

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

**TRANSITIONAL REVIEW UNDER 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 18 November 2003, the Council undertook the second 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, Chinese Taipei, the European Communities and the United States. These submissions were circulated in documents IP/C/W/410, 411, 413 and 414, respectively.
3. In a communication, dated 17 November 2003, China provided information as specified in Annex 1A to the Protocol. This submission was circulated as document IP/C/W/415, dated 18 November 2003.
4. An annex to this document contains the relevant part of the minutes of the Council's November meeting¹ that reflects the statements made under the review.

¹ To be circulated as IP/C/M/42.

ANNEX

Item C of the minutes of the Council's meeting of 18 November 2003
to be circulated as IP/C/M/42²

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

1. The Chairman recalled that paragraph 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. The TRIPS Council had taken up the first review under paragraph 18 at its meeting in September 2002 in combination with its normal review of China's TRIPS implementing legislation. The report on the first transitional review had been forwarded to the General Council in document IP/C/26. He further recalled that paragraph 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 to it as required under Annex 1A of the Protocol of Accession, dated 17 November 2003, had been circulated in document IP/C/W/415. Questions and/or comments in connection with the transitional review had been submitted by Japan, Chinese Taipei, the European Communities and the United States, which had been circulated in documents IP/W/410, 411, 413 and 414 respectively.

2. The representative of China said that, prior to the Council's meeting, China had submitted to the TRIPS Council the information required by Annex 1A to the Protocol on Accession. In order to ensure a better understanding of the status of protection of intellectual property rights (IPRs) in China, her delegation had also made available to the meeting a White Paper on "Intellectual Property Protection in 2002 in China". This paper presented a detailed and updated account of the developments with regard to the IPRs in China, covering patents, trademarks, copyright, new plant varieties, etc. A considerable part of the report was devoted to the efforts and achievements in regard to the enforcement of IPR legislation by the relevant government authorities. She said that these two documents provided Members with a comprehensive and objective picture on the implementation of TRIPS-related commitments by China, and also served as a useful source of information to address some of their concerns.

3. She said that a large volume of questions had been posed to China in the context of the transitional review mechanism (TRM). While wishing to ensure that the questions would be dealt with in the most responsible and serious manner, she pointed out that the communications from some Members had reached her delegation only very recently, leaving China with little time for necessary preparation. She said that China attached great importance to IP protection and the TRM in the TRIPS Council. A strong team had been put together with officials and experts from various departments, including the Ministry of Commerce, State Administration of Industry and Commerce, National Copyright Administration, State Intellectual Property Office, and the Legal Affairs Office of the State Council. She said that their presence was intended to improve the quality of information exchange with Members.

4. Turning to the comments made and questions posed to China, a second representative of China said that his delegation was grateful that some Members had commented on the IP protection regime in China. He found this to be constructive. It was the belief of the Chinese Government that enhancing IPR protection was a long-term course of action with strategic significance. Since the beginning of the 1980s, China had gradually established an excellent IPR legislation and enforcement

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.

mechanism. In China's Criminal Law, there were specific provisions on IPR crimes. China had also set up special IPR courts to hear cases involving IPR infringements. China had modified its laws and regulations in relation to IPRs, making them compatible with international conventions, including the TRIPS Agreement. He said that the Chinese Government would fulfil its commitment to further improve its IPR system, fully implement various IPR laws, upgrade IPR protection with adequate measures to keep pace with international standards, and create a sound legal environment for the introduction of foreign advanced technologies, funds and management skills. At the same time, the Chinese Government would also implement effective IPR policies and strategies, reinforcing its efforts to boost technological innovation with IPR protection, strengthening IPR administration and guiding all economic entities to enhance their competency in management, applications and protection of IPRs as well as the ability to meet international competition, and consequently improve the technological and comprehensive forces of China. The Chinese Government would, as always, pursue IP protection policy and effectively safeguard the legitimate interests of both Chinese and foreign right owners. China was willing to further cooperate and communicate with other Members on the basis of equality and mutual benefits.

