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Sino-US Intellectual Property Dispute: a New Chapter in WTO History

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Sino-US intellectual property dispute: a new chapter in WTO history

Lanye Zhu and Jiarui Liu*

Setting the scene

On 10 April 2007, the USA initiated two disputes against the People's Republic of China (PRC) in the World Trade Organization. In one dispute (the 'IPR Dispute'), the USA requested consultations with China concerning the protection and enforcement of IP rights in China.¹ In another dispute (the 'Market Access Dispute'), the USA requested consultations with China concerning certain restrictions on distribution of imported copyright works and certain restrictions on market access for foreign distributors of copyright works.²

The focus of this article is the IPR Dispute. In this dispute, the USA requests consultation on four issues:

1. the thresholds that must be met in order for certain acts of trade mark counterfeiting and copyright piracy to be subject to criminal procedures and penalties under PRC law;
2. the confiscation of infringing goods by Chinese customs authorities, and the disposal of such goods following removal of their infringing features;
3. the scope of coverage of criminal procedures and penalties for unauthorized reproduction or unauthorized distribution of copyright works;
4. the denial of copyright and related rights protection and enforcement to creative works of authorship, sound recordings, and performances that have not been authorized for publication or distribution within China.³

On 20 April 2007, Japan asked to join the consultations, shortly followed by Canada, the European

Key issues

- It is well known that the USA is an aggressive proponent of the use of WTO dispute resolutions in its campaign against jurisdictions that fail to match up to TRIPs protection standards, and that China is the source of many complaints on the part of the USA.
- A closer look at the relevant provisions of TRIPs and of national legal provisions in China reveals that some of the complaints of non-compliance may be hard to sustain.
- In this article, each IP-related complaint levelled by the USA is held up to scrutiny, examining it within the context of Chinese law and interpretational guidance. The authors then predict possible grounds upon which future complaints may be lodged.

Communities, and Mexico. After China agreed to these requests,⁴ all the parties held consultations in Geneva regarding the IPR Dispute, which failed. On 25 September 2007, the DSB established a panel to review the dispute following a second request from the USA.⁵

Shortly after the USA announced its decision to initiate the IPR Dispute, China expressed 'great regret' and 'strong dissatisfaction'. Wang Xinpei, the spokesman for the Ministry of Commerce, said that

the decision runs contrary to the consensus between the leaders of the two nations about strengthening bilateral economic and trade ties and properly solving trade disputes.⁶

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1 Summary of the Dispute to Date (up-to-date at 20 August 2007) of DS362 prepared by the Secretariat of World Trade Organization, available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm#facts (last visited on 17 November 2007).

2 Summary of the Dispute to Date (up-to-date at 20 August 2007) of DS363 prepared by the Secretariat, available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm (last visited on 1 October 2007).

3 See above n 1.

4 China—measures affecting the protection and enforcement of intellectual property rights, Request for Consultations by the USA, available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm#facts (last visited on 1 October 2007).

5 WTO: 2007News Items, available at http://www.wto.org/english/news_e/news07_e/dsb_25sep07_e.htm (last visited on 17 November 2007).

6 China Express Regret, Dissatisfaction over US Complaints at World Trade Organization, available at <http://english.mofcom.gov.cn/aarticle/newsrelease/commonnews/200704/20070404553955.html> (last visited on 17 November 2007).

The US Trade Representative believed that bilateral dialogue and multilateral forums are both important tools for ensuring healthy and sustainable relations, and dispute settlement and co-operative efforts complement one another. According to the Office of the US Trade Representative, since the beginning of 2006, the USA has pursued a two-track approach to resolving US–WTO concerns—it continued to conduct bilateral dialogues with China, while remaining willing to utilize WTO's dispute settlement mechanism to settle disputes with China, as it would with any other mature WTO member, if bilateral dialogue fails to address US concerns.⁷

Another Chinese government authority relevant to the IPR Dispute, the State Intellectual Property Office (SIPO) said it is 'an unwise and irrational move'. Tian Lipu, the director of SIPO, said that the initiation of this dispute shows the US' ignorance of the great effort and progress China has made in terms of strengthening the protection of IP rights and law enforcement. The USA emphasized that, despite China's great effort and the achievement thus far, 'piracy and counterfeiting levels in China remain unacceptably high' and 'inadequate protection of intellectual property rights in China costs US firms and workers billions of dollars each year, and in the case of many products, it also poses a serious risk of harm to consumers in China, the United States and around the world'.⁸

The IPR Dispute has complicated background. In both China and the USA, it is whispered that there are hidden agendas behind the initiation of the IPR Dispute and the Market Access Dispute, such as 'to defuse mounting political pressure on Capitol Hill to reverse a growing trade deficit with China', to press China to cease to undervalue its currency.⁹ This article consciously omits discussion of the complicated background of US domestic politics and USA–China trade negotiations, asking only whether allegations of the USA are based on a correct understanding of the provisions of PRC law and whether its laws and regulations on IPR protection are consistent with WTO rules.

