of semi-finished or unfinished components and also materials and implements indicative of infringement.

(b) China's General (Derivative) Criminal Laws regarding Intellectual Property

13. The United States and other parties to this dispute have disregarded China's general criminal laws, which might be characterized in western common law as "derivative" criminal laws. These laws include inchoate crimes, such as preparation and attempt, and vicarious liability crimes, such as joint crimes and criminal group activity.

14. These general criminal laws apply to the specific section on intellectual property crimes and expand the scope of China's criminal measures against counterfeiting and piracy. These general criminal laws take into account unfinished products, non-quantitative factors and organizational elements.

2. The Administrative Regime addresses low-scale (non-commercial scale) infringement

15. China describes the administrative enforcement procedures that apply against intellectual property infringement that falls beneath the criminal thresholds. These procedures are quick, efficient and well-suited to a high volume of low-scale infringement cases. China takes vigorous measures to ensure that infringers beneath the criminal thresholds in no way have "safe harbor," and that administrative enforcement leads to significant penalties for infringers.

16. China disputes the contention that administrative enforcement is not an effective deterrent. Administrative enforcement may impose somewhat less severe punishment, but it is far more likely to be applied to low-scale intellectual property infringement than the comparable criminal laws in the United States. Contrary to US assertions, China considers administrative enforcement an effective remedy, not its "preferred remedy".

B. LEGAL STANDARD FOR INTERPRETATION OF COMMERCIAL SCALE STANDARD

17. China respectfully submits that the Panel should apply the Article 61 "commercial scale" standard in light of the well-accepted interpretive canon *in dubio mitius*. The WTO Appellate Body has expressly adopted this canon, which has particular justification in the realm of criminal law.

18. The United States has argued for a strict and intrusive application of TRIPS Article 61. To support such a reading, the United States must show that the "commercial scale" standard in Article 61 clearly and precisely has the meaning that the United States attributes to it. To the extent that "commercial scale" is somewhat unclear or vague, the canon of *in dubio mitius* holds that the US interpretation cannot prevail. Article 61 must be read to regulate Members' domestic criminal laws only to the limit that Members expressly and unequivocally consented. It is the responsibility of the United States to show that Members expressly and unequivocally consented to accept the legal obligation of applying criminal measures to counterfeiting and piracy of a low scale. The United States has not fulfilled this responsibility.

C. THE TRIPS ARTICLE 61 OBLIGATION

19. The foremost task before the Panel in the dispute over TRIPS Article 61 is to determine the meaning of "commercial scale". Contrary to the statements of the United States, China has strictly followed the rules of the Vienna Convention on the Law of Treaties in explaining the meaning of "commercial scale".

1. Ordinary meaning of "commercial scale"

20. The United States has failed to set forth a reasonable and supportable ordinary meaning of "commercial scale". Its contention that commercial scale covers any activity undertaken for financial gain does not withstand scrutiny. The United States has also failed to effectively rebut China's contention that "commercial scale" is a broad standard that refers to a significant magnitude of activity.

(a) The United States fails to set forth a reasonable definition of "commercial scale"

21. The United States sets forth inconsistent definitions of the term "commercial scale". In its previous submissions, the United States set forth a definition of "commercial scale" that includes any activity undertaken for financial gain. However, it has also made statements inconsistent with that definition, contending that what constitutes a commercial scale action can vary from situation to situation according to a number of factors.

22. The definition of "commercial scale" adopted by the United States also serves to read the word "scale" out of the term, rendering the term synonymous with "commercial purpose" or "commercial". This definition results in a rewriting of the text of Article 61 with terms that were explicitly distinguished and rejected in WIPO and TRIPS discussions.

23. Contrary to US assertions, dictionary definitions of individual words of a combined term do not conclusively define the "ordinary meaning" under Article 31.1 of the Vienna Conventions, nor is the absence of a dictionary definition of the combined term determinative. The essential test of ordinary meaning is how words are commonly used. China has provided multiple examples of "commercial scale" being used to refer to a significant magnitude of activity, while the United States has not furnished a single example of the use it proposes.

24. The Panel should further note the wide variety of definitions advanced for "commercial scale" during these proceedings. This variance highlights that the phrase was intended to be a flexible one, susceptible to different interpretations, and underscores the salience and importance of the statutory canon of *in dubio mitius*. In the face of these conflicting interpretations, and the apparent underlying ambiguity or vagueness, "commercial scale" should be read conservatively and so as to intrude minimally on Members' sovereignty.

(b) The ordinary meaning of "commercial scale" is – broadly – significant magnitude of activity

25. China submits that the essential test of the meaning of "commercial scale" should be how the term is actually used, and sets forth a definition of "commercial scale" that is consistent with all available evidence. Examples presented by China demonstrate that governments have tended to understand "commercial scale" to refer to a significant magnitude of activity – <u>not</u> low-scale economic activity.

26. China presents a clarification of the legal status of the definition of "commercial scale" set forth by the Word Intellectual Property Organization Committee of Experts on Measures Against Counterfeiting and Piracy ("WIPO Committee"). The WIPO Committee definition is not merely part of the negotiating record under Article 32 of the Vienna Convention; it is not a "special meaning" under Article 31.4 of that Convention; and it is not a formal part of TRIPS. Rather, the WIPO Committee definition is a noteworthy example of the common usage of the phrase, which reveals its "<u>ordinary meaning</u>" of the treaty under Article 31.1 of the Vienna Convention.

27. The WIPO Committee's Model Provisions for National Laws contradicts the US assertion that any act undertaken for financial gain constitutes commercial scale: it states that the "will to make profit" is only one of several factors. The WIPO Committee sets forth a definition that is flexible, where the United States apparently seeks to impose a specific standard. The WIPO Committee definition also contradicts the US contention that "commercial scale" covers even very small-scale activity.

28. The United States accuses China of replacing "commercial scale" with "industrial scale" and argues that had the drafters of TRIPS wished for TRIPS Article 61 to apply only to industrial scale activity, they would have used that phrase. However, the US mischaracterizes China in two respects: China does <u>not</u> believe that "commercial scale" sets out as high a standard as "industrial scale," and has never described the phrase in those terms; and China submits that "commercial scale" is a substantially broader standard than "industrial scale," and was likely chosen quite specifically because it has this character.

(c) Clarification of the "commercial scale" standard: the impact of infringement, the price of the infringed good and the role of technology are not proper considerations

29. China further clarifies three particular elements of the "commercial scale" standard. First, the plain text of TRIPS Article 61 refers to "commercial scale" as a measure of infringing activity, not the impact of the infringement. Consequently, to read "commercial scale" as measuring the impact of the infringement on the right-holder would abuse the text of TRIPS.

30. Second, the United States has not justified its premise that the impact of the infringing act on the right-holder ought to be considered in measuring "commercial scale" activity. In so far as "commercial scale" in Article 61 properly measures the infringing activity, it is eminently sensible for Members to use the infringing price – which measures the value of the infringing activity – in determining the "commercial scale" threshold.

31. Third, although several parties have suggested that the definition of "commercial scale" under Article 61 should change to reflect changes in technology, China does not believe that any change to the legal obligation expressed by Article 61 is either appropriate or necessary. Significant changes ought to be addressed in the context of new international agreements. Moreover, new developments in technology have not, in fact, undermined the commercial scale threshold. As technology has improved, a much higher proportion of infringing activity has become subject to criminal measures.