5. As to the principle of transparency and notification obligations, he said that China respected this principle and, since its accession, had fully implemented its obligations in the light of the TRIPS Agreement and its accession commitments. Pursuant to Article 63.2 of the TRIPS Agreement, China had notified ten main dedicated laws relating to the IPRs in full text and a series of laws and regulations in summary, including the Criminal Law, the Anti-Unfair Competition Law, and the Civil Procedure Law. Following the TRIPS Council's decision of 21 November 1995, China had also provided information on its enforcement regime in a notification of its responses to the Checklist of Issues on Enforcement. He said that China's IPR laws and regulations were characterized by their broad coverage and great quantity. A large volume of judicial interpretations and sub-national legislation had added to the complexity. The notification to the WTO and the provision of requested information entailed huge tasks, not the least of which was translation. As a developing Member, however, China would redouble its efforts to further improve the notification process while requesting the necessary assistance on translation according to Article 2.5 of the Agreement between the World Intellectual Property Organization and the World Trade Organization. As a major arm in IP enforcement, the judiciary departments in China were also subjected to the principle of transparency, which was evidenced by the public soliciting of comments for judiciary interpretations. The Supreme People's Court would further broaden the scope of commenting in the course of interpretation. Meanwhile, all the TRIPS-related laws, regulations, and other regulatory documents would be published through the Chinese Foreign Trade and Economic Cooperation Gazette as well as the bulletins and the websites of the relevant government departments. Members could also access the enquiry point set up by the Chinese Government for interesting information.

6. Regarding the recent reorganization of the Chinese responsibilities for intellectual property matters, he said that there were no changes to the responsibilities of China's IP agencies. The Bureau of Economic Crime Investigation under the Ministry of Public Security was responsible for the investigation of IP crimes. The Division of Economic Crime under the Supreme Procuratorate was responsible for the prosecution of IPR crimes. Number 2 Criminal Tribunal of the Supreme People's Court was in charge of IPR criminal cases. As to standards for IPR crimes, he said that two laws applied at the central and local levels, that is, the Interpretation on Specific Application of Law on Several Questions of Trial for Illegal Publication Criminal Cases by the Supreme People's Court and the Regulations on Standards for Initiating Cases In Economic Crimes by the Supreme People's Procuratorate and the Ministry of Public Security.

7. With respect to the consistency of China's administrative actions with Articles 41 through 49 of the TRIPS Agreement, he said that administrative responsibility must be imposed in accordance with the Administrative Penalty Law or the special provisions of the separate law. Some administrative remedies, such as an order requiring the suspension of infringing acts, were similar to

civil remedies in form, but they were different in nature. In cases where the form of administrative remedies seemed to be similar to civil remedies, Articles 41 through 48 of the TRIPS Agreement should be applied to administrative remedies. Some civil remedies provided for in Articles 41 through 48, such as an order requiring the payment of damages to right holders, could not apply to administrative cases in China, since neither the Administrative Penalty Law nor the separate law granted such a power to administrative authorities.

8. The provisions on administrative enforcement in the Chinese trademark system complied with Article 49 of the TRIPS Agreement. The procedures were fair and equitable, including the rules on the presentation of evidence and decisions on the merits of the case in writing, etc. He then said that the form, legal basis and nature of administrative remedies were different from those of criminal remedies. Therefore, the Chinese administrative remedies could not be covered by Article 61 of the TRIPS Agreement. Nevertheless, China's criminal legal system met the requirements of Article 61.

9. The representative of China said that the revision of the Chinese Civil Law was an important task for legislators. The ninth National Congress had enacted and revised a draft code. Due to the rapid social and economic development in China, it was necessary to regulate and rewrite some contents of that draft. China needed to do further research and investigation on this matter.

10. China had made every effort to enhance its administrative transparency. This included two main aspects. First, the legislators had enacted the Legislation Law, the Regulations on the Drafting Procedure of Administrative Regulations, and the Regulations on the Drafting Procedure of Rules, which standardized the operating procedure of administrative power. Second, the Administrative Permission Law would be enforced in 2004. The Law further regulated the boundary, conditions and procedure of administrative permission. It provided that only laws, regulations and local regulations could establish administrative permission and local laws could establish interim administrative permission. However, the departmental rule of the State Council could not establish administrative permissions. Thanks to these laws and regulations, administrative transparency had been increasing remarkably and the efficiency of administration would be further promoted.

11. In regard to the relationship between laws, regulations and rules, he said that, according to the Legislation Law, the Regulations on the Drafting Procedure of Administrative Regulations and the Regulations on the Drafting Procedure of Rules, the efficacy of laws and regulations was prior to that of local legislation and departmental rules, and the efficacy of local regulations was prior to local administrative rules. While local regulations conflicted with the regulations of the State Council, the National Congress had the authority to review them. When local rules conflicted with the departmental rules of the State Council, the State Council would be responsible for the review.