Criminal thresholds

The first issue raised by the US concerns the thresholds under PRC laws that must be met in order for certain acts of trade mark counterfeiting and copyright piracy to be subject to criminal procedures and penalties. Acts of trade mark counterfeiting and copyright piracy for commercial purposes in China which fail to meet these thresholds are not subject to criminal procedures and penalties. The USA believed that the lack of criminal procedures and penalties for such activities appeared inconsistent with China's obligations under Articles 41.1 and 61 of TRIPs to impose criminal responsibility for trade mark counterfeiting and copyright piracy on a 'commercial scale'.¹⁰

The PRC threshold

Serious circumstances	Exceptionally serious
Illegal turnover \geq RMB50,000	Illegal turnover \geq RMB250,000
Illegal income \geq RMB30,000	Illegal income \geq RMB150,000 (US\$18,750)
2 TMs infringed and illegal turnover \geq RMB30,000	2 TMs infringed and illegal turnover \geq RMB150,000
2 TMs infringed and illegal income \geq RMB20,000	2 TMs infringed and illegal income \geq RMB100,000
Reproduction and/or distribution of pirated copies of copyright works \geq 500 copies	Reproduction and/or distribution of pirated copies of copyright works \geq 2500 copies

Under Chinese Criminal Law, offenders face criminal liability for their acts of trade mark counterfeiting or copyright piracy if the circumstances of such acts are 'serious' or 'exceptionally serious', or if the sales volume or the illegal income is 'large' or 'exceptionally large'.¹¹ Standards for seriousness are not provided in the Criminal Law but by various judicial interpretations.¹² We list below the key circumstances under which individuals and company who conduct counter-

7 WTO Case Challenging Weaknesses in China's Legal Regime for Protection and Enforcement of Copyrights and Trademarks, Trade Delivers, by Office of the United States Trade Representative, available at www.ustr.gov (last visited on 1 October 2007).

8 United States Files WTO Cases Against China Over Deficiencies in China's Intellectual Property Rights Laws and Market Access Barriers to Copyright-Based Industries, available at <http://www.ustr.gov> (last visited on 1 October 2007).

9 Taking a Harder Line on Piracy, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/09/AR2007040900574.html> (last visited on 1 October 2007).

10 See above n 4.

11 See Criminal Law of the People's Republic of China, effective from 1 October 1997, Arts 213, 214, 215, 217, and 218.

12 See Interpretation by the Supreme People's Court and the Supreme People's Procuratorate on Several Issues of Concrete Application of Law in Handling Criminal Cases of Infringing Intellectual Property effective as

feiting and piracy may be pursued for criminal liability.¹³

The US concern is that these thresholds actually offer a safe harbour for pirates and counterfeiters. Taking the threshold of number of illegal copies as an example, a retailer could stock up to 499 pirated DVDs and face no possibility of criminal responsibility.

Moreover, under current Chinese laws and judicial interpretations, the turnover or income of infringement activities is normally calculated by reference to the actual sale price or the labelled price of the counterfeit or pirated products, not the price of legitimate goods. Only when the counterfeit or pirated products has no labelled price or when its sales price cannot be ascertained will the median market price of the relevant legitimate product be used to calculate the turnover.¹⁴ The USA believes that, except when the median market price of the legitimate product is used, the lower the actual sales price or the labelled price of the pirated or counterfeit product, the more the infringer could sell without worrying about criminal liability.

TRIPs rules

China has clearly set a threshold for criminal responsibilities and procedures for copyright piracy and trade mark counterfeiting activities as a result of which some infringing activity escapes criminal responsibility, but does this necessarily mean China has failed to lived up to her commitment under TRIPs? Let us examine the standards set by TRIPs, especially Articles 41.1 and 61 cited by the USA.

