

**Council for Trade-Related Aspects
of Intellectual Property Rights**

**SECTION 18 OF THE PROTOCOL ON THE ACCESSION
OF THE PEOPLE'S REPUBLIC OF CHINA**

Report to the General Council by the Chair

1. At its meeting of 23 and 24 October 2007, the Council undertook the sixth annual transitional review of the implementation by China of its WTO commitments pursuant to Section 18 of the Protocol on the Accession of the People's Republic of China (WT/L/432), and agreed that the Chair, acting on his own responsibility, would prepare a brief, factual report on the review to the General Council.
2. Written comments and questions in connection with the review were submitted in advance of the meeting by Japan, the United States and the European Communities. These submissions were circulated in documents IP/C/W/498, IP/C/W/502 and IP/C/W/503.
3. In a communication dated 18 October 2007, China provided information as specified in Annex 1A to the Protocol. This submission was circulated as document IP/C/W/505.
4. The annex to this report contains the relevant part of the minutes of the Council's October meeting¹ that reflects the statements made under the review.

¹ To be circulated as IP/C/M/55.

ANNEX

Item C of the minutes of the Council's meeting of 23 – 24 October 2007 to be circulated as IP/C/M/55²

C. TRANSITIONAL REVIEW UNDER SECTION 18 OF THE PROTOCOL ON THE ACCESSION OF THE PEOPLE'S REPUBLIC OF CHINA

1. The Chairman recalled that section 18 of China's Protocol on Accession required the TRIPS Council to review the implementation by China of the TRIPS Agreement each year for eight years and report the results of such review promptly to the General Council. He further recalled that section 18 required China to provide relevant information, including information specified in Annex 1A, to the TRIPS Council in advance of the review. He informed the Council that the information submitted by China pursuant to the requirement, dated 18 October 2007, had been circulated as document IP/C/W/505. In addition, the Chinese delegation had made available two room documents entitled *Report on China's Intellectual Property Rights Protection in 2006* and *China's Action Plan on IPR Protection 2007*. Questions and comments in connection with the transitional review had been submitted by Japan, the United States and the European Communities (documents IP/C/W/498, 502 and 503, respectively).

2. The representative of China said that it was his delegation's understanding of past practice in transitional reviews that Members that had posed questions to China, or had submitted comments, would always take the floor first to introduce their submissions. China would then take the floor to give its responses, both to the general comments and to the technical questions, and that this would conclude the transitional review.

3. The representative of the United States said that the practice of TRMs had varied from committee to committee, but that in this Council China had always taken the floor first to introduce its submission, had provided its responses to the written questions and Members had intervened afterwards. However, it was his delegation's view that substance was more important than procedure in this case and the United States were therefore prepared to proceed in either order at this time.

4. The representative of Brazil said that, although his delegation was not part of the dialogue that usually took place under this item, it was nonetheless a Member of the Council. He believed that this was not a tribunal and that procedures in the Council had to be fair and equitable. The obligations of China, as his delegation understood them, were to respond to questions and he was therefore interested in hearing the introduction of the questions first, as this was the natural order of things.

5. The representative of the European Communities said that his delegation had submitted seven pages of questions, 36 paragraphs, and that to read them out would be wasting time. His delegation would therefore prefer for China to respond to the questions that had already been put in writing and then possibly to additional questions that Members may raise on the basis of these responses. This process did not have the character of a tribunal. His delegation was simply applying the agreement and posing its questions, and expected a proper response.

6. The representative of China said that, as his delegation had pointed out repeatedly in the past, it was the logic of the review that China respond orally to the questions posed. However, it went beyond the commitments of China under Article 18 to provide any written responses or to respond to any additional questions posed after its answers, although China was prepared to listen to any such

² The paragraph numbering of this excerpt will not correspond with that of the minutes of the TRIPS Council meeting but has been included for the convenience of users.

questions. In keeping with this logic, he asked the Chair to proceed as in previous TRMs and invite Members that had posed questions to first introduce their submissions.

7. The representative of Japan said that, while the practice in this Council had been for China to first provide its responses and for Members to then make additional further comments, his delegation, like others, liked to focus on substance in a practical manner.

8. The representative of the United States thanked the Chinese delegation in advance for its attention to the questions raised by the United States and other Members. These questions touched on many issues of concern. The United States had worked hard to address these and similar concerns through meetings of this Council and through constructive bilateral dialogue and cooperation with China. Unfortunately, it had not been possible to resolve all of these issues through these mechanisms alone.

9. His delegation recognized that China had made the protection of intellectual property rights a priority and had taken active steps to improve IPR protection and enforcement. It continued to welcome and appreciate the commitment at the highest levels of China's Government to addressing these issues. However, the United States was concerned that several aspects of the Chinese legal regime actually hindered IPR protection and enforcement and raised WTO concerns.

10. He noted that the WTO Dispute Settlement Body had established a panel to look into three such concerns under the TRIPS Agreement. These related to China's thresholds for criminal copyright and trademark enforcement; customs rules for destructions of infringing goods; and copyright protection for new products that had not yet received Chinese Government approval for publication or distribution.

11. The United States was also concerned about certain Chinese measures that affected market access for films for theatrical release and audiovisual home entertainment products such as DVDs and video cassettes; for books, periodicals, journals, and other publications; and for music. China's barriers to market access for these copyright-dependent products created legal obstacles to legitimate products reaching the Chinese consumer. That, in turn, made it easier for copyright pirates to operate in China's market. It was his delegations view, therefore, that the protection of intellectual property rights and market access for legitimate copyright-dependent products were bound together. He noted that the United States had requested establishment of a WTO panel to look into these market access concerns as well.