12. Regarding patent pendency he said that, in 2002, the State Intellectual Property Office (SIPO) had received 252,631 patent applications, including inventions, utility models and industrial designs, an increase of 49,048 over the previous year. The growth rate was 24.1 per cent. 951 international applications had been filed and 697 requests had been made for the international preliminary examination. 738 requests for the international preliminary examination had been completed.

13. To date, the State Food and Drug Administration (SFDA) had not found any application for drug registration which used undisclosed information. In regard to data exclusivity provided by the SFDA, he referred to the relevant regulations. Pursuant to Article 35.2 of the Rules on Implementation of Drug Law, the SFDA would not render a marketing approval pursuant to an application by taking advantage of other applicants' undisclosed information. Pursuant to Article 14 of the Measures on Regulation of Drug Registration, when putting forward an application for drug registration, the applicant should ensure that all data submitted were obtained independently. Pursuant to Article 21 of the Measures on Regulation of Drug Registration, when putting forward an

application for drug registration with foreign data being introduced, the applicant should provide the verification of the legal origin of data. Pursuant to Article 22 of the Measures on Regulation of Drug Registration, the SFDA was entitled to require applicants to repeat the test in order to ensure that the relevant data had been obtained independently. Pursuant to Article 52, during the period of new drug approval, the technical requirements upon a new drug would not be lowered because the drug of the same class had received a marketing approval abroad, that is to say, the situation of documentation dependence did not exist. He further said that, pursuant to Article 35.2 of the Rules on Implementation of Drug Law, the SFDA would not render marketing approval to an application taking advantage of other applicants' undisclosed information. The SFDA had the obligation to protect the undisclosed test data obtained independently and other relevant data submitted by the applicant. Those illegally disclosing undisclosed data would be punished. The SFDA would accept a relevant application in accordance with Article 35.3 of the Rules on Implementation of Drug Law under the condition that measures had been taken, as the public interest required, to protect the data against unfair commercial use. He said that, besides Article 120 of the Civil Procedure Law and Article 48 of the Provisions Regarding Evidence in Civil Litigations, the other provisions of the Civil Procedural Law and other laws, such as the Law on Lawyers and the Law for Promotion of Science provided protection for confidential information during civil litigation.

14. Referring to paragraph 256 of the Report of the Working Party on the Accession of China, stating that China's IPR laws provided that any foreigner would be treated in accordance with any agreement concluded between the foreign country and China, or in accordance with any international treaty to which both countries were party, or on the basis of the principle of reciprocity, he said that China would observe the TRIPS Agreement, paragraph 256 of the Report of the Working Group on the Accession of China, and the terms in the international treaties or conventions China had signed and/or joined in.

15. With respect to trademarks, he said that China had been protecting foreign well-known marks in the light of international conventions. In line with the Provisions on the Determination and Protection of Well-Known Marks, which had come into force on 1 June 2003, the municipal level administrative authorities for industry and commerce should, within 15 working days from the date of the acceptance of the request of the interested party, report and send all the documents to the provincial administrative authorities for industry and commerce, if the case satisfied the requirements under Article 13 of the Trademark Law. The provincial authorities should, within 15 working days from the date of acceptance of the request of the interested party, report and send all the documents to the Trademark Office (TMO). The TMO should make its determination within six months from the date of the receipt of the relevant documents. Although it had received some domestic and foreign requests for the determination of well-known marks, the TMO had not yet determined well-known trademarks under the new provisions.

16. Turning to the legal differences between the terms "well-known marks", "famous marks", "provincial famous marks", and "famous brands", he said that well-known trademark referred to a mark that was widely known to the relevant sectors of the public and enjoyed a relatively high reputation in China. Relevant sectors of the public should include consumers of the type of goods and/or services to which the mark applied, operators who manufactured the said goods and/or provided the said services, and sellers and other persons involved in the channels of distribution of the type of goods or services to which the mark applied. The Chinese term "Zhuming shangbiao" (famous trademarks) referred to marks which were determined by the administrative authorities for industry and commerce at the provincial, municipal, or autonomous region level, based upon the local legislations, local government regulations or other administrative provisions, having a relatively high reputation and a greater influence within the specific jurisdiction. A provincial famous mark was the same as "Zhuming shangbiao". The Chinese term "You Ping Ming Pai" (famous brands) was not a legal term in the field of trademarks. The TMO never used this term. In addition, the TMO had used

to have a list of marks for enhanced protection, which had been based upon the frequency and scope of trademark infringement. However, this practice had been abolished.