2. The legally relevant context of TRIPS Article 61 underscores that "commercial scale" is a broad and flexible standard

32. According to Article 31.1 of the Vienna Convention, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. China sets forth several contextual factors that undermine the US contention that Article 61 imposes a highly specific obligation on Members.

33. First, contrary to US assertions, China does not invoke TRIPS Articles 1.1 and 41.5 as a defense against the obligation imposed in Article 61. Instead, China has consistently highlighted Articles 1.1 and 41.5 as relevant context for Article 61 in determining the scope of its substantive obligation. Articles 1.1 and 41.5 were key concessions to the developing world, which the United States and other developed third parties seek now to dismiss and disregard. These Articles strongly counsel against interpreting Article 61 as imposing the obligation to apply criminal measures against any act undertaken for financial gain, as this standard would be inconsistent with China's legal system and would require the diversion of enforcement resources.

34. Second, one of the third parties argues that the 2nd, 3rd and 4th sentences of Article 61 use flexible language, whereas the 1st sentence contains a hard-and-fast rule obliging WTO Members to provide criminal enforcement against willful counterfeiting and infringement, implying that the 1st sentence allows no flexibility. This argument fails because Article 61 does not set forth a "hard-and-fast rule" as to the scope of "commercial scale". Further, the 2nd sentence provides flexibility in determining the choice of punishment. If the 1st sentence were read to require a Member to apply criminal measures to low-level infringement, the acknowledged flexibility of the 2nd sentence – which would suggest that in some criminal law systems a low level crime need not be subject to any punishment – would create a conundrum. The 2nd sentence of Article 61 thus is indeed relevant context: its very flexibility demonstrates the error of interpreting Article 61 to impose an exacting and specific standard.

35. Third, China presents further contextual factors that warrant consideration in any examination of the meaning of "commercial scale". Neither TRIPS nor the Berne Convention sets forth complete definitions of "trademark counterfeiting" or "copyright piracy". In addition, the broad and vague

phrasing of TRIPS Article 61 stands in stark contrast to the highly detailed provisions set forth in TRIPS Articles 42-49, as well as in relevant parts of the AD Agreement and ASCM. When the drafters of WTO instruments intended to set forth precise standards, they did so unambiguously. The lack of such clarity in Article 61 suggests that there was no such intent. These examples counsel against interpreting "commercial scale" to set forth a rigid and precise standard, yet the United States has yet to address either of these factors.

3. The object and purpose of TRIPS confirms that "commercial scale" is a broad and flexible standard

36. Article 31.1 of the Vienna Convention provides that in addition to the context, the "object and purpose" of the treaty should be considered in determining the meaning of the treaty. The purpose of TRIPS was to balance the protection of intellectual property rights with deference to Members' legal systems and public policy objectives. This balance – between effective intellectual property enforcement and deference to Members – is consistent with interpreting "commercial scale" in Article 61 to set forth a broad and flexible standard.

4. The subsequent practice of Members of TRIPS demonstrates that commercial scale is a broad standard that refers to a sgnificant magnitude of activity

37. Article 31.3 of the Vienna Convention provides that parties should take into account any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation. The subsequent practice of Members of TRIPS provides further confirmation that "commercial scale" was never generally understood to refer to any activity undertaken for financial gain.

38. First, US practice in implementing its TRIPS Article 61 obligation demonstrates that it has implicitly understood "commercial scale" to refer to significant magnitude, as is evidenced by a US Department of Justice manual and from US intellectual property prosecutions. Article 61 requires that Members "shall provide for criminal procedures and penalties to be applied." A review of a sample of US federal prosecutions demonstrates that in all of the 60 cases featuring copyright piracy for which there is information as to the value of the goods, US authorities applied criminal procedures to acts associated with at least $2,000 of infringement. Given that the US practice is to apply its IPR criminal laws against large-scale counterfeiting and piracy, US practice demonstrates that infringement "on a commercial scale" is large-scale infringement.

39. Second, Canada has explicitly defined the "commercial scale" standard to refer to large-scale infringement. Notwithstanding its weak protests to the contrary, Canada's practice, pursuant to its Copyright Enforcement Policy, has been to only apply criminal measures to large-scale offences.

40. Third, the United States has yet to address China's argument that in a series of free trade agreements (FTAs) subsequent to TRIPS, the United States has included an explicit definition of "commercial scale" as "wilful infringements for the purpose of commercial advantage or gain," a significant departure from the standard of "commercial scale".

5. The negotiating record of TRIPS confirms that "commercial scale" was intended to set forth a broad standard referring to a significant magnitude of activity

41. Article 32 of the Vienna Convention provides that supplementary means of interpretation may be utilized to confirm the meaning resulting from the application of Article 31. This may include the preparatory work of the treaty and the circumstances of its conclusion. The negotiating record is appropriate to confirm the meaning resulting from the application of Article 31, yet the United States has yet to address it.

42. The WIPO Committee definition of "commercial scale" was the basis for the ultimate phrase in TRIPS Article 61. Delegations to the WIPO plenary session explicitly distinguished "commercial scale" from "for commercial purpose" and "for commercial gain." The TRIPS negotiating parties rejected efforts by both the United States and Canada to replace "commercial scale" with "commercial". Thus they clearly understood the terms to have different meanings, and the negotiating parties clearly did not embrace the meaning of "commercial".

D. CHINA HAS FULLY IMPLEMENTED ITS TRIPS ARTICLE 61 OBLIGATION

43. China has met its obligation under Article 61 by setting forth criminal measures against "commercial scale" infringement. Notwithstanding the United States' arguments to the contrary, China has done so in a manner that is appropriate within its legal and commercial context.

1. China has implemented Article 61 in China's legal and commercial context

44. The Panel must first consider whether China's IPR criminal thresholds are appropriate within the structure of Chinese law. China sets forth criminal thresholds for intellectual property infringement parallel to those for other illicit activities. Members have the legal right to implement, as far as possible, their Article 61 obligation within their own legal systems and practice (Article 1.1), and in such a way as to avoid diverting general law enforcement resources (Article 41.5). Moreover, the 2nd sentence of Article 61 directs Members to apply criminal punishment that is comparable to that for other crimes. Thus contrary to US assertions, how China's IPR criminal laws fit within the broader structure of China's legal structure is critical to determine whether China implements the "commercial scale" standard in good faith.

45. The second question is whether China's thresholds are appropriate within the context of Chinese commerce. China's 50,000 RMB (US$6,900) threshold for illegal business volume is less than one per cent of the annual revenue of industrial enterprises that are officially "small size" and less than 25 per cent of the annual revenue of the individual or household business operation (the smallest economic unit that China tracks). China has set forth criminal thresholds that capture intellectual property infringement of any reasonable scale. In addition, the per capita income measure proposed by the United States is an inappropriate metric of commercial scale activity. "Commercial scale" is a not a measure of how much individuals earn – it is a measure of business activity. Per capita GDP is not a measure related to commercial activity, much less "commercial scale" activity.

2. Article 61 does not require that Members' authorities be given highly discretionary Standards to enforce

46. The phrase "commercial scale" is a broad and flexible standard; and the WIPO Committee definition of the phrase suggested that a variety of factors might be considered in applying it. This does not mean that Members have an obligation under TRIPS to implement a highly discretionary standard, but simply that Members have flexibility in implementing it.