12. As the questions from Members today reflected, the concerns that were the subject of the two pending dispute settlement proceedings represented only a part, albeit an important part, of a much larger set of concerns about China's protection and enforcement of intellectual property rights. It was critical that China and its trading partners worked together to aggressively seek solutions to these larger issues.

13. His delegation saw evidence of unacceptable levels of IPR infringement most vividly in the numbers of infringing goods seized at US borders. Mid-year statistics for 2007 showed that China was the source of 81 per cent of infringing goods seized at US borders. China had had a high share of seized goods in past years as well, but it was especially troubling that the seizure of Chinese goods had been increasing, not decreasing, each year since China had joined the WTO in 2001. Exports were only part of the problem, however. US copyright industries consistently reported high rates of piracy within China, although there had been improvement in the software sector. Trade in pirated optical discs continued to thrive. The operation of large retail and wholesale markets for counterfeit and pirated goods had not been deterred. Piracy of books and journals was a key concern. Internet piracy was increasing.

14. Overall, product counterfeiting in China was widespread, affecting pharmaceuticals, electronics, batteries, auto parts, industrial equipment, toys, and many other products. Many of these counterfeit products, moreover, posed a direct threat to the health and safety of consumers in China, the United States and elsewhere around the world. The underlying causes for these problems, and the possible solutions, were too numerous to describe here. The US Government had set out its views on those issues in detail in various reports available on the website of the Office of the US Trade Representative.

15. Last year at the transitional review before this Council, his delegation had noted that the United States looked forward to continuing to engage bilaterally with China on a wide range of IPR issues. At the same time, it had pointed out that the multilateral WTO forum, and the tools provided under the WTO agreements, including reviews like this one, the provision for transparency requests under Article 63.3 of the TRIPS Agreement, and the availability of WTO dispute settlement, were equally indispensable to a healthy international trade environment. His delegation continued to be disappointed at China's apparent reluctance to take full advantage of the capacity of these tools to clarify issues and aid in the exploration of possible solutions.

16. The larger issue before China and its trading partners was how solutions would be found and mutual understandings be reached regarding the various IPR issues discussed today. His delegation had observed that China seemed reluctant to use the transitional reviews before this Council to their full advantage. It had also seen that China was reluctant to respond substantively to requests under Article 63.3 of the TRIPS Agreement. Since the filing of the two WTO disputes against China, it had also noted a reluctance on China's part to engage in bilateral dialogue.

17. The United States continued to believe that deeper multilateral and bilateral dialogue and cooperation was the path to progress. The United States would continue to put serious efforts into its joint work with China on innovation policy, intellectual property protection strategies, and the range of other important matters in its bilateral economic relationship through the US-China Strategic Economic Dialogue, the Joint Commission on Commerce and Trade and other bilateral engagements. He hoped that China would fully embrace all of those opportunities and his delegation viewed the current WTO disputes as evidence of the need for more, not less, bilateral and multilateral cooperation on China's IPR issues.

18. Moving ahead with that work would of course require a willingness to cooperate on the Chinese side. The United States had seen evidence of that in some areas, such as recent joint US – Chinese law enforcement actions and a memorandum of cooperation in the sphere of IPR border enforcement. His delegation hoped to see deeper cooperation in other areas as well, with a view to making progress on the important issues that remain to be addressed with regard to China's IPR enforcement regime.

19. The representative of the Japan said that his delegation had raised questions regarding the future improvement of criminal enforcement and other issues at all TRMs from 2002-2006. With regard to further improvement of criminal enforcement, he noted that a new judicial interpretation in April 2007 had abolished the differences between criminal threshold for units and that for individuals, and had substantially lowered the threshold for units. Japan appreciated that the Chinese Government had recognized the importance of the protection of IPRs and had made efforts to improve enforcement. On the other hand, despite such efforts, a survey conducted by the Japanese Government in March and April 2007 showed that IPR enforcement in China had still room for improvement. While there had been some strengthening measures in IPR enforcement, such as an increase in the amount of confiscated illegally acquired income, which he understood was a relatively severe penalty, there continued to be some deficiencies in IPR enforcement, such as repeat offences, more sophisticated *modus operandi* of counterfeiters, and insufficient enforcement, especially in local areas. Therefore, his delegation had to conclude that IPR infringement in China continued to be severe for the Japanese

industry. A deterrent effect through the strengthening of administrative punishment and criminal prosecution and through the enhancement of measures against the sophisticated *modus operandi* of counterfeiters and repeat offenders was essential to improve the situation. Japan was looking forward to China enhancing IPR protection and taking further steps to provide effective enforcement against any act of infringement of IPRs in China. Regarding the specific questions Japan had posed to China, in the interest of time and efficiency, he referred Members to document IP/C/W/498 that Japan had submitted.