TRIPs detailed the situations under which World Trade Organization 'shall' and 'may' provide for criminal procedures and penalties. Members *shall* provide for criminal procedures and criminal penalties 'at least' in cases of 'willful trade mark counterfeiting or copyright piracy' on a 'commercial scale'. In addition to that, Members *may* provide for criminal procedures and penalties to be applied in other cases of infringement of IP rights, in particular where they are committed willfully and on a commercial scale.¹⁵

TRIPs thus requires members to criminalize certain IPR infringement activities when all three conditions are met: (1) the activity is 'willful'; (2) it is trade mark

counterfeiting or copyright piracy; and (3) it is on a 'commercial scale'.

The key issue here is the meaning of 'commercial scale'. This term does not appear in other TRIPs provisions and is thus difficult to interpret within TRIPs itself. In addition, no WTO DSB precedent provides guidance on the interpretation of this term. We are also unaware of a globally accepted reading of the term. Currently, there are three major types of interpretation.

First, the European Union maintains that 'commercial scale' equals 'commercial purpose'. Under the European Union Directive on the Enforcement of IP Rights,

Acts carried out on a commercial scale are those carried out for direct or indirect economic or commercial advantage; this would normally exclude acts carried out by end consumers acting in good faith.¹⁶

The directive defines 'commercial scale' by looking at the purpose of the act and the state of mind of the actor. Thus 'on a commercial scale' is the same concept as 'for commercial purpose'.

Secondly, the Australia–United States Free Trade Agreement interprets 'commercial scale' as a broader concept than 'commercial purpose'. It comprises two scenarios: one is 'significant wilful' infringements of copyright, which have no direct or indirect motivation of financial gain, and the other is wilful infringements 'for the purposes of commercial advantage or financial gain'. The key difference between this and the EU reading is that, when the infringement activity is 'significant wilful', there is no requirement for 'commercial purpose' in order to qualify the activity as 'on commercial scale'.¹⁷

The third reading is reflected in the legislation of China: 'commercial scale' is a concept that is narrower than 'commercial purpose'. Commercial purpose alone is insufficient to make an infringement activity 'of commercial scale'; the activity must also be in a significant scale comparable with general commercial enterprises. Following this reading, PRC law has set no additional threshold on top of the 'commercial scale' standard. Rather, the standard for seriousness and quantity of infringement activities is part of the 'commercial scale' standard under TRIPs rules.

of 22 December 2004) ('2004 Judicial Interpretations'), and the Interpretation by the Supreme People's Court and the Supreme People's Procuratorate on Several Issues of Concrete Application of Law in Handling Criminal Cases of Infringing Intellectual Property (II) effective from 5 April 2007 ('2007 Judicial Interpretations').

¹³ See above n 12.

¹⁴ Interpretation by the Supreme People's Court and the Supreme People's Procuratorate on Several Issues of Concrete Application of Law in

Handling Criminal Cases of Infringing Intellectual Property effective as of 22 December 2004), Art. 12.

¹⁵ Agreement on trade-related aspects of intellectual property rights, Art. 61.

¹⁶ Directive 2004/48/EC of the European parliament and of the council of 29 April 2004 on the enforcement of IP rights, item (14) of preliminary statement.

¹⁷ The Australia–United States Free Trade Agreement, para 26 of Art. 17.11.

The WTO DSB's interpretation of the term 'commercial scale' is keenly awaited in this case, which could settle the debate once and for all.

Two relevant observations

Under TRIPs, penalties remedies available for IPR infringement activities include imprisonment and/or monetary fines sufficient to provide a deterrent consistent with the level of penalties applied for crimes of corresponding gravity.¹⁸ Under Chinese law, the threshold for criminal liability for theft is RMB 500–2000, whereas the threshold for fraud is RMB 2000–4000.¹⁹ Arguably, the dramatically different threshold for IP crimes and those for theft and fraud makes the penalty for IP crime inconsistent with the level of penalties for crimes of corresponding gravity. In the IPR Dispute, the USA has not raised this issue, but China may need to prepare to address it.

The threshold of criminal responsibility was lowered a couple of days before the USA initiated the IPR Dispute. On 4 April 2007, the Interpretation by the Supreme People's Court and the Supreme People's Procuratorate on Several Issues of Concrete Application of Law in Handling Criminal Cases of Infringing Intellectual Property (II) was passed. This reduced the former threshold for criminal responsibility (1000 copies) by half. The prior threshold applicable to enterprises, which had been three times the threshold for individuals, was lowered to the same level as that for individuals. Five days later, the USA initiated the IPR Dispute, which suggests that these changes were insufficient to address its concerns. Nevertheless, once this issue is submitted to the WTO DSB, what matters is not whether the current legislation of China is satisfactory to the USA, but whether it meets China's commitment in the TRIPs. We look forward to the determination of the DSB.