47. The WIPO Committee definition of "commercial scale" is a preeminent example of the common usage of the phrase and it was relied upon by the negotiating parties to TRIPS. However, the WIPO Committee definition is not a formal part of TRIPS. Therefore, the Panel should reject any exhortations to incorporate the WIPO Committee definition into TRIPS.

48. Under TRIPS Article 1.1, Members have the right to implement obligations in accordance with their own legal system and practice. Acting within their sovereign discretion and in accordance with their legal system, Members may have legitimate interests in the uniform regulation of illicit activity across markets, products, operators and regions. Members' legal systems may also be incompatible with foreign notions of judicial discretion. Thus while the concept of "commercial

scale" would permit highly discretionary standards, TRIPS does not require it, but instead counsels in favor of standards that are consistent with Members' reasonable discretion and in accordance with their legal system and practice.

3. Hypothetical examples do not show that China has failed to implement TRIPS Article 61

49. The United States and several other parties have advanced a bewildering array of hypothetical examples in an attempt to show that China does not comply with TRIPS Article 61. These hypothetical examples prove no such thing. The United States, as the complaining party, must provide evidence that Chinese laws actually function to exclude a category of infringement that meets the "commercial scale" standard. Hypothetical examples do not qualify as sufficient evidence. Moreover, the hypothetical examples that have been advanced during these proceedings are deeply flawed and mischaracterize Chinese law.

III. CLAIM TWO: CHINA'S MEASURES FOR THE DISPOSITION OF SEIZED GOODS ARE CONSISTENT WITH CHINA'S OBLIGATIONS UNDER TRIPS

50. The United States has failed to demonstrate that Chinese Customs' legal framework for handling seized goods is inconsistent with TRIPS. The United States has failed to show that Chinese Customs lacks the proper authority to dispose infringing goods outside the channels of commerce in such a manner as to avoid harm to the right-holder; or that Chinese Customs lacks an appropriate level of destruction authority under TRIPS. The United States has also failed to show that Chinese Customs' use of public auction – undertaken in conjunction with removing all infringing features and using a reserve price so as to prevent any economic benefit to the infringer – is inconsistent with the 4th sentence of Article 46. China has implemented its TRIPS obligations regarding seized goods fully and in good faith.

A. CHINA COMPLIES FULLY WITH THE 1ST SENTENCE OF ARTICLE 46 AS APPLIED TO CHINESE CUSTOMS BY ARTICLE 59

51. The 1st sentence of Article 46, as incorporated by Article 59, imposes two obligations on Members. First, they must vest their customs agencies with the authority to dispose infringing goods outside the channels of commerce in such a manner as to avoid harm to the right-holder. Second, Members must vest their customs agency with the authority to destroy infringing goods. China has fulfilled the first obligation by granting its Customs appropriate authority to donate seized infringing goods to social welfare organizations or to enter into a voluntary sales transaction with the right-holder that wishes to purchase the goods. It has fulfilled the second obligation by endowing its Customs with appropriate authority to destroy infringing goods. Having fully satisfied these two obligations, China is not barred under TRIPS from permitting its Customs to employ additional forms of disposition.

1. The United States has failed to establish that customs lacks disposal authority

52. The United States has failed to show that Chinese Customs lacks the authority to dispose of infringing goods outside the channels of commerce in such a way as to avoid harm to the right-holder. As long as Customs has available to it an option that does avoid harm to the right-holder, it has the genuine authority to dispose of infringing goods outside the channels of commerce in such a manner as to avoid harm to the right-holder, consistent with TRIPS.

(a) Donation to social welfare organizations reflects TRIPS disposal authority

53. Chinese Customs has the authority to donate seized goods to the Red Cross Society of China ("Red Cross") as well as to other social welfare organizations in such a manner as to avoid harm to the

right-holder. Customs may only donate goods that are appropriate for social welfare purposes (no luxury or defective goods); and Customs has a legal responsibility to ensure that the donated goods are properly and exclusively used by social welfare organizations. Chinese law stipulates that donations to other social welfare organizations must remain outside the channels of commerce. The United States has provided the Panel with no evidence of harm to the right-holders from Customs' regime of donations to the Red Cross and other charities.

54. Under Chinese law, social welfare organizations are not allowed to sell the infringing goods donated by Customs. Therefore, Customs' donation of all such goods avoids harm to the right-holder.

55. Moreover, the legally binding memorandum between Customs and the Red Cross ensures that donated goods are used exclusively for social welfare purposes. Customs clearly has the power to order the donation of infringing goods to the Red Cross, and, thus, by definition, authority to order that these goods be disposed outside the channels of commerce in such a manner as to avoid harm to the right-holder.

(b) Transfer to the right-holders reflects TRIPS disposal authority

56. Chinese Customs also has the authority to sell seized goods to an interested right-holder. This disposition method plainly avoids any harm to the right-holder because the right-holder would not voluntarily purchase the goods unless it benefited from the transaction.

2. The United States has not established that customs lacks destruction authority

57. The United States has also failed to show that Chinese Customs lacks the authority to order the destruction of infringing goods. China has vested Customs with appropriate destruction authority within the meaning of TRIPS Arts. 46 and 59.

(a) TRIPS does not require absolute authority

58. The United States asserts that the "authority" required under TRIPS must be absolute and unconditional. This assertion is contrary to the practice of the United States and other Members, to the arguments that the United States has advanced elsewhere in these proceedings, and to a wide variety of legitimate government regulations. The US claim – that China may not condition in any manner whatsoever the destruction authority it vests in its Customs – is untenable in light of any reasonable interpretation of TRIPS.

(b) The destruction authority vested in Chinese customs is an appropriate grant of authority under TRIPS

59. All the evidence before the Panel suggests that "authority" under TRIPS Arts. 46 and 59 may be appropriately conditioned. The United States has not advanced any argument to date as to why Chinese Customs' destruction authority is not appropriate under TRIPS. China offers four factors to help inform the relevant analysis.

(i) Discretion

60. Customs has considerable discretion to make the subjective determination of <u>whether</u> an infringing good meets the criteria for each disposition method and therefore, whether it ought to be destroyed. Once Customs determines that an infringing good meets the criteria for a disposition method, it has a legal obligation to carry out that disposition process.

(ii) Autonomy

61. Customs has complete autonomy in making the determinations relevant to whether an infringing good ought to be destroyed. Its decisions are not subject to the approval of some third party, which might effectively constrain the agency's power.

(iii) Legitimate Government Interests

62. Each of the particular priorities have legitimate government interests consistent with China's sovereign discretion afforded by TRIPS Article 1.1, such as preferring that goods be put to socially useful purposes through donation to charitable organizations.

(iv) The Principles of TRIPS Articles 46 and 59

63. All four disposition methods employed by Customs are consistent with the principles of TRIPS Articles 46 and 59 because they effectively deter infringement and avoid harm to the right-holder.

3. TRIPS allows Members to publicly auction formerly infringing goods in addition to disposal and destruction

64. China has satisfied its obligation under the 1st sentence of Article 46 as incorporated into Article 59 to vest Customs with appropriate disposal authority and destruction authority. Members have every right under TRIPS to allow their customs agencies disposition options other than disposal outside the channels of commerce and destruction.

(a) The United States now concedes that public auction is compatible with the 1st sentence of Article 46

65. Members clearly have the legal right under TRIPS to allow their customs agencies to conduct public auctions. If a Member provides disposal and destruction authority, then it may also allow public auction, consistent with the 1st sentence of Article 46. The United States has now conceded this point.