20. The representative of the European Communities said that his delegation noted with satisfaction certain progress that had been made on IPRs and certain ongoing positive initiatives that had been taken by China to tackle remaining problems. However, like other delegations he remained concerned by the very high level of counterfeiting and piracy in China. According to EC customs statistics of 2006, China remained the main source of counterfeited and pirated goods, with over 86 per cent of counterfeit goods seized at the EU border coming from China. His delegation remained particularly worried by the lack of criminal prosecution. The sanctions against IPR infringement were insufficient and not a deterrent. Civil and administrative procedures against counterfeiting and piracy remained expensive and time-consuming. The European Communities therefore urged China to actively pursue its efforts towards an effective IP protection and enforcement system.

21. In this respect, he recalled that the European Communities and China had established a structured dialogue on intellectual property and had set up, in that framework, a joint IP Working Group, the fourth session of which had met in Beijing on 27-28 September. He hoped that such a cooperative approach with China on IPR issues would lead to concrete and tangible results, as these were much needed. Finally, he said that he looked forward to a comprehensive reply to the questions posed in writing in document IP/C/W/503 of 11 October 2007 and hoped that what appeared to him as lack of cooperation of China in this TRM would not have to be interpreted as a lack of respect for the questions asked by Members.

22. The representative of China said that his delegation welcomed this opportunity to elaborate on the status of China's implementation of the TRIPS Agreement and other relevant commitments, and on its intensified IPR enforcement efforts since the last review through more effective administrative sanctions, as well as to brief the Council on China's efforts in deepening its international IPR cooperation with other Members in recent years. Ever since adopting the reform and opening up policy, particularly in recent years, China had made impressive progress on IPR protection and had recently incorporated it into its national strategy. Furthermore, the Chinese President Mr. HU Jintao had reiterated in his report to the 17th CPC Congress the Party's determination to "improve indigenous innovation, build an innovative country... and implement IPR strategies", which would serve as a long-term goal for China to pursue firmly in its IPR protection task.

23. Regarding the legal infrastructure perspective, in a short period of merely 30 years, China had put in place a legal and regulatory IPR framework incorporating laws, regulations, department rules and judicial interpretations. In order to respond to its own development needs and in order to advance its national drive to build an innovative country, China was constantly studying and formulating new IPR-related laws, regulations and rules and making improvements of its IPR protection system.

24. In 2006, the State Council had promulgated the *Regulations on the Protection of the Right of Communication through Information Network*. The Supreme People's Court (SPC) had issued the *Decision (No. 2) on Amending the Supreme People's Court's Interpretation on Certain Issues Concerning Application of Laws in Dealing With Cases Concerning Computer Network Copyright Disputes*. The Supreme People's Procuratorate (SPP), the Ministry of Public Security, National Copyright Office, State Administration for Industry and Commerce (SAIC) and General Administration of Customs had issued four regulations on accelerating civil-to-criminal case transfer. The Ministry of Commerce (MOFCOM) and others had introduced specific rules on IPR protection

related to trade fairs and exhibitions. The State Intellectual Property Office (SIPO) had issued the *Guide on Patent Re-examination and Measures for the Reduction or Postponement of the Payment of Patent Fees*. The SPC and SPP had clarified the criteria for convictions relating to IPR crimes involving piracy and illicit sales of audiovisual products.

25. On 1 April, 2007, the National Working Group for IPR Protection had published the *2007 Action Plan on IPR Protection*, which detailed 276 specific measures in ten areas including legislation and enforcement. Under this *Action Plan*, China would formulate and revise 14 laws, regulations, rules and administrative measures on trademark, copyright, patent and customs protection as well as seven judicial interpretations and guidelines. In the first half of 2007, the SPC had issued the *Opinions on Fully Intensifying IPR Trials to Provide Judicial Assurances for Building an Innovative Country*, the *Interpretations on the Application of Laws in Civil Cases Involving Unfair Competition*, and the *Rules on the Application of Laws in Disputes Involving Infringement of Right to New Plant Varieties*. The SPC and SPP had jointly circulated the *Interpretations on Issues Relating to the Application of Laws in IPR Criminal Cases II*. The SAIC had promulgated the *Measures for the Administration of Special Signs of Geographical Indication Products*. The formulation and updating of the *Trademark Law*, *Law against Unfair Competition*, *Patent Law*, and *Patent Commissioning Regulations* was also progressing on schedule.

26. On the IPR enforcement side, within the framework of international conventions and treaties such as the TRIPS Agreement and taking into consideration its national situation, China had come up with an IPR protection model featuring a parallel and concurrent system of administrative and judicial protection as well as an enforcement structure that effectively integrated administrative approaches with criminal justice, ensuring adequate protection for rightholders and ultimate fulfillment of China's international IPR obligations. In 2006, China had set up IPR Service Centers in 50 large and medium-sized Chinese cities and had launched the special "12312" service hotlines to facilitate IPR complaints and crime reporting. IPR enforcement agencies had carried out seven dedicated crackdown campaigns including Operation Sunshine, Operation Blue Sky, Mountain Eagle Two and the Anti-Piracy 100 Days Campaign, which had resulted in notable achievements.

27. Regarding the series of figures detailing China's efforts on enforcement, he referred Members to the information his delegation had provided under Annex I of Article 18 of China's Accession Protocol. In response to some Members' interventions, he emphasized that in 2006, 2,277 criminal IPR cases had been settled with a verdict of legal effect regarding 3,508 persons, 3,507 of whom had been convicted. This clearly demonstrated China's efforts to intensify criminal enforcement.

28. Some Members had also quoted increased numbers of seized pirated products at their borders. Also in China there had been an increase in the number of seizures of pirated products. From his perspective, these figures only demonstrated that China's efforts on IPR enforcement were more intensified, not less.