17. With respect to the determination of famous trademarks, he said that the provincial or municipal authorities had the authority to make such decisions, and were not required to report to the TMO. Therefore, the TMO had no such information.

18. In regard to the protection of three dimensional marks and colour marks, he said that by the end of October 2003, the TMO had received 1398 three-dimensional mark applications, among which 343 had been approved for registration. For some technical reasons, the TMO had no statistics on colour marks. In addition, smell and sound marks were non-registrable under the Trademark Law.

19. With respect to the application of the transliteration or translation of others' marks, he said that transliteration or translation was one of the standards to determine the identity or similarity. Thus, such applications could be refused during the trademark examination. Moreover, interested parties could file the request to the trademark review and arbitration bureau through the opposition or dispute procedure.

20. Article 15 of the Trademark Law provided that where the agent or representative of the owner of a mark applied for the registration in his own name without the owner's authorization and the owner opposed the registration, the application should be refused and the use should be prohibited. This problem could be solved through the opposition or dispute procedure. The interested party could file an application with the TMO or the Trademark Review and Arbitration Bureau (TRAB). He noted that, by the end of September 2003, the number of pending cases in the TRAB was 31,924. The number of pending opposition cases at the TMO was 16,386. The pending new applications for registration at the TMO were 380,000.

21. With respect to the assignment or licensing of trademarks, he said that no government approval of the terms of a licence or assignment was required. However, a trademark licence must be reported to the TMO for the record, regardless of whether the trademark owners were Chinese or foreign. The recording was not required for an assignment contract. As for the effect of the recording of a licence contract, although there was no express provision in the Trademark Law, the judicial interpretation provided that, where the trademark licence contract was not recorded at the TMO, it should not affect its effect, unless otherwise agreed between the interested parties, but an unrecorded licence contract should not resist a third party with good faith. In addition, the Trademark Law provided that the assignment of a registered trademark should be published after it was approved. The assignee should enjoy the exclusive right to use the mark from the date of the publication.

22. Turning to geographical indications, he said that, to date, the TMO had received 260 GI applications for the registration of certificate marks, 100 of which had been approved. The registrant of a certificate mark could file a complaint with the local authorities for industry and commerce or might file a law suit at the People's Court requesting to stop the infringement.

23. With respect to the exceptions to GI protection provided for in Article 24 of the TRIPS Agreement, he said that every country might encounter the problem of earlier registered trademarks and the GIs. Article 16 of the Trademark Law was substantially in compliance with the exceptions provided for in the TRIPS Agreement. He said that China had acceded to the WTO on 11 December 2001 and the latest amendment of the Trademark Law had come into force on 1 December 2001. Those marks which had obtained registration in good faith would continue to be valid under Article 16 of the Trademark Law, which referred to marks registered before this date rather than after it.

24. The State General Administration for Quality Supervision, Inspection and Quarantine (AQSIQ), in accordance with the Regulation for the Protection of Products with Geographical Indications, carried out the protection of GIs. If a trademark or certificate mark already existed, the AQSIQ would still provide GI protection from different respects and functions according to the Regulations and the related stipulations in the TRIPS Agreement. The following action had been taken against the infringement of GIs: the AQSIQ was the authorized government agency with two major functions, namely comprehensive administration and law enforcement. The agencies of the AQSIQ executed random checks and law enforcement against the infringements of GIs and trademarks in accordance with the Law on Product Quality, the Law on Entry and Exit of Commodities Inspection, Standardization Law of the People's Republic of China, and other relevant laws and regulations.

25. Turning to the protection of copyright, the representative of China said that a series of activities had been organized to study and prove the necessity and feasibility of the provisions that might be introduced in the regulations on the protection of the right to communication through information networks in respect of specific copyright matters. For example, in October 2002, the State Council had sent a high level delegation to Europe to investigate copyright systems in the digital network environment. In November 2002, the National Copyright Administration of China (NCAC) organized a delegation to visit WIPO and exchange views with the organization in respect of China's accession to the two new treaties. In July 2003, the NCAC had held a forum on the Internet Treaties and copyright protection in digital network environment and listened to the opinions from legal and network circles. In November 2003, the NCAC would invite WIPO experts to China to give touring lectures on the two new treaties. The competent authorities had also carried out various other relevant activities. With regard to the legislation on copyright protection of digital networks, he said that there was still much work to be done by the competent authorities in a thorough and careful manner, including the investigation and study of the legislative experiences of other Members.