(b) Public auction is consistent with the principles of the 1st sentence of Article 46

66. The public auction procedure which China's Customs employs is fully consistent with the principles of Article 46. First, public auction is no less a deterrent to infringement than donation or destruction; Customs' use of a reserve price at the auction ensures that infringers lack the opportunity to cheaply reclaim the seized goods and use them in furtherance of any counterfeiting activity. Second, public auction of seized goods is no more harmful to the right-holder than donation or destruction. Customs only undertakes public auction of seized goods once it has removed all infringing features to prevent damage to the right-holder.

B. CHINA COMPLIES FULLY WITH ALL OBLIGATIONS IN THE 4TH SENTENCE OF ARTICLE 46 AS APPLIED BY ARTICLE 59 – AND THE UNITED STATES HAS NOT OFFERED ANY CONTRARY EVIDENCE

67. China is in full compliance with Article 59. The United States has failed to show that the 4th sentence of Article 46 is incorporated into Article 59 and therefore applies to Chinese Customs. Even if the 4th sentence of Article 46 were read to apply, Chinese Customs measures fulfill that provision.

1. The 4th sentence of Article 46 is not incorporated into Article 59

68. The United States wrongly asserts that the 4th sentence of Article 46 is incorporated into Article 59. The relevant principles of Article 46 – which are incorporated into Article 59 – are those related to the authority to order disposal or destruction. The 4th sentence of Article 46 does not provide any authority to dispose or destroy; and it does not elaborate on the requirement of authority. Rather, it sets forth the circumstances under which domestic authorities may discharge infringing goods within the channels of commerce.

2. China complies fully with the 4th sentence of Article 46

69. Even if the 4th sentence of Article 46 were read to be incorporated into Article 59, China would be in full compliance. Chinese Customs complies with the 4th sentence of Article 46 because it takes steps beyond the mere removal of the infringing mark to prevent the cheap return of the seized goods to the infringers. The US reading of the 4th sentence is inconsistent with the plain text.

(a) The 4th sentence of Article 46 bars the cheap return of seized goods to infringers that would allow them to unfairly profit

70. The United States wrongly argues that the 4th sentence of Article 46 imposes a categorical bar on the discharge of seized counterfeit goods into the channels of commerce, other than in "exceptional circumstances". If authorities take measures that exceed the mere removal of the infringing mark and that thereby prevent infringers from cheaply reclaiming the seized goods, then authorities may discharge such goods into the channels of commerce.

71. First, the 4th Sentence of Article 46 does not limit the discharge of seized counterfeit goods to "exceptional cases". The United States misreads the plain text of the 4th sentence of Article 46 to limit the discharge of seized counterfeit goods to exceptional cases only. The 4th sentence does not impose a ban, but rather a threshold, that, when met by measures exceeding the "simple removal of the trademark unlawfully affixed," permit the discharge of the goods into the channels of commerce.

72. Second, the central focus and plain meaning of the 4th sentence of Article 46, especially the term "release," is not the public sale of the seized good, but the return of the good to the infringer, from whom it might continue, once more, into the channels of commerce.

73. Likewise the "exceptional cases" exemption to the 4th sentence of Article 46 – and the restriction on the release of seized goods – refers to returning the seized goods to the infringer. If this exception pertains exclusively to the return of the seized goods to the infringers, then so does the scope of the restriction itself.

74. Third, the 4th sentence of Article 46 is intended to prevent infringers from cheaply reclaiming seized goods, with only the marks removed. The negotiating record underscores that the purpose of the fourth sentence of Article 46 is to ensure that authorities deprive infringers of economic benefits from the goods, not to bar the return of seized goods to the channels of commerce.

(b) Chinese customs satisfies the 4th sentence of Article 46

75. Chinese Customs complies with any obligation of the 4th sentence of Article 46 because prior to public auction, it takes measures that exceed the mere removal of the infringing mark and that thereby prevent infringers from cheaply reclaiming the seized goods: it eliminates all infringing features and not just the infringing trademark; it formally solicits comments from the right-holder; and, most significantly, it establishes a reserve price, based on an expert appraisal, for the public

auction of the seized goods. Such measures clearly meet the sufficiency threshold under the 4th sentence of Article 46 for permitting discharge into the channels of commerce through public auction.

IV. CLAIM THREE: CHINA'S MEASURES FOR THE PROTECTION AND ENFORCEMENT OF COPYRIGHT AND RELATED RIGHTS ARE CONSISTENT WITH CHINA'S OBLIGATIONS UNDER TRIPS

76. In its Claim Three, the core contention of the United States all along has been that, as a consequence of Article 4.1 of China's Copyright Law, China fails to protect the copyrights of works that are at various stages of content review. In fact, as China has demonstrated, the US attempt to link Article 4.1 with China's content review processes is fatally flawed.

77. China notes that the United States now appears to be advancing an argument that Article 4.1 on its face is a violation of TRIPS. This is also a flawed contention. China has demonstrated that the sovereign power to prohibit works, recognized in Article 17 of the Berne Convention, in fact does permit TRIPS Members to maintain a provision of law such as Article 4.1. China also notes that the United States has failed to demonstrate that Article 4.1 has any adverse effect whatsoever on copyright protection in China.

A. THE UNITED STATES HAS FAILED TO MAKE A PRIMA FACIE CASE WITH RESPECT TO VIRTUALLY ALL OF THE LEGAL THEORIES IT ADVANCED IN CLAIM THREE

78. For the amalgam of US theories relating to content review (collectively referred to in this section as the US "Content Review Theories"), the United States has given the Panel no supporting evidence. In contrast, the Panel received from China significant evidence to the contrary of the US theories. As a result, the Panel now has before it a situation where the United States has made allegations for which it has advanced no supporting evidence. Under the rules of the WTO, the United States has failed to make a prima facie case.

1. WTO Law requires a ruling against a complaining party that fails to establish a prima facie case

79. The United States has brought an "as such" challenge to China's Article 4.1. The Appellate Body has stated that it will "expect" that measures subject to "as such" challenges will "normally have undergone, under municipal law, thorough scrutiny ... to ensure consistency with the Member's international obligations" and there will be both presumption and strong expectation that a measure is "not inconsistent with those obligations."

2. The United States Content Review Theories assume that copyright protection is contingent upon content review, but the United States has offered no evidence to support such a claim

80. The United States mistakenly alleged in its first written submission that China will not protect copyright in (1) works that are awaiting the results of content review, (2) the unedited version of a work that has been edited to pass content review, (3) works that have failed content review, and (4) works that have never been submitted for review.

81. The United States, in asserting its Content Review Theories, has the clear and particular factual burden of proving that China's Article 4.1 operates through the prepublication licensing system.

82. At no point does the United States cite a single authority for this proposition. The United States apparently supposes that the point is evident from the text. But the text of Article 4.1 says

nothing about content review, and the content review regulations say nothing about copyright. The US Content Review Theories in fact are not supported in any way by the face of the text.

3. The US claim that China denies copyright protection to works that are not yet licensed for distribution within China is demonstrably false: The United States has failed to establish a prima facie case supporting its claim

83. China does not have an obligation to prove that its law is WTO-compliant. That burden is borne by the United States. A burden in rebuttal does not shift to the responding party unless the complaining party makes a sufficient prima facie case. Nonetheless, China has provided the Panel and the United States with comprehensive factual evidence and legal analysis demonstrating the operation of its laws.