29. Regarding international IPR cooperation, on 29 December 2006, China had announced its decision to join the *WIPO Copyright Treaty* and *WIPO Performances and Phonograms Treaty*. On 9 June 2007, these two treaties had officially taken effect in China. At present, China was also approaching its final procedures for ratifying the *Protocol Amending the TRIPS Agreement*.

30. China had been actively involved in the reform of international IPR systems and negotiations on global IPR issues in international forums such as the WTO, WIPO, UPOV, APEC and ASEM, while increasing bilateral IPR collaborations with other Members. China-US, China-EU, China-Russia and China-Switzerland IPR working groups had been set up to meet regularly. IPR exchange mechanisms had also been established and consolidated between China and other countries and regions, such as Japan, Korea and ASEAN. In 2007, the first sessions of the China-Russia IPR Working Group and the China-Switzerland IPR Working Group, as well as the fourth session of the

China-EU IPR Working Group had successfully been convened, cementing IPR exchanges and cooperation. China had also held a China-US Enforcement Cooperation Joint Liaison Group meeting, had signed an MOU on Intensifying IPR Enforcement Cooperation between the Chinese and US customs services, and had hosted the WIPO Asia-Pacific Symposium on Performers' Rights in the Digital Network Environment, as well as an international symposium on geographical indications.

31. In conclusion, despite being a developing country confronted with many difficulties, China had never slowed down its pace of IPR protection. It should be underlined that IPR protection was a global issue and not a country-specific one. As developed and developing Members shared the daunting challenge of improving IPR protection, cooperation should serve as the main vehicle for international endeavor in the field of IPR protection. China was determined to further improve its IPR protection and enforcement system through unremitting efforts and to collaborate extensively with other WTO Members on this issue.

32. Responding to the technical questions submitted to China, another representative of China said that around 20 of these questions were closely related to the WTO dispute case DS362 or the case on market access of goods and that, therefore, her delegation did not deem it appropriate to provide responses to them. For the sake of clarity and efficiency the other questions had been categorized into 11 groups.

33. Responding to question in the first category on **General Issues**, she said that, regarding transparency, Chinese IP legislation was quite open and transparent. It had been provided that between the release and implementation of laws and administrative regulations at least one month had to be allowed for public comments. Before submitting drafts of laws and regulations for deliberation and review, they had to be made public for comments from all, including experts, scholars and practitioners in IP-related fields. In addition, China also paid great attention to opinions from IP-related international organizations, foreign enterprises and individuals. All suggestions were taken seriously and submitted for detailed analysis and classification. The feedback of some crucial suggestions would be delivered to the organization or individual that had made the suggestions for further comments.

34. For example, in 2004 and 2005, the Supreme People's Court had made available on the Internet the five judicial interpretations, respectively on technical contracts, unfair competition, new plant varieties, right conflicts and legal application of MTV copyright, for public comments. Revisions had been made according to comments from the public. In China's IPR legislation, it was rarely the case that more than one agency was involved in drafting legislation at the same time. However, if such a case did occur, according to the Ordinance Concerning the Procedures for the Formulation of Administrative Regulations and the Regulations on Procedures of the Rules Formulation, all the agencies involved were required to solicit public opinions in the process of drafting administrative rules and regulations. In addition, if the draft administrative rules and regulations related to responsibilities of more than one agency, the drafting agency was required to fully consult with all the other agencies involved to ensure coordination and avoid inconsistencies among different IP-related agencies.

35. In the process of the third amendment to the Patent Law, opinions had been solicited widely from related government agencies, organizations, enterprises and citizens, and a great number of suggestions for amendments were collected. In addition, the Legislative Affairs Office of the State Council had held an international seminar on the Patent Law Amendment on 10-11 October 2007. Experts, scholars, representatives from Chinese enterprises, WIPO and well-known companies in the US, EC, Japan, Brazil, India, etc. had held comprehensive and in-depth discussions on the amendment of the draft.

36. For the amendment to the Trademark Law, the State Trademark Office had begun to solicit social comments by sending letters and holding seminars since April 2006. By the end of 2006, 48 correspondents with 1,012 pieces of suggestions from 47 organizations, groups and individuals, including foreign organizations such as the USPTO, JPO, INTA and AIPLA had been received. In late September 2007, a new round of solicitations for opinions from domestic and foreign institutions and experts was launched.

37. Regarding IP protection and enforcement, China had taken many effective measures in recent years to push forward IPR protection in a comprehensive manner and had achieved good results. China had further improved its legislation, greatly enhanced its efforts to fight against infringement, increased the number of criminal prosecutions and penalties, and had strengthened public awareness for IPR protection. The Chinese Government had been exploring ways to establish an effective IPR protection system. However, as China was still a developing country, it was unrealistic and unreasonable to require China to reach the standards of developed countries like the European Communities within a short period of time. China hoped that the European Communities could continue to support China in its IPR protection endeavors, improve mutual understanding and trust, and reduce complaints and criticism.

38. Responding to questions in the second category on **Legislation and Judicial Interpretations**, she first turned to the revised draft of China's patent law. As the revision of the Patent Law was still underway, her delegation was unable to predict the final results and could therefore not provide further clarification of the provisions at present. China's Anti-Monopoly Law would come into force on 1 August 2008. Currently, there was no explicit definition of "abuse of IPR" in Article 55.