Customs disposal

The second matter on which the USA requested consultations concerns the disposal of infringing goods that are confiscated by the Chinese customs authorities. Under applicable PRC law such goods, following removal of their infringing features, may be sold by auction. The USA believes that the disposal of goods

through auction is inconsistent with China's obligations under Articles 46 and 59 of TRIPs, which require such goods to be disposed 'outside the channels of commerce' or destroyed.²⁰

PRC rules

Under the currently applicable Chinese Customs regulations, the hierarchy for the method of disposal of infringing goods seized by Customs is

1. donation to a charitable institution if it can be used for public welfare or to be sold to the rightowner of the relevant IP rights if it intends to purchase (there is no apparent priority between these two methods of disposal under the legal provisions);
2. auction after removal of the infringing IPR features; and
3. destruction.²¹

TRIPs rules

Under Articles 46 and 59 of TRIPs, the competent authorities shall have the authority to dispose infringing goods outside the channels of commerce or destroy the infringing goods. We believe the key to this provision is to avoiding causing harm to the right holder to the greatest extent possible. Article 46 further provides that, as to counterfeit trade mark goods, the simple removal of the trade mark unlawfully affixed shall not be sufficient, other than in exceptional cases, to permit release of the goods into the channels of commerce. It appears that, in order to avoid harm to the right holder, TRIPs is cautious regarding disposal of the infringing goods into the channel of commerce, and higher priority is given to disposal out of channel of commerce and destruction.

Analysis

The USA believes that, under the hierarchy provided under PRC law, the Chinese customs authorities often appear to be required to give priority to auction of the infringing goods, which would let them enter the channels of commerce. The order of priority of disposal method under PRC law does seem different from that of the TRIPs agreement. However, by taking a closer look at the PRC provisions and TRIPs rules, we note several things.

18 Agreement on trade-related aspects of intellectual property rights, Art. 41.1.

19 The Interpretations of the Supreme People's Court regarding Several Issues on the Application of Laws in the Trial of Theft Cases effective from 4 November 1997.

20 See above n 4.

21 Regulations of the People's Republic of China for Customs Protection of Intellectual Property Rights effective from 1 March 2004, Art. 27, and Implementing Measures of Customs of The People's Republic of China for the Regulations of The People's Republic of China on Customs Protection of Intellectual Property Rights, adopted effective from 1 July 2004, Art. 30.

First, TRIPs does not ban the disposal of infringing goods into channel of commerce. By not specifying the circumstances under which infringing goods may be disposed into channel of commerce, and by requiring the member to balance 'the seriousness of the infringement and the remedies ordered as well as the interests of third parties',²² TRIPs effectively leaves some room for manoeuvre for the domestic legislation of its members.

Secondly, TRIPs does not mandate the competent authorities to dispose of infringing products outside channels of commerce or to destroy infringing products. It only requires members to give the competent authority the authority to do so. As to whether the relevant PRC law has given the Customs such authority under all circumstances, one can argue the case both ways. Under PRC law, infringing products may be destroyed *only* if the infringing features cannot be removed. As a result, the Customs do not always have authority to order destruction of the infringing goods. But if all the infringing features of an infringing product are removed, it is no longer technically 'infringing goods'. Therefore, it should not be considered a violation of the TRIPs Articles 46 and 59, if the competent authority is required to prioritize the disposal of such goods, which no longer infringe, into channels of commerce.

Naturally, the key issue here boils down to what 'infringing features' means. Under Notice No. 16 of 2007 from the General Administration of the Customs of PRC, issued 8 days before the IPR Dispute, the IPR features should include the infringing feature of the product itself and those of its packing, including the features of trade mark, copyright, and patent infringement. On the basis of this interpretation, we would say, for handbags, to remove the trade mark tag does not remove all its IPR features, as the design of the handbag may be protected by copyright. We believe that such interpretation of the 'infringing feature' is consistent with what Article 46 provides.²³ The Public Notice emphasizes that, if the infringing features of certain goods cannot be completely removed, it should be destroyed, not be put into auction. Disregarding the implementation of these provisions in practice,

current PRC legislation may well comply with TRIPs Article 46.