(a) China has provided comprehensive legal analysis, with supporting evidence, to demonstrate that copyright protection is not contingent upon content review

84. The process of content review remains, as an administrative matter, separate from copyright. As explained by China in detail in its first written submissionand in its response to the Panel's questions, content review is conducted by a number of agencies under the authority of the State Council. The agencies under the State Council responsible for content review do not apply Article 4.1, or administer the copyright laws in any way.

(b) The Zheng Haijin opinions confirm that copyright is protected in works irrespective of their status with regard to publication approval

85. The US contention that works that have not been reviewed are prohibited by law is simply wrong. To illustrate this fact, China offered analysis of the *Zheng Haijin* case in its First Written Submission. The central meaning of the *Zheng Haijin* case is that even if a work has violated publication regulations – e.g., a work being distributed without a license or without having completed mandatory review – it is still protected by the Copyright Law as long as its contents are not illegal.

(c) The US Contention that the enforcement action taken by the NCAC in *Shrek II* was not authorized under the Copyright Law is demonstrably false

86. In the US first written submission, the United States proposed a theory that in *Shrek II*, the NCAC took action pursuant to unfair competition laws and not the Copyright Law. From this incorrect observation, the United States derived a conclusion that the NCAC did not act pursuant to the Copyright Law because the *Shrek II* work had not yet been reviewed, and therefore could not enjoy copyright protection. China has demonstrated the contrary: the NCAC not only could, but did take action pursuant to the Copyright Law. China clarified this matter in China's first written submission.

B. ASIDE FROM THE BURDEN OF PROOF, CHINA HAS DEMONSTRATED THAT CHINA DOES NOT MAKE COPYRIGHT PROTECTION CONTINGENT ON A FORMALITY

87. Copyright in China vests automatically, free of any formality. Berne Article 5(2) refers to administrative requirements such as the affixing of a mark, registration, the deposit or filing of copies, or the payment of fees. China makes no such demands of Berne authors prior to either the vesting of copyright, or prior to the enforcement of copyright. While for some works, content review may be characterized as a formality precedent to publication, in no sense can it be characterized as a formality precedent to copyright. Copyright matters are not implemented through the content review system. As China has illustrated, in the *Zheng Haijin* case both the NCAC and the Supreme People's Court

affirmed that under Chinese law, it is actual illegality of content that is at issue in Article 4.1 matters, and not the content review process itself.

C. THE US CONTENTION THAT ARTICLE 4.1 OF THE COPYRIGHT LAW IS A FACIAL VIOLATION OF TRIPS IS FALSE AS A MATTER OF FACT AND LAW

88. The failure of the United States to support its Content Review Theories leaves it with only one argument: its contention that the text of Article 4.1, regardless of how it might be applied, violates Berne Article 5(1), and in turn denies enforcement under TRIPS Arts. 41.1 and 61. The United States did not clearly engage with this issue in its First Written Submission. The United States now appears to contend that its primary claim all along was facial.

1. China recognizes and preserves all rights under TRIPS: the scope and operation of Article 4.1 is extremely limited and leaves TRIPS rights unmolested

89. Chinese law recognizes and preserves all TRIPS rights. China recognizes copyright in all categories of literary and artistic works, and Chinese law guarantees all the substantive rights required by TRIPS, and indeed rights above and beyond those. As conceded by the United States, Article 10 of China's Copyright Law sets forth 17 substantive moral and economic rights that copyright owners may enjoy. And under Copyright Law Article 2, China recognizes copyright for Chinese and foreign-authored works at the moment of the work's creation, without any formality or precondition, whether a work is published or unpublished.

90. China respectfully asks the Panel to recognize that Article 4.1 is in complete accord with the censorship power recognized by Berne Article 17. It is both negligible in terms of its implications in the marketplace, and in terms of any nullification or impairment of Member benefits.

(a) China recognizes and preserves all TRIPS rights

91. TRIPS Article 9.1 incorporates Arts. 1-21 of the Berne Convention and defers to the Berne text for full explication of Member obligations. Copyright Law Article 2 directly implements an author's rights under the Berne Convention into Chinese law. So long as copyright is granted under the Berne Convention, that right is protected by Chinese law. China grants to authors all the substantive protections of the Berne Convention, in addition to others, through Article 10 of the Copyright Law.

(b) Properly understood, the scope and application of Article 4.1 are extremely limited and completely in accord with the sovereign principles recognized by Berne Article 17

92. Properly understood, Article 4.1 merely recognizes that copyright protection is meaningless in a certain context: its core principle is that Chinese law will not enforce the protections of the copyright law for works the contents of which are already illegal.

93. Accordingly, the scope and operation of Article 4.1 are extremely limited. Copyright in a work vests under Article 2 without any inquiry into whether a work is prohibited by law.

94. Under Article 4.1, to the extent that any party has a legal right to exploit the work, it is the right-holder. If at any point the work becomes other than "prohibited by law", it is the right-holder and his or her assignees who enjoy protection.

2. The sovereign right to prohibit works is recognized by International Law, the Berne Convention and TRIPS, and is not limited by those Agreements

95. Article 17 of the Berne Convention expressly recognizes a preexisting and supervening sovereign domain in which TRIPS may not interfere. That domain is the right of sovereign governments to control and prohibit the production and distribution of certain works. Berne Article 17 recognizes this sovereign interest and effectively denies WTO jurisdiction in this area. Berne Article 17, both in reserving this sensitive aspect of state power to the sovereign, and by its plain-meaning, requires broad construction and deference.

96. TRIPS incorporates the entire Berne structure of substantive rights, together with the express recognition in Article 17 that those substantive rights are subject to the sovereign's inherent right to prohibit. Thus when there is any conflict between the author's rights under the Berne Convention and the sovereign's censorship privilege under Berne Convention Article 17, the former gives way to the latter.

3. Berne Article 17 requires broad construction and deference and even under the narrowest reading, there are no rights granted to prohibited content that are denied by China's Law

97. Even if Berne Article 17 is parsed as if it limits and defines a sovereign's right to prohibit works – which China submits is an incorrect reading – China's law still does not violate Berne or TRIPS. This is true for two reasons: all of the economic rights of authors under either agreement are limited by Berne Article 17, and the fundamental TRIPS enforcement right is to give authors a power of "effective action". Failure to grant a private right to restrict publication of content that has already been banned by the government does not in any way deny "effective" action.

(a) All economic rights of authors are limited by Berne Article 17

98. TRIPS rights are economic rights. The rights guaranteed in the Berne Convention are rights to authorize certain otherwise permissible uses of a work. All affirmative economic rights may therein be limited in accordance with Berne Article 17.

99. Given that all economic rights under the Berne Convention are limited by Berne Article 17, the denial of copyright protection to illegal works under Article 4.1 cannot violate Berne Article 5(1), and in turn cannot violate Article 9.1 of TRIPS.

(b) There is no right of availability of enforcement under TRIPS Part III with respect to prohibited works

100. The United States has failed to demonstrate that China has any obligation to grant TRIPS enforcement rights to prohibited works, despite the argument set forth in its first written submission. The fundamental obligation under Part III of the TRIPS Agreement is set forth at Article 41.1. That Article charges Members to make available under their law procedures "so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement ... ."

