WORLD TRADE ORGANIZATION

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Council for Trade-Related Aspects of Intellectual Property Rights

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REVIEW OF LEGISLATION

Follow-up questions by the European Communities and their member States

Addendum

By means of a communication from the Permanent Delegation of the European Commission, dated 11 October 2002, the Secretariat has received a copy of the following follow-up questions that the European Communities and their member States have communicated to the People's Republic of China. These questions supplement those posed by the European Communities and their member States in document IP/C/W/361.

CHINA

A. TRADEMARKS

1. Well-known marks: (i) what is the actual status regarding the review of the Interim Rules on the Determination and Administration of Well-known Marks? (ii) Article 5 of the Implementing Regulations only permits a trademark owner to submit an application for recognition of a well-known mark when a dispute arises (when he pursues oppositions or cancellations). Is there any provision that would permit the trademark owner to apply directly for well-known status? (iii) Apparently, there exists a list of all the trademarks which were recognised as well-known in China (your reply to question 9 raised by the United States is not unequivocal). If so, may we receive a copy of such a list and please specify how the list was elaborated (i.e. whether all trademarks enlisted were recognised as such after an application for recognition was filed).

2. Transliterations: Which procedure does the Chinese Trademark Law foresee for the protection of transliterations of foreign marks into Chinese? Would a foreign trade mark owner be able to successfully oppose a trade mark application filed in Chinese characters of his earlier trademark written in roman characters? Would a the owner of a, in roman characters, register mark be successful in opposing the use of his mark in Chinese characters?

B. GEOGRAPHICAL INDICATIONS

3. In reply to the EC question 22, it is mentioned that "at the level of law adopted by the People's Congress and the regulations promulgated by the State Council, GIs are protected mainly under the Trademark Law and the Anti-Unfair Competition Law". Please clarify whether there are other tools that may serve to adequately protect GIs in China (i.e. the so-called *GI Act* - General requirements for products of designations of origin or geographical indications GB 17924-1999 - of 7 December 1999,

in force since 1 March 2000 and issued by the State Administration for Quality Inspection, Supervision and Quarantine).

4. In reply to question 14 posed by the United States it is mentioned that "if a GI is protected under the Trademark Law, the scope of its protection is limited to the mark that has been approved for registration and to the goods in respect of which the use of the trademark has been approved" and "this kind of protection for GIs is identical with that for registered trademarks". Such a reply seems to confirm that the Trademark Law does not provide in an enlarged protection for GIs for wines and spirits (such GIs should be protected according to Article 23.2 TRIPS regardless whether or not they mislead the public). Please clarify.

C. PATENTS

5. The reply to EC question 30 states that for compulsory licences granted for reasons of "public interest", the requirement of prior negotiations with the patent holder does not apply. Could you please explain how this fits into the wording of Article 31(b) which stipulates that the obligation that efforts must be made to obtain authorisation from the right holder prior to the granting of a compulsory licence can only be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. What is the basis to interpret Article 31(b) as waiving the obligation to have prior negotiations with the patent holder also in cases where an authorisation is granted for reasons of "public interest"?

D. UNDISCLOSED INFORMATION

6. According to Article 35 of the Implementing Regulations of the Drug Administration Law of 4 August 2002, the undisclosed test and other data submitted in support of applications for marketing approval of pharmaceutical products which utilises new chemical entities, are protected, conform Article 39.3 TRIPS, against unfair commercial use (6 years as from the date of marketing approval, no disclosure and no reliance by the marketing authorisation body for second applicants). (i) Please confirm that data exclusivity over 6 years would be available even in cases where the drug concerned is not patent protected. (ii) Please indicate whether the marketing authority will have an obligation to verify (i.e inform with the Patent Office), prior to the granting of an authorisation, whether the drug concerned is patented or not. (iv) Finally please specify whether your legislation "links" the term of data exclusivity protection to, where appropriate, the term of the underlying patent, i.e. if the drug concerned is also patented, would the term of data protection be linked to the term of the patent in such a way that the data protection term eventually may be shortened in case the patent expires before the 6 year data exclusivity term?

E. ENFORCEMENT

7. In the replies received, China communicated statistical information regarding counterfeiting and piracy. It appears that for the year 2001, of the initial copyright claims (4,416) 66 were transferred to criminal procedure and of the initial counterfeiting cases (22,813) only 86 were transferred to criminal procedure. Such figures demonstrate that the prosecution standard are indeed very tough. We understand that recommendations have been made by relevant administrative authorities to the judicial authorities in order to lower the thresholds for initiating criminal investigations. Please specify when and how the State Council's Regulation "Provisions on the Transfer of Susceptible Criminal Cases by Administrative Law Enforcement Bodies" and the Supreme People's Procurator "Standard for Criminal Prosecution in Economic Offences" will be modified in order to lower the prosecution standard.

8. Many different administrative governmental bodies (Customs, SAIC, AQSIQ, AIC) are in charge of the enforcement of the laws against IP infringement and more precisely counterfeiting and

piracy. Please briefly indicate which procedure a right holder is to take should he desire to undertake action against the infringement of his rights. How is he to initiate the action before each of the administrations? On what grounds precisely can the right holder ask either one of the named bodies to intervene? Who will give him a helping hand in the investigation? What are the rules to be respected for determining which administration has jurisdiction both administratively and territorially? What legal or administrative actions can be undertaken by the respective governmental bodies?

9. In China's communication regarding the Transitional Review Mechanism (IP/C/W/382) it is mentioned that customs authorities around China investigated and dealt with 330 cases involving infringements by the end of 2001. Please give details as whether any of these cases lead to criminal prosecutions. Please indicate whether there is an increase of investigations for the year 2002 so far.

F. BORDER MEASURES

10. From the response to question 26 of the United States, it appears that the Custom Regulations of 1995 are under review, please specify whether the modified Regulation would (i) lower the security that is requested to the applicant when he requests to detain suspected infringing goods (actual Article 14); (ii) whether the modified version will explicitly foresee that both the applicant and the consignee or consignor will have the right to inspect the suspected infringing goods according to Article 57 TRIPS; (iii) whether "ex-officio actions" would be instituted even in cases where the rights were not recorded with the General Administration of Customs, that is to say in flagrant cases of infringement, ex. obvious cases of counterfeiting well-known marks or drugs counterfeiting.