26. Regarding the protection of temporary copies, he said that such term was used neither in the Berne Convention nor in the TRIPS Agreement. In regard to re-publication of materials in Chinese textbooks, he said that, to date, the NCAC had not yet obtained any information in this respect from foreign right owners or domestic publishers.

27. In regard to the reasonable royalty to be provided for under Article 10 of the Regulations for Protecting Software, he said that so far no copyright administrative department had dealt with such a case, and there had been no news reported concerning the relevant judicial decision. In addition, he said that under Article 30 of the Regulations, the "holder of copies of a piece of software" was defined as the end user of software who had performed the reasonable duty for care and had obtained a copy of software in good faith. Accordingly, it could not be inconsistent with Article 13 of the TRIPS Agreement. If the holder of the copy of software used an infringing copy, the person was obliged to prove that he or she never knew nor had reasonable grounds to know that such a copy was an infringing one.

28. With respect to the use of software for the purpose of study and research provided for in Article 17 of the Regulations, he said that Article 17 contained the same principles as adopted in Article 22 of the Copyright Law concerning fair use. According to Article 21 of the revised Implementing Regulations of the Copyright Law, fair use should not conflict with the normal exploitation of the work and should not unreasonably prejudice the legitimate interests of the right holder. Consequently, Article 17 of the Regulations should be deemed as consistent with Article 13 of the TRIPS Agreement.

29. In accordance with Article 47 of the Copyright Law, copyright administrative departments had been authorized to take action against an Internet Service Provider (ISP) who was illegally making the content available to the public or downloading it.

30. In China, if an infringement took place on the Internet, the infringer, whether an individual or a legal entity, should bear the corresponding legal liabilities pursuant to the Copyright Law. He added that the NCAC had not issued any directive regarding the proper use of the Internet in universities, government offices or state-owned corporations.

31. Regarding the prosecution of hackers, he said that, in February of 2002, the copyright administrative department of Zhejiang province had dealt with a case concerning "the US Chemistry Digest Disc Publication" pirated by means of illegal decoding. Two suspects had decoded a lawful copy of the disc, made reproductions and then sold them on the Internet by sending batches of mails. The copyright administrative department had ordered the decoder and the two suspects to cease the infringing acts and confiscated their unlawful income. In addition, the competent department had confiscated the equipment and tools mainly used to make infringing copies, destroyed the infringing copies and imposed a forfeit on the two suspects. Regarding the removal or alteration of electronic rights' management information, he said that this issue was not covered by the TRIPS Agreement but by the WCT. Nevertheless, the issue was under consideration in China.

32. In respect of the Copyright Law, the Regulations neither decreased nor increased the burden of proof on the right holder. On the other hand, the revised Copyright Law increased the burden of proof on the party against which an action was brought by adopting Article 43.2 of the TRIPS Agreement. The Regulations reflected the legislative purpose of the Copyright Law. According to Article 3.2 of the Regulations, administrative procedures could be initiated not only on the basis of complaints from right holders but also with the removal of cases by other relevant departments, reports from other persons finding out infringements, or initiative investigation by administrative departments. In accordance with the Regulations, the NCAC had to investigate the case with a great influence in the country, which was determined at the NCAC's discretion. In general, an infringement should be dealt with by the local administrative department of the place where the infringement was committed.

33. With respect to the negative prescription of administrative penalty, he said that Article 9 of the Regulations was consistent with Article 29 of the Administrative Penalty Law of China, i.e., where an illegal act was not discovered within two years of its commission, administrative penalties should no longer be imposed, except if otherwise prescribed by the law. The period of time prescribed should be counted from the date the illegal act was committed. If the act was of a continual or continuous nature, it should be counted from the date the act terminated. The prescription of administrative penalty was different from that of a civil action in that the latter was calculated from the date on which the injured party knew or had the reasonable grounds to know that his rights were infringed while the former was calculated from the date on which the illegal act took place or stopped.

34. Regarding the identification of holders of copyright, he said that the copy of a work with a complainant's name on it might be deemed as a proof of the right holder's identification. A copyright registration was not necessarily required for complainants to apply to administrative procedures. The expression of "parties' names" included not only the name of the right holder but also that of a complaining party. Otherwise, an administrative department could hardly investigate a case or render specific administrative penalties without having obtained sufficient information concerning the complaining party, or without having known the exact complaining party. An administrative department might not accept an application for administrative procedures if it was not in charge.