101. The US claim, in light of this provision, falls short on two grounds. First, enforcement procedures must be provided only for rights covered by TRIPS. If a right is not covered by TRIPS, then there is no obligation to enforce it. Second, the content at issue here has been banned by the government. No person, whether the author or infringer, is permitted to publish or distribute the work. Thus, rather than grant the author a power to prohibit publication, the sovereign itself prohibits publication – prohibition that is itself rigorously enforced. By definition, then, China has provided a procedure for "effective action" against any attempt to publish that content. It is banned entirely.

4. Public prohibition completely preempts the private right of censorship

(a) Neither the Berne Convention nor TRIPS grant a right to publication: copyright enforcement confers a private right to censor works that might otherwise be published

102. The Berne Convention and TRIPS serve primarily to secure for the author the right to prohibit publication by others. Access to a market is not guaranteed. In other words, there is no right to publish under international copyright.

(b) No meaningful private rights of censorship can subsist when a work is completely prohibited

103. When governments exercise their sovereign power to censor, the exercise of private rights is moot: unauthorized copying is not permitted. Copyright continues, but enforcement is not needed: the content is banned. It may not lawfully be copied, adapted, translated, and certainly not distributed. Copyright enforcement thus is meaningless in this context.

(c) US Prohibition likewise denies effective protections for the rights of authors

104. The US law similarly subsumes protections for the rights of authors in obscene works, and in particular works of child pornography. Such a function comports with the overarching authority referenced by Berne Article 17.

D. THE UNITED STATES HAS FAILED TO PRESENT A CASE TO SUPPORT ANY OF ITS CONTENT REVIEW THEORIES OR ITS OTHER AMALGAM OF CLAIMS RELATING TO ARTICLE 4.1: THE PANEL SHOULD ACCORDINGLY ENTER A FINDING IN FAVOR OF CHINA ON THESE MATTERS

1. The burden of proof lies with the complaining party

105. According to well established Appellate Body law, the complaining party must both properly assert and prove its claim. If such proof is absent or deficient, then the respondent has no burden going forward: the complaining party must present and substantiate its *prima facie* case. In the absence of evidence other than that which has been comprehensively rebutted, it cannot be held that the complaining party has met its burden.

2. The United States has failed to meet its burden

106. With regard to its Content Review Theories, the United States has wholly failed to demonstrate that China's law makes content review a precedent condition to copyright.

107. With regard to its other claims relating to Article 4.1, the only evidence proffered by the United States is the text of the provision itself. China has offered detailed argument on the nature of international copyright law, and of the structure of the Berne Convention, and has shown that China's law and practice in this regard are not inconsistent with TRIPS.

ANNEX B-5

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF CHINA AT THE SECOND SUBSTANTIVE MEETING

I. INTRODUCTION

1. Mr. Chairman, members of the Panel: Thank you. The United States has advanced three legal claims against China in this dispute. In each of its claims the United States has mischaracterized China's laws and is asking this Panel to dramatically expand the scope of legal obligations under TRIPS.

2. China respectfully submits that this Panel must address several key questions as it confronts the meaning of a number of obligations under TRIPS. Among these questions are the following: What is the appropriate balance of obligations and rights, and of legal constraints and deference to local legal systems as provided by TRIPS Articles 1.1 and 41.5? What is the appropriate scope of core sovereign functions, such as criminal law enforcement and the power to prohibit publication? What is the appropriate role of traditional legal principles, such as *in dubio mitius*?

II. CLAIM ONE

3. China wishes to address the first claim of the United States: that China's criminal law does not fulfill TRIPS Article 61, which requires that Members must apply criminal measures to willful counterfeiting and piracy on a commercial scale.

4. First, the definition of "commercial scale" that the United States has advanced is itself vague and ambiguous and fails to establish any clear standards by which to measure compliance with Article 61.

5. Second, the actual usage of "commercial scale" suggests that it refers to a significant magnitude of activity. China has offered several examples where "commercial scale" has been treated as a distinctive phrase and has referred to a significant magnitude of activity. By contrast, the United States merely tries to construct a meaning from the definitions of separate words. But the test of ordinary meaning is how that phrase is actually used.

6. Third, the Panel, at the very least, confronts in "commercial scale" a phrase whose meaning is vague and doubtful. China respectfully submits that the Panel must consider two crucial legal principles in the face of this vagueness. The first principle is that under Article 31.1 of the Vienna Convention, the meaning of "commercial scale" must be understood in context. The relevant context is principally Articles 1.1 and 41.5 of TRIPS which reflect deference to the norms, legal systems and resource constraints of Members, and were crucial concessions for developing countries in the final negotiating rounds of TRIPS. They suggest that TRIPS would not have imposed an exacting and intrusive regulation of Members' criminal enforcement regime. The second legal principle that this Panel should recall here is that of *in dubio mitius*, which holds that ambiguous legal obligations should be interpreted to minimally intrude on Members' sovereignty. This principle suggests that although countries have the right to cede their authority over domestic criminal law, they should not be presumed to do so lightly.

7. Fourth, the United States demands for itself significant discretion in its implementation of TRIPS Article 61. The United States is correct that Members have discretion in matters of criminal

enforcement – but it is wrong as to the source of this discretion in Article 61. In fact, it is the broad and flexible standard of "commercial scale" that grants this discretion.

8. China now turns briefly to its own legal system. In addition to misconstruing the "commercial scale" standard of TRIPS, the United States has routinely mischaracterized China's criminal law regime.

9. Here the United States makes three principal errors. The first error is that the United States frequently ignores the full breadth of evidence that is legally relevant to Chinese criminal law. The second error is that the United States disregards China's general criminal laws. These general criminal laws are "criminal procedures and penalties" applicable to commercial scale counterfeiting and piracy within the meaning of TRIPS Article 61. The third error is that the United States considers only a single moment of infringement. China's criminal law considers the entire period of infringement, not a snapshot in time.

10. China wishes to make one final note with respect to the China Copyright Alliance ("CCA") Report. The United States wrongly declares that the report shows that the "vast majority of traditional retail outlets" operate under China's criminal thresholds.

11. The CCA Report summarizes administrative raids. The United States extrapolates from these administrative raids to the general state of infringement. This is a logical fallacy. Just as no one would try to measure the frequency of murder from a review of traffic police reports, so no one should assume that administrative raids portray the full range of Chinese enforcement, which includes levels of activity far beyond that dealt with by the administrative law.

12. In sum, China respectfully submits that the first claim of the United States fails. The United States has demonstrated neither that Article 61 imposes a specific and low-scale standard, nor that China's criminal laws fail to capture commercial scale activity.

III. CLAIM TWO

13. China now turns to the second claim advanced by the United States. However, before addressing the substantive issues in this claim, China wishes to register an important procedural note: the United States has failed completely in these proceedings to make the argument that China's laws governing the disposition of goods destined for export are inconsistent with TRIPS. The United States has made clear that it "takes no position" regarding the applicability of Article 59 to such goods. The Panel should therefore hold that China's measures concerning goods destined for export are not subject to the US claim regarding Article 59.

14. Concerning the substance of the US claim, two distinct components are at issue in this second claim: the proper understanding of the 1st sentence of Article 46, as applied to Article 59; and the 4th sentence of Article 46, as applied to Article 59. The United States has failed to show that China breaches TRIPS in either respect.