39. On conflicts between trademarks and trade names, the existing Law to Counter Unfair Competition was still under review and in the process of being amended. In November 2005, the Supreme People's court had formulated the draft text of the Interpretations on Applicable Legal Issues Concerning the Ruling of Civil Cases Involving IPR Conflicts, and had solicited public comments through the Internet in December 2005. The Judicial Interpretation draft covered relevant issues on conflicts between trademarks and trade names. Her delegation was currently unable to provide any details.

40. On the issue of royalty criteria for broadcasting and television organizations, according to the provisions of Article 43 of the Copyright Law, the Chinese State Council was working on Measures on the Remuneration for Using Audio Products by Radio and Television, and related legislation procedures were now underway.

41. According to Article 43 of the Regulations on Copyright Collective Management, when a user was able to provide the details of use but refused to do so, or practiced fraud in providing such information, the copyright administration departments of the State Council were required to rectification. The copyright collective management organization could terminate the Licensing Contract.

42. Regarding the import and export of technology, according to the Regulations on Technology Import and Export Administration, the administration of technology imports was divided into categories of technology prohibited from import, technology restricted from import and technology of free import. The technologies of free import were managed through contract registration without real examination of the contents of the contract. On the other hand, the competent authorities still needed to instruct the enterprises to provide the authentic basic information of the contracts. In actual practice, some of the provincial and municipal authorities could suggest revisions of terms that were non-compliant with China's existing laws and regulations in the technology import contracts of the enterprises, but the final say still rested with the enterprises. The Government had never made compulsory requirements on items like royalty rates.

43. Article 355 of the Contract Law explicitly provided that "Where the laws and administrative rules and regulations stipulate otherwise on the technology import and export contracts, or patent contracts or contracts on application for patents, such provisions shall prevail". The Regulation contained special provisions for the infringement liability in the technology import contract in the form of administrative regulation, without contradicting the Contract Law. Article 24 did not conflict with Article 28.2 of the TRIPS Agreement. According to this Article, "The patentee has the right to transfer or transfer through inheritance the patent and establish license contracts".

44. Article 25 of the Regulation was appropriate and currently China had no plan to revise it. This Article focused on the technology itself, i.e. under the agreed conditions the technology could achieve the agreed technological objective. If the mishandling of or other failures to meet the agreed conditions by the Chinese side led to a failure of achieving the agreed technological objective, the responsibility should be borne by the erring party. Since this Article was mandatory, whether the concerned parties made written commitments or not to implement the above provision in their agreement, its effect could not be affected and the Chinese Government would not reject the agreement for such reason.

45. Responding to questions in the third category concerning **Patents**, she said that China's patent system had adopted the first-to-file principle, granting the patent to the first applicant. If parties had disputes over the rights and interests concerning the ownership of the invention and creation, they could appeal to the People's Court according to the relevant provisions of the Patent Law. The revision of the Patent Law was under way. As regarded concrete amendments to the provisions, China was soliciting opinions on various aspects, and was therefore unable to predict the final results. Currently, China was not considering changing the provisions on the scope of patentability of software inventions.

46. According to Article 12 of China's Patent Law, any entity or individual exploiting someone else's patent had to conclude a written licence contract with the patentee for exploitation and pay a fee for the exploitation of the patent. Therefore, if the licensee did not pay the fee according to the contract, the patentee could appeal to the People's Court.

47. Regarding the two questions that had been posed on the protection of confidential information, she said that these questions were quite general, without pointing to a specific law or regulation, and that therefore China was unable to respond to these questions.

48. Responding to questions in the fourth category, concerning the **Protection of Test Data for Pharmaceutical Products**, she said that medicines should be registered in accordance with the Provisions for Drug Registration and that undisclosed information on clinical trials should be protected in line with the above-mentioned provisions, excluding information that had already been disclosed. Under the Measures of the Implementation of the Pharmaceutical Administration Law, China was committed to the protection of undisclosed information rather than to data protection and monopoly. Protection of undisclosed information took effect automatically and no form filing, authorization or record was needed. Its effectiveness depended on how people who had access to the information kept that information undisclosed. Therefore, there was no need to provide monopolistic data as was required under the relevant laws and regulations of some other WTO Members.

49. In accordance with the Administrative License Law and the Pharmaceutical Administration Law, the State Food and Drug Administration should base its approval on the pharmaceutical and clinical materials obtained by the applicants themselves, rather than on reference materials already disclosed or materials provided by other applicants. For medicines, whether domestically produced or imported, the exact same material requirements and review and examination procedures were applied and these did not constitute any discrimination at all.

50. According to the Provisions for Drug Registration, the State Food and Drug Administration should make decisions on review and approval based on the material submitted by applicants. In light of the universally applied Bolar exception, patent disputes arising during the review and approval procedures for drug registration were impossible to constitute a patent infringement.

