

## VIII. CONCLUSIONS AND RECOMMENDATION

8.1 For the reasons set out in this Report, the Panel concludes as follows:

- (a) the Copyright Law, specifically the first sentence of Article 4, is inconsistent with China's obligations under:
  - (i) Article 5(1) of the Berne Convention (1971), as incorporated by Article 9.1 of the TRIPS Agreement; and
  - (ii) Article 41.1 of the TRIPS Agreement;
- (b) with respect to the Customs measures:
  - (i) Article 59 of the TRIPS Agreement is not applicable to the Customs measures insofar as those measures apply to goods destined for exportation;
  - (ii) the United States has not established that the Customs measures are inconsistent with Article 59 of the TRIPS Agreement, as it incorporates the principles set out in the *first* sentence of Article 46 of the TRIPS Agreement; and
  - (iii) the Customs measures are inconsistent with Article 59 of the TRIPS Agreement, as it incorporates the principle set out in the *fourth* sentence of Article 46 of the TRIPS Agreement; and
- (c) the United States has not established that the criminal thresholds are inconsistent with China's obligations under the first sentence of Article 61 of the TRIPS Agreement.

8.2 The Panel exercises judicial economy with respect to:

- (a) the claim under Article 5(2) of the Berne Convention (1971), as incorporated by Article 9.1 of the TRIPS Agreement; and the claims under Article 61 of the TRIPS Agreement (with respect to the Copyright Law); and
- (b) the claims under Article 41.1 of the TRIPS Agreement and under the second sentence of Article 61 of the TRIPS Agreement (with respect to the criminal thresholds).

8.3 Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. China did not succeed in rebutting that presumption. Accordingly, the Panel concludes that, to the extent that the Copyright Law and the Customs measures as such are inconsistent with the TRIPS Agreement, they nullify or impair benefits accruing to the United States under that Agreement.

8.4 In light of these conclusions, the Panel recommends pursuant to Article 19.1 of the DSU that China bring the Copyright Law and the Customs measures into conformity with its obligations under the TRIPS Agreement.

### *Concluding remark*

8.5 In this dispute, the Panel's task was not to ascertain the existence or the level of trademark counterfeiting and copyright piracy in China in general nor to review the desirability of strict IPR

enforcement. The United States challenged three specific alleged deficiencies in China's IPR legal system in relation to certain specific provisions of the TRIPS Agreement. The Panel's mandate was limited to a review of whether those alleged deficiencies, based upon an objective assessment of the facts presented by the parties, are inconsistent with those specific provisions of the TRIPS Agreement.

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