15. The first dispute is whether China satisfies its obligation to provide Customs with appropriate disposal authority and destruction authority. With respect to disposal authority, China has demonstrated that its Customs has the power to dispose of seized goods outside the channels of commerce through donation to social welfare organizations and direct sale to interested right-holders. The sole point of contention is whether Customs may conduct these disposition methods in such a manner as to avoid harm to the right-holder.

16. In its first written submission, the United States expressed a completely unsubstantiated concern that defective or dangerous goods would be donated, and that such goods might harm the

reputation of the right-holders or lead to unwarranted legal claims. Neither the facts nor applicable Chinese law provided any support for this claim, and the US in fact complimented China's Customs for its donations to the Red Cross. In its written rebuttal, the United States then claimed for the first time that ordinary infringing goods could also harm the right-holders' reputation. Chinese Customs, however, already takes steps to prevent such a theoretical harm to a right holder.

17. The other apparent concern of the United States is that a recipient social welfare organization will resell donated goods. This concern is equally misplaced. Chinese law requires that Customs must ensure that donated goods are used exclusively by social welfare organizations. In this regard, Customs diligently exercises its legal responsibility.

18. China would respectfully ask the Panel to note that China satisfies TRIPS fully by ensuring that its Customs has the power to order the donation of seized goods in such a manner as to avoid harm to the right-holder.

19. Under the 1st sentence of Article 46, as applied by Article 59, China must afford its Customs destruction authority as well as disposal authority. China fully satisfies this obligation.

20. The United States affords its own Customs only conditioned authority and it insists elsewhere that China do likewise. But the United States has provided the Panel no arguments as to why its favored form of conditioning is appropriate, but China's sequencing guidelines are not.

21. China has highlighted several features of Customs' appropriate destruction authority: considerable discretion; the exercise of independence and autonomy; the pursuit of legitimate government interests; and consistency with the principles of TRIPS Articles 46 and 59. China has explained that Customs has the destruction authority required by TRIPS, as well as the reality that the majority of goods seized by Customs are, in fact, destroyed by Customs in the exercise of its discretion.

22. In sum, China has vested its Customs with the appropriate power to dispose of seized goods outside the channels of commerce in such a way as to avoid harm to the right-holder. China has also provided Customs with the appropriate power to destroy seized goods. In so doing, China fully satisfies its TRIPS obligations.

23. The second dispute in Claim Two concerns the 4th sentence of Article 46. As China has explained, Article 59 does not appear to incorporate this provision. Article 59 refers to the "principles set out in Article 46." But these "principles" do not modify disposal and destruction, as the United States has alleged. These "principles" modify the authority to order disposal of destruction.

24. However, even if Article 59 were read to incorporate the 4th sentence of Article 46, China fully complies with this provision.

25. The United States argues in its written rebuttal that this sentence means that seized counterfeit goods may only be released into the channels of commerce in exceptional cases. But the US reading of the text disregards entirely the term "sufficient". In fact, "sufficient" clearly sets forth a threshold: certain acts (such as merely removing the trademark) do not normally permit discharge into the channels of commerce; and certain unspecified acts beyond removing the trademark do so permit.

26. This plain textual interpretation is buttressed in several respects. First, there is clear evidence – from the negotiating history and commentaries – that the exceptional cases were understood to refer to the return of the seized good to the non-professional infringer.

27. Second, the concern behind the 4th sentence appears to have been that infringers might cheaply recover seized goods, wait for another batch of infringing marks, and continue their counterfeiting operations.

28. It is proper to read the 4th sentence to allow public sale when authorities take needed steps – beyond the removal of the counterfeit mark – to prevent infringers from cheaply reclaiming the seized goods and reapplying infringing marks.

29. China respectfully submits that the record before the panel is clear: China Customs would be in full compliance with the 4th sentence of Article 46, even if it were read to apply. In addition to removing the infringing mark from counterfeit goods, Customs eliminates other infringing features, solicits comments from the right-holder and – most significantly – sets a reserve price for the auction. The reserve price ensures that infringers pay market price to recover their goods and that they therefore are unable to cheaply continue their counterfeiting operations.

30. The Chinese Customs' option of using an auction does not violate the 1st sentence of Article 46, as incorporated into Article 59, because it is sufficient that Customs have appropriate disposal and destruction authority. Nor does it violate the 4th sentence of Article 46, even if that were to apply to Article 59, because Customs take significant measures beyond simply removing the infringing mark.

IV. CLAIM THREE

31. China turns now to the third US claim. This relates to Article 4.1 of China's Copyright Law.

32. The focus of the original US claim was China's content review system. In this regard, the US claim was grounded on a complete misunderstanding of Chinese law, and the United States has failed to carry its burden of proof.

33. The failure of the United States to support its allegations is worthy of review. At paragraph 198 of its first written submission, the United States made four key false and unsupported assertions.

34. First, the United States asserted that Chinese copyright law "provides no protection to works that are awaiting the results of content review in China." China has, however, given the Panel a specific example of this enforcement: the *Shrek II* enforcement actions by the NCAC, protecting the copyright in a work that had not completed the content review process.

35. Second, the United States asserted that where a work is never submitted for content review, China "provides no copyright protection." China, has provided legal analysis to show that such works in fact do receive copyright protection, and has provided examples of enforcement actions aimed at protecting the copyright in such works.

36. Third, the United States stated that where a work is edited to pass content review, Chinese copyright law "provides no copyright protection for the version that was not authorized for distribution in China." China has demonstrated that these works do receive copyright protection: NCAC Circular number 55 set up procedures to protect 700 US films, without inquiry as to whether the films were edited to pass content review.

37. Fourth, the United States challenged China's content review by contending that works that fail content review do not receive copyright protection. China, has shown that it will protect the copyright in the legal content of a work, even if that work fails content review as a whole.

38. In its written rebuttal, the United States merely reiterated its flawed theories, focusing this time on the contention that content review imposes a formality on the "enjoyment and exercise" of copyright in violation of Article 5(2) of the Berne Convention. This is not true.

39. With the failure of the US arguments regarding content review, all that remains of the US claim is a facial challenge to Copyright Law Article 4.1. As an initial matter, China wishes to highlight that the United States has not been able to provide a single example of a case where Article 4.1 of the Copyright Law has been applied.

40. That noted, China respectfully submits that the Panel's analysis of this facial challenge to Article 4.1 should begin with Article 17 of the Berne Convention.

41. Article 17 of the Berne Convention recognizes, and does not limit, the sovereign right to impose censorship.

42. The Berne rights that are incorporated into TRIPS are economic rights. Under any construction of Berne Article 17, there are no remaining enforceable private economic rights when a work is subject to prevailing public censorship.

43. Finally, as part of its facial challenge to Article 4.1, the United States has argued that Article 4.1 denies copyright protection to a category of works, in violation of Article 2 and Article 5(1) of the Berne Convention. This also is incorrect. Even when a work has been found to contain prohibited content, China continues to recognize the author's copyright in the work's legal content. And that copyright will be protected if it is found to be infringed by a work that is legally circulating within China.

44. China respectfully asks the Panel to find that the United States has failed to meet its burdens on its Claim Three arguments, and to rule in favor of China. The United States has failed to offer evidence to support its misreading of Chinese law, and the United States has failed to demonstrate that Article 4.1 of China's copyright law violates TRIPS on its face.