51. Questions in the fifth category concerned **Trademarks and Geographical Indications**. On trademarks, she said that "famous brands", "renowned brands" and "export brands" were supporting measures initiated to lead and encourage enterprises to create famous brand products, to enhance product quality and managerial level and raise the overall quality level and competitiveness of China. In identifying well-known trademarks, the State Trademark Office and the Trademark Review and Adjudication Board would treat domestic and foreign trademark holders equally, without any discrimination or preference to Chinese trademarks. China's Trademark Law and Recognition and Protection of Well-Known Trademarks Provisions (2003) explicitly provided for objective standards for the recognition procedures of well-known trademarks. Detailed provisions were available on the website of the State Administration for Industry and Commerce (SAIC) at <http://www.ctmo.gov.cn>. In regard to the question of malicious application for foreign well-known trademarks, she referred Members to Article 14 of the Trademark Law and Articles 3 and 10 of the Recognition and Protection of Well-Known Trademarks Provisions. The renown gained through publicity of the media such as the Internet was also one of the elements for consideration by the SAIC when recognizing well-known trademarks.

52. Article 31 of Trademark Law protected the "prior right" of trademarks with certain renown, yet short of the well-known trademark standard. According to the principles of territoriality of intellectual property rights, the Trademark Examination and Trial Standards restricted trademarks subject to "prior use" to those used in China.

53. For actions such as malicious application for or exploitation of well-known trademarks or influential trademarks already used, but not yet registered, the SAIC would take the following actions in the stages of examination, opposition and review: (1) In the stage of examination, except for some well-known trademarks with high popularity, the SAIC generally did not take the initiative to render protection and tended to settle the problem in the subsequent opposition and review stages. (2) In the stage of opposition, the right holder could file an opposition to the Trademark Office of SAIC if he thought the trademark which had passed the preliminary examination violated Article 13 or 31 of the Trademark Law. The trademark would not be approved for registration if the Trademark Office confirmed the opposition. (3) In the stage of review, disputes could be filed if the right holder thought the registered trademark violated Articles 13 and 31 of the Trademark Law. The Trademark Review and Adjudication Board would cancel the registered trademark if the dispute was confirmed.

54. With regard to similar goods and services, the State Trade Mark Office would look at the Similar Goods and Services Differentiation Table compiled by the State Trademark Office based upon the International Classification of Goods and Services for the Purposes of the Registration of Marks. For example, gloves belonged to Similar Group 2510 of Category 25 and scarf to the Similar Group 2511 of Category 25. According to the Table, goods of these two Similar Groups were not judged as similar. Therefore, when applying for a trademark for "gloves", where there were identical or similar registered trademarks or prior applications for "scarves" by someone else, such an application would be passed for preliminary review.

55. With regard to GIs, according to related regulations, a GI could be protected as a trademark, while other forms of protection were not excluded. In 2001, China had acceded to the WTO. In its Accession Protocol, China had promised to fully comply with the geographical indication-related clauses in the TRIPS Agreement and to provide effective legal protection for GIs.

56. Currently, in the practice there were no conflicting GIs at STMO and AQSIQ because they had been registered by different registrants. Article 6 of the Provisions on the Protection of GI Products specified that the protection of GI products followed the principle of voluntary application, transparent acceptance, handling and approval. According to the Trademark Law, Trademark Law Implementing Regulations and Procedures for the Registration and Administration of Collective Marks and Certification Marks, GIs could be registered as collective marks or certification marks to gain legal protection in China. Registered geographical indications could enjoy sound and effective protection and their owners had no need to register with any other agencies.

57. When applying for registration of trademarks in China, according to Article 17 of the Trademark Law, foreigners and foreign enterprises should proceed in accordance with the agreements signed between their home countries and China or international treaties of which both are members, or the reciprocity principle. Besides, pursuant to Article 6 of the Procedures for the Registration and Administration of Collective Marks and Certification Marks, when registering their GIs as collective marks or certification marks, foreigners or foreign enterprises should submit proof of the legal protection of the GI in their home countries for them as the right holders. For example, the orange produced in Florida of the United States had successfully been approved for registration in China.

58. All the circulars and documents concerning the acceptance and approval of GI products protection, as well as the use of specialized indications had been made public and could be found on the website of AQSIQ at <http://www.aqsiq.gov.cn>.

59. Regarding counterfeiting at retail and wholesale markets, she said that the three major retail markets in Beijing had taken effective measures in IPR protection after signing MOUs with famous European brands holders, and had honored their commitments. However, in the process of implementing the MOUs, IPR agents and landlords had had some frictions due to different understandings of some articles in the contracts, which was quite normal. The Chinese government authorities had made great efforts to mediate between the parties to settle the frictions, and to push forward the perfection and implementation of the MOUs. At present, the market organizers held a positive and cooperative attitude.

60. On the issue of including IPR protection into the lease contracts between the landlords and vendors, the Shanghai Industrial and Commercial Administration had amended the Demonstration Text on Shanghai Merchandise Trading Market Operation Contract this year, prescribing obligations for landlords and vendors on trademark protection. Now landlords in many key garment and small merchandise markets had adopted the new contract model. To prepare for the 2008 Olympics, the Beijing Municipal Government had held a meeting in which it had decided to strengthen the communication with foreign right holders, improve the precautionary and remedy systems in wholesale and retail markets and the 12312 Complaining and Appeal Services Centre Mechanism, and phase out counterfeiting in wholesale and retail markets.

61. On the issue of the Trademark Office backlog, due to year-on-year increase in China's trademark applications, in 2006 there had been as many as 766,000 cases. Currently the time span of the examination was about 30 months, which was longer than last year. In view of the longer time span of trademark examination, SAIC had further recruited trademark examiners, strengthened management and enhanced the operation guarantee for the automated system. All staff worked diligently in every step of the trademark application procedure and tried hard to enhance working efficiency. In 2006, altogether 313,000 trademark registration applications had been examined and the annual examination quantity of every examiner had been much higher than in other countries.