Copyright in pre-censored works

A third issue is that the USA believes that, under current PRC law, creative works of authorship, sound recordings, and performances of foreign nationals that have not been authorized for publication or distribution within China do not enjoy copyright and related rights protection and enforcement, and that this denial is inconsistent with (i) the principle of national treatment provided under Berne Convention and TRIPs, (ii) the minimum rights granted in the Berne Convention and TRIPs, and (iii) the provisions of Berne Convention and the TRIPs that copyright protection may not be made to be subject to any formality.

TRIPs and Berne Convention rules

Under TRIPs, members must accord to the nationals of other members' treatment no less favourable than that it accords to its own nationals with regard to the protection of IP.²⁴ TRIPs also requires all members to comply with Articles 1 to 21 of the Berne Convention²⁵, which requires that foreign authors of protected works shall enjoy all the rights granted to domestic authors, as well as all the rights specially granted by the Berne Convention,²⁶ and such protection shall be subject to no formality of any kind.²⁷ The minimum copyright protection for literary and artistic works specially granted by the Berne Convention includes, inter alia, the right of reproduction,²⁸ the right of adaptation,²⁹ and the right of translation.³⁰

PRC rules

Article 4 of the PRC Copyright Law provides that 'Works the publication or distribution of which is prohibited by law shall not be protected by this Law'. In addition, under various administrative regulations, some works of foreign nationals must pass pre-censorship before authorization of their publication or distribution.³¹ The US concluded, therefore, that authors of imported works

22 TRIPs Art. 46.

23 The Public Notice No. 16 of Year 2007 from the General Administration of the Customs of PRC effective from 2 April 2007.

24 Agreement on trade-related aspects of intellectual property rights, Art. 3 National Treatment.

25 Agreement on trade-related aspects of intellectual property rights, Art. 9 Relation to the Berne Convention.

26 Berne Convention for the Protection of Literary and Artistic Works, Art. 5.

27 *ibid.*

28 Berne Convention for the Protection of Literary and Artistic Works, Art. 9(1).

29 Berne Convention for the Protection of Literary and Artistic Works, Art. 12.

30 Berne Convention for the Protection of Literary and Artistic Works, Art. 8.

31 See the Administrative Regulation on Publishing effective from 1 February 2002, Art. 44, and Administrative Regulations on Audiovisual Products effective from 1 February 2002, Art. 28.

whose publication or distribution has not been authorized (and whose publication or distribution is therefore prohibited) appear not to enjoy the minimum standards of protection specially granted by the Berne Convention in respect of those works (and may never enjoy such protection if the work is not authorized, or is not authorized for distribution or publication in the form as submitted for review).

We do not agree entirely with this reading. The US reading is that Article 4 of the PRC Copyright Law and relevant regulations regarding publication and distribution of works impose both substantive requirements and procedural requirements on the protection of imported works subject to pre-censorship: to be protected (i) such work cannot contain any prohibited content—a substantive requirement and (ii) publication or distribution of such work must obtain authorization—a procedural requirement.

We believe that Article 4 imposes only a substantive requirement. According to Article 4 and related regulations,³² a work will not be protected in the following cases:

1. conflict with the basic principles stipulated in the PRC Constitution;
2. threat to state unity, sovereignty, and territorial integrity;
3. revelation of state secrets, danger to state security, or destruction of state honour or interests;
4. incitement of hatred and discrimination between races or undermining of ethnic customs and practice;
5. propagation of evil religions or superstitions;
6. disturbance of social order and undermining of social stability;
7. pornography, gambling, or violence or abetting criminal acts;
8. humiliation or defamation of others or violation of the legal interests of others;
9. detriment to social morality or good ethnic cultural traditions and
10. content forbidden by laws and regulations.

On the procedural side, whether a work of a foreign national has passed pre-censorship and is authorized for publication and distribution and whether the work will be protected under PRC Copyright Law are two

totally different matters. The latter is not conditioned upon the former.

When a work, the publication and distribution of which is subject to authorization, has not yet been so authorized, protection against infringement is determined by a court (when the relevant issue is in front of a court) or the administrative authorities (when the issue is in front of administrative authorities). We are not aware of any statutory provision which prohibit such work from being protected under PRC Copyright Law.

For the works of foreign nationals, the distribution and publication of which is disapproved for grounds other than its contents, for example, where the quota for importation of foreign film for the year has been reached, we understand that such work remains protected under PRC copyright law. In this sense, in this aspect of PRC law, there is no violation of the national treatment principle and the rule against formality requirement for copyright protection under TRIPs and Berne Convention.