ANNEX B-6

CLOSING ORAL STATEMENT OF CHINA AT THE SECOND SUBSTANTIVE MEETING

I. INTRODUCTION

1. Mr. Chairman, members of the Panel: The People's Republic of China wishes to thank you for your time and attention in this meeting, and for your service on this Panel. The care that you have taken to prepare for this dispute has been evident throughout this proceeding. China also wishes to thank the WTO Secretariat Staff for its excellent work.

2. We have now exchanged two rounds of written submissions and held two substantive meetings. It is appropriate to consider the status of the key issues in this dispute, and to review the tasks remaining for the Panel.

3. In the broadest terms, the United States has failed to make its case. In each of the three claims the United States' case depends on legal interpretations that run counter to the governing agreements and a flawed understanding of Chinese law and practice. On many issues the United States has failed even to advance a *prima facie* case.

4. Let me briefly turn to the specific claims.

II. CLAIM ONE

5. The United States has asked this Panel to conclude that an infringer must be subjected to criminal penalties whenever that infringer is "seriously engaged" in pursuing financial gain. While the United States contends that its proposal is not an "intent" test, it is hard to describe "pursuing financial gain" as anything else. The discussion of the proposed US definition in this meeting offered nothing to dispel that conclusion.

6. The United States also contends that the rules of treaty interpretation leave "no doubt" about the meaning of the "commercial scale" standard. If by that the United States means that there is no doubt regarding it own proposed standard, China respectfully submits that the discussion of the US proposal at this meeting in fact identified considerable cause for doubt.

7. China has shown that an intent test like that of the United States was expressly rejected in the TRIPS negotiations. The Panel should also reject an intent test here, however it may be described.

8. Instead of an intent test, the TRIPS agreement adopted an objective test based on the scale of infringing operations – the "commercial scale" test. It is this test that the Panel must apply.

9. To apply this test, the Panel faces a challenge. Far from being without "doubt", the test in fact needs considerable definition. The Panel must take a very broad standard – "commercial scale" – and apply it to the very specific implementation of a Member country. The United States has not identified a concrete, principled approach for the Panel to do this. Through all the pleadings and meetings in this dispute, the United States instead has relied on hypothetical examples that assume their own conclusion. These examples follow a pattern: they describe a hypothetical infringement, allege that it falls beneath China's thresholds, and then assert that operations of that kind are infringement at a commercial level. China already has briefed this issue, and will not respond to those

examples again this morning. Instead, China notes that the Panel should adopt a standard that is objective and not the creature of hypothetical facts.

10. China, in contrast, has given the Panel two concrete measures. First, it has proposed a comparison to official statistics that describe the actual scale of commerce in China. Second, China has compared the thresholds for intellectual property crimes to the thresholds of other commercial crimes, and noted the importance of this comparison in light of the second sentence of Article 61, and in light of the deference to national systems expressed in Articles 1.1 and 41.5.

11. In defining the commercial scale standard, the Panel faces an important decision in the jurisprudence of TRIPS. China urges it to apply a standard that respects the compromises reached in the TRIPS negotiations, both in the text of Article 61 itself, and in the broader context of Article 1.1 and 41.5. At the same time, the Panel should apply a standard that is capable of principled application to a Member's actual implementation.

12. China is confident that if the Panel applies the correct standard, it will find that China's criminal IPR law meets that standard.

III. CLAIM TWO

13. With respect to Claim Two, the United States has asked this Panel to conclude that under TRIPS Members may not preference donations to charity over destruction. China has already explained why its Customs prefer certain disposition methods, such as charitable donation, over destruction. Yesterday, in response to a question from the Panel, the United States again commended to China that donation of seized goods be conditioned on the approval of the right holder - just as the United States does in its own practice. The United States appears to approve the constraints on authority that the United States itself prefers, but at the same time, reject the conditions, such as prioritizing donation to charity, that it does not. Moreover, the United States continues to wrongly assert that Chinese Customs injures right holders through donations to charities such as the Red Cross. China has detailed, with numerous laws and concrete examples, precisely how Customs avoids harm to the right holder. When asked during this hearing for actual examples of charitable donations causing harm to right-holders in China, the United States declined, as it has in the past.

14. China was disappointed by the number of inconsistencies and factual inaccuracies in the US statement yesterday. For example, the United States told the Panel that the circumstances under which China's legal regime permit destruction were "highly limited," but the actual Chinese Customs data already provided in this dispute flatly contradict that assertion. The data demonstrate the extensive use of the destruction option by China Customs. The United States also provided the parties and Panel with a chart purporting to explain China's disposal and destruction regime, but then later acknowledged that the chart was incomplete, and did not cover several relevant laws and options.

15. Lastly, as the Panel deliberates and prepares its rulings, China would respectfully ask that its decision address the complete US failure to argue that China's laws governing the disposition of goods destined for export are inconsistent with TRIPS. The United States has made clear that it "takes no position" regarding the applicability of Article 59 to such goods. The Panel should therefore hold that China's measures concerning goods destined for export are not subject to the US claim regarding Article 59.

IV. CLAIM THREE

16. China has set forth in detail the shortcomings of the US case on Claim Three. On most of the subject matter of its claim, the United States has not made a prima facie case. On the remainder, the US argument falls short, both because it focuses on a highly theoretical concern, and because it is

contradicted by the best reading of the Berne Convention. China has set these points forth in detail in its written submissions, and will not repeat them again this morning.

17. China must, however, call to the attention of the Panel some misstatements of fact and misstatements of China's position that were made in the US oral statement. This is not a comprehensive list of issues, and China will not address many questionable US points, particularly those that China already has rebutted. But today China calls attention to several particularly egregious misstatements that China believes it must identify on the record of this meeting.

18. First, in the absence of any concrete example of any actual application of Article 4.1, at paragraph 69 of its oral statement the United States simply blames Article 4.1 for the existence of infringement in China. China asks the Panel to recognize that this is mere allegation, not fact, and that the United States has offered no support whatsoever for this point.

19. Second, at paragraph 76 the United States claims that Article 4.1 denies copyright protection to any work where pre-publication review is required and has not been received. This is simply not true. China has demonstrated to the contrary in its pleadings, and China notes particularly that even at this late stage of the proceeding the United States cannot support this statement either with legal analysis or with a single example.

20. Third, at paragraph 77 the United States claims that China "admits" that "regardless of whether a particular defendant raises a formal defense, courts and the NCAC must determine the legality of a work *de novo*." China protests in the strongest terms this misstatement of its position. China has made no such admission. China's statement was made in the context of a case where the issue in fact *was* before the court. Once the issue is before the court, then, if content review had not previously been undertaken, the court would have to inquire into the legality of the content *de novo*. This is all that China said. China most assuredly is *not* of the view that such a court review of content must be made in every copyright enforcement action. China also notes that the United States again misstates this point in paragraph 78.

21. Fourth, and finally, in paragraph 79 the United States makes a major misstatement of Chinese law. The United States alleges that content review processes prohibit the publication or dissemination of works until the pass content review, and then tries to link this point to the language of Article 4.1. China has briefed this point extensively and will not repeat its analysis here, but does ask the Panel to recognize the US assertion for what it is – allegation that is simply not credible. China asks the Panel to demand more from the United States – to demand legal analysis and specific examples.

22. These misstatements, unfortunately, characterize much of the US case before this Panel. China respectfully requests the Panel to recognize to the failures in the US case, and to rule in China's favor.

* * *

23. This concludes China's closing statement. China again expresses its gratitude for the hard work and attention of the Panel and the WTO staff, and looks forward to responding to the Panel's written questions.