62. Responding to questions in the sixth category, concerning **Copyright**, she said that in 2006, the Chinese Copyright Authority had investigated and confiscated pirated overseas textbooks failing to pass content review in six universities of Beijing, Shanghai, Guangzhou and Wuhan. The

Association of American Publishers and the Association of British Publishers had both expressed their gratitude with regard to such actions taken by the Chinese Government.

63. Responding to questions in the seventh category, regarding **General Enforcement**, she said that SAIC and China Customs had regularly published statistical data on infringement cases. As for the concrete information, i.e. the analytical statistics of all cases that had been requested by the United States, her delegation was unable to provide them as this request went completely beyond the scope of the TRIPS Agreement.

64. Measures relating to notarization and legalization of Powers of Attorney and evidence had been adopted and were consistent with Article 242 under the Civil Procedure Law of China. In accordance with Article 49 of the TRIPS Agreement, relevant administrative procedures should adopt the same principles as for civil procedures. Regarding the problem of possibly time-consuming procedures in practice, a call for more cooperation and communication between China and foreign countries (including foreign IPR holders and related enforcement institutions) was becoming more and more urgent, as well as mutual comprehension on systems of law, enforcement systems and document requirements in order to reduce unnecessary delays caused by misunderstandings of respective systems of law.

65. As for the implementation of interim injunctions, the People's Court exercised them in an active and prudential manner pursuant to laws. Her delegation was wondering about the source of the quote that "less than 2% of all interim injunction applications actually submitted to the courts are granted".

66. It had always been the principle and goal of the Chinese Government and the public security bodies to constantly strengthen cooperation with IPR holders in conducting IPR protection. At the same time, it was also the foundation of effectively cracking down on IPR crimes. Once an appeal of the IPR holder was accepted and heard, the right holder participated in the relevant legal procedure. The private-prosecuting case in which the right holder appealed to courts directly was a major form of the right holder's direct participation.

67. According to the Criminal Law of the PRC, the Regulation on the Transferring of Suspected Crime Cases at Administrative Agencies, and the Administrative Punishment Law, the administrative law enforcement agencies should report or transfer the cases to the public security agencies if criminal responsibilities were involved. If administrative punishments such as fines had already been imposed before the transfer, such penalties would be considered by the People's Court under the law when making determinations. It was necessary to point out that, according to the Regulation on the Transferring of Suspected Crime Cases at Administrative Agencies, the cases transferred were "suspected" rather than "affirmed" cases. Cases that could not be identified as criminal cases by the public security agencies would be transferred to the relevant administrative agencies for settlement.

68. Responding to questions in the eighth category, concerning **Administrative Enforcement**, she said that it was widely recognized that the Chinese Government had spared no efforts in strengthening administrative enforcement of IPR protection. According to Article 53 of Trademark Law, when handling trademark infringement cases, the administrative authorities for commerce and industry could confiscate and destroy the infringing products once the violations had been confirmed. If the confiscated products were of value, which was detachable from the infringing trademark, according to Article 53 of Administrative Punishment Law, they could be openly auctioned or disposed according to the relevant provisions of the country. The proceeds from the auctioning of the confiscated illegal property should be handed to the state treasury.

69. IP infringement crimes are effectively cracked down upon. However, a few criminals still attempted to evade legal punishment by acting in a more sly and concealed manner. In this context,

Chinese public security agencies had formulated strategies of both "targeted fighting" with a focus on chief offenders who were responsible for the infringing activities and "whole-chain fighting" aimed at destroying every link in the criminal network from production, storage, transportation, sales to export. As for the question of "what are the necessary conditions to punish manufacturers, distributors or would-be distributors concurrently?", she said that criminals would be held accountable as long as it could be proven that those criminals had common criminal intentions, conducted criminal activities jointly and the actions constituted criminal offences.

70. Responding to questions in the ninth category, concerning **Civil Enforcement**, she said that according to the Several Provisions of the Supreme People's Court on the Evidence for Civil Actions, the formality and source of evidence should be in line with the laws. Evidence collected by private investigators and used in civil litigations should be subject to the Civil Procedure Law.

71. Responding to questions in the ninth category, concerning **Customs/Border Enforcement**, she said that, to reduce the outbound flow of counterfeit goods across China's borders, China Customs had improved enforcement means. Great importance had been attached to the close combination of inspections and examinations on custom declaration data, declaration bills of documents, and examination work on the spot. Some advanced examining techniques had been widely adopted by China Customs, such as X-ray machines, which effectively improved their capability and efficiency to inspect and confiscate infringing goods. Special enforcement actions aiming at cracking down on illegal export of infringing goods in the form of freight, post or express delivery had been initiated. For example, a special IPR protection action named "Dragon Boat Action" was being carried out from 1 October 2007 to 31 March 2008. China Customs had also strengthened international enforcement cooperation with customs of other countries with the purpose of protecting IPRs.

72. Responding to questions in the ninth category, concerning **IPR Infringement through the Internet**, she said that China severely cracked down on copyright piracy on the Internet pursuant to international treaties and domestic laws and regulations. In 2006, the State Council had promulgated the Regulations on the Protection of the Right of Communication through Information Network. The SPC had issued Decision (No. 2) on Amending the Supreme People's Court's Interpretation on Certain Issues Concerning Application of Laws in Dealing With Cases Concerning Computer Network Copyright Disputes. On 29 December 2006, China had announced its decision to join the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty. On 9 June 2007, these two treaties had officially taken effect in China. However, she pointed out that the issue of copyright piracy on the Internet went beyond the scope of the TRIPS Agreement and that it was therefore not appropriate to discuss this issue in the framework of the transitional review of China.