Reproduction/distribution

The fourth matter on which the USA requested consultations was that, it believes, under current PRC law the unauthorized reproduction of copyright works not accompanied by unauthorized distribution or unauthorized distribution not accompanied by unauthorized reproduction may not be subject to criminal procedures and penalties, and the USA believe that this is inconsistent with the requirement for criminal penalty for copyright piracy activities under Articles 41.1 and 61 of TRIPs. We believe this may be a misunderstanding.

The basis of the USA understanding is that, when Article 217 of Criminal Law lists the acts of copyright piracy that are subject to criminal procedures and penalties, it uses the term ‘reproducing and distributing [*fuzhifaxing*]’ of copyright works without permission. The USA therefore believe that, based on this expression, a willful copyright piracy on a commercial scale that consists of unauthorized reproduction alone or unauthorized distribution alone may not be subject to criminal procedures and penalties.

Article 217 of the Criminal Law is ambiguous, and could be interpreted as the USA does. However, the Supreme People’s Court³³ has stated clearly that ‘reproduction and distribution *fu zhi fa xing*’ in Article 217 of the Criminal Code means reproduction, distribution,

³² See above n 31.

³³ Explanation on Certain Questions Related to the Concrete Application of Law in Hearing Cases of Crimes of Illegal Publication effective as of 23 December 1998.

or reproduction and distribution.³⁴ The 2007 Judicial Interpretations have confirmed this.

The USA did not note the Supreme Court Explanation, but it noted its confirmation in the April 2007 Judicial Interpretations. The USA has said that it looks forward to discussing this matter with China during consultations. We believe that, once China clarified the meaning of 'fuzhifaxing' in its current legislation, the USA would realize that this fourth issue really was not an issue.

When will all this end?

In theory, the USA and China can settle the IPR issue at any stage, even after establishment of the panel. Nevertheless, given the changes to PRC law which China made just before the USA initiated the disputes, and given the complicated background of the IPR Dispute—the US trade deficit with China, China's undervaluation of its currency, environment issues, and so on, agreement might not be easy for the two countries. If they do not settle, how long will we wait for the final result of the dispute? World Trade Organization provides the following estimate on its own website on how long it may take to solve an issue.³⁵

How long to settle a dispute?

60 days	Consultations, mediation, etc.
45 days	Panel set up and panelists appointed
6 months	Final panel report to parties
3 weeks	Final panel report to WTO members
60 days	Dispute Settlement Body adopts report (if no appeal)
12 months	(Total without appeal)
60–90 days	Appeals report
30 days	Dispute Settlement Body adopts appeals report
15 months	(Total with appeal)

However, experience teaches us that the path to resolution may take longer. The average time taken to solve an issue is 23 months, as opposed to the optimistic estimate of 15 months.

More in the pipeline?

As of April 2007, there were 26 IP-related WTO complaints, of which the USA was involved in 19, representing 73% of the cases. In 15 of these, the USA is the party initiating the dispute. This tends to show that the USA is actively using, and is likely to use, WTO DSB to solve IP-related trade disputes with other countries.

Assuming that the IPR Disputes and the Market Access Disputes are not the last two disputes that the USA initiates against China, we would like to take a wild guess as to what could possibly be the next subject picked by the USA—the notarization and legalization requirement for evidence taken outside China³⁶ may be one, as it could arguably be considered not a 'fair and equitable' procedural requirement under Article 41.2 of TRIPs; and whether China's administrative channels allows for 'effective action' as required by Article 41.1 of TRIPs might be another potential issue.

Among the 15 cases initiated by the USA, 14 were initiated under the Clinton Administration, which lasted about 5 years after the establishment of World Trade Organization, whereas only one case was initiated under the Bush Administration in around 8 years in office; this sole case was initiated after the Democratic Party took control of Congress in 2006. This seems to indicate that, if the Democratic Party wins the president election of 2008, the USA may make use of the WTO DSB more often.

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34 Supreme People's Court Explanation on Certain Questions Related to the Concrete Application of Law in Hearing Cases of Crimes of Illegal Publication effective as of 23 December 1998, Art. 3.

35 Available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last logged in on 1 October 2007).

36 Several Provisions of the Supreme People's Court regarding Evidences in Civil Litigations effective from 1 April 2002.