73. The representative of the United States thanked China for its detailed responses to the questions. While it was difficult to follow the responses as particular countries' questions had not been identified, it was his delegation's impression that the following questions posed by the United States had not been responded to or further clarification was necessary. Regarding US question 5 on the legislative priorities in China 2007 Action Strategy, his delegation had not heard a response on whether China was considering any further new IPR measures that were not mentioned in that Action Strategy. Regarding enforcement issues, particularly those relating to criminal enforcement, the United States had asked in questions 6 and 7 whether there were Uniform Guidelines for Public Security Bureaus with regard to case initiation standards for criminal IP investigations and particular pilot projects in effect. US question 9 had been about whether there were any legislative proposals that would enhance the power of Chinese judges to enforce judicial orders. In questions 12 and 13 the United States had requested particular data about cases in China. In response to China's comment that these requests were beyond the scope of the TRIPS Agreement and the transitional review, he said that in his view this type of mechanism could be a useful tool and exercise in transparency and, for it to make progress, it should be interpreted broadly rather than narrowly. Regarding the questions on copyright piracy on the Internet, his delegation had the same concern. Regardless of competing views

of this issue's relevance under the TRIPS Agreement, China should have answered US questions 18, 19, 20 and 21 on copyright piracy on the Internet in the interest of transparency. Regarding question 22, while appreciating China's responses on past efforts to combat textbook piracy on university campuses, there had been no answer to the additional question whether any new enforcement efforts were being planned. Lastly, regarding question 36 regarding data exclusivity, the United States had asked about the total number of data exclusivity grants provided by SFDA but had not received a response. His delegation was looking forward to further clarifications and responses from China in this regard.

74. The representative of Japan thanked China for its detailed responses. As it had not been possible to identify which response was directed at which question, his delegation would pose further questions and make further comments after having examined China's responses in detail. He reiterated his delegation's hope for China to enhance IPR protection and to take further steps to provide effective enforcement against any act of infringement of intellectual property in China.

75. The representative of the European Communities said that, although his delegation was grateful for China's detailed answers, he had not received answers to its questions 8, 9 and 10 relating to the third patent law revision in document IP/C/W/503. He disagreed with China's comment that the situation regarding the struggle against counterfeiting in the Silk Market in Beijing was improving. On the contrary, he himself had had occasion to witness the rampant and widespread counterfeiting there in person. This was unfortunate, as the European Communities had tried to improve the situation in cooperation with Chinese authorities for several years. The Shanghai situation, by contrast, seemed to be much better and therefore whatever was working in Shanghai should also be applied in Beijing. He expressed the hope of his delegation for China to intensify its efforts in struggling against counterfeiting, which was a priority for the European Communities.

76. The representative of the China thanked the Members that had demonstrated their interest in China's IPR issues by putting forward so many questions and comments. Although it was fair to say that China never liked the Article 18 review which imposed WTO-plus obligations on China, China never escaped from fulfilling its commitments. Contrary to what some Members had said, China was always willing to take full advantage of this review mechanism in word and in spirit and had been doing so in the past five years by providing the required information and by responding to the enormous number of questions put forward by Members. However, it should be emphasized again that Article 18 was a provision with a special nature and a limited function, and that it did not require China to provide written responses nor to respond to any questions that went beyond its commitments under the TRIPS Agreement. Some questions that China had not provided answers to were closely linked to the IPR case that was already the subject of a panel process, which would be the more appropriate mechanism to deal with those questions. China's door was always open for cooperation on IPR issues, both bilaterally and multilaterally. Such additional questions and comments could always be dealt with through other more appropriate channels. With regard to the specific cases put forward by some Members, he said that IPR was a global issue instead of a country-specific one. He had visited a shopping centre in central London where he had seen a small vendor selling Louis Vuitton bags that had obviously been pirated, but such isolated cases did, of course, not diminish the efforts by those developed Members regarding their IPR enforcement. The same applied with regard to those isolated cases existing in China.

77. The representative of the European Communities said that while some counterfeit products could be found anywhere in the world, the difference lied in the size and magnitude of the counterfeiting, whether it was just one product or a shop the size of a football field with six floors like the Silk Market, which was dedicated almost entirely to the sale of counterfeits.

78. The representative of the United States reiterated his delegation's view that China had not taken full advantage of the review mechanism over the years and had shown a reluctance to do so

from the beginning. It was his delegation's view that the review was a commitment that had been negotiated and agreed by China in its accession agreement and that China should fully adhere to that commitment. If China would do that, more progress would be made on some of these issues.

79. The Chairman thanked China for all the information it had provided, as well as other Members for their contributions. Turning to the Council's reporting obligation to the General Council, he suggested that the Council follow the same procedure as in the past years, namely that the Chairman, acting on his own responsibility, would again prepare a factual report. The content of the cover page to the report would be similar to that of the report submitted by the Council in 2006 and the part of the minutes reflecting the discussions held under this agenda item would be attached.

80. The Council took note of the statements made and agreed to proceed as suggested by the Chair.