35. He said that the expression "person who has a burden of proof" as mentioned in Article 16 of the Regulations referred to the complaining party but not the right holder. The expression "parties" in the same Article referred to both the right holder and the complaining party. Whether an illegal act was slight or not was determined by the administrative department according to the concrete circumstances of each case.

36. Regarding the auction or re-selling of facilities used for making infringed goods, he said that the person who bought such facilities must observe the law. Moreover, such facilities could be bought only by factories in lawful operation and with the requisite qualifications.

37. With regard to the trial term, he said that Chinese courts would strictly follow the Regulations on Civil Procedure Law and judicial interpretation. According to Article 147 of the Civil Procedure Law, the parties who could not accept a judgement or decision might lodge an appeal. According to Article 178 of the Civil Procedure Law, the parties could apply for another trial to the same court or the superior court for those cases which had been effective. Besides, the court or the procuratorate could start supervising procedures.

38. The representative of China said that commercial exporting belonged to selling. According to the provisions of Chinese laws and judicial interpretations, this intellectual infringement crime of counterfeiting goods export might lead to more serious punishment in manners, methods or results, and the culprit could be punished under more serious accusations. Therefore, some of these intellectual infringement crimes were punished pursuant to the conviction standards for "smuggling" or the conviction standards for "carrying out illegal business activities" in the same law. Second, any of the actions which infringed upon copyright or circumvented the copyright technological protection measure for the purpose of producing, reproducing, distributing and selling, would be directly convicted for the crime of infringing upon copyright. Those who offered help for the above-mentioned actions would be convicted for complicity. If trafficking technological protection actions infringed the monopolization, franchising or restrictive dealing, the culprit would be directly convicted for the crime of selling infringing reproductions. If simultaneously infringing the copyright, the culprit would be co-convicted for the crime of infringing upon copyright. If for the purpose of reaping profits or where the amount of illegal gains was huge, which accorded with the judicial stipulation, together with other serious circumstances, a criminal conviction would also result. Layout-designs and utility and design patents were protected by China's Patent Law and the relevant regulations. Forging others' patents with serious circumstances would be convicted of the crime of forging others' patents according to Article 216 of the Criminal Law.

39. He said that the statistics of privately initiated criminal cases accepted by the Chinese courts from January to September of 2003 were the following: one on copyright, one on commercial secrets, two on selling infringing reproductions, 18 on producing and selling counterfeit products.

40. Apart from those noted in document IP/C/W/374, there were two main regulations concerning the circumstances in which investigations should be initiated by the procuratorate or by individuals: the Interpretation Regarding Practical Questions Concerning the Judicial Application in Hearing the Illegal Publication Criminal Cases by the Supreme People's Court, and the Interpretation Regarding Practical Questions Concerning the Judicial Application in Hearing Producing, Selling Counterfeit Goods Criminal Cases by the Supreme People's Court and the Supreme People's Procuratorate. At this stage, the Supreme People's Court had been carrying out investigation and research concerning the responsibility and scientificity of the Standards for Initiating Criminal Cases. China would stipulate the interpretation with the feasibility or submit the relevant law-making suggestions in the near future. Regarding the steps which were being taken to facilitate the referral from administrative agencies, he referred to the Provisions on the Transfer of Susceptible Criminal Cases by the Administration Organs for Law Enforcement.

41. With respect to the guidelines for penalties to be provided for wilful trademark counterfeiting or copyright piracy on a commercial scale, he said that Chapter 3 of the Chinese Criminal Law, revised in 1997, criminalized the destruction of the socialist market economic order. Section 7 of Chapter 3 was set to target the infringement of IPRs and listed seven crimes in detail, covering trademarks, patents, copyright and confidential information. In addition, on 17 December 1998, the Supreme Court's Interpretation on the Practical Problems on Application of

Laws Against Illegal Publications clarified the standards of penalty regarding copyright offences, including the penalty against a crime of illegal business operation. Moreover, the Regulations of the Standards for Litigating Cases in Economic Crimes, which was promulgated by the Supreme People's Procuratorate and the Ministry of Public Security on 18 April 2001, set the standards of prosecution in IPR offences except copyright crimes. He said that Section 7 of Chapter 3 of the Criminal Law and these two above-mentioned Interpretations constituted the most fundamental basis for the protection of IPRs in terms of the criminal law. In addition, he said that Section 1 of Chapter 3 of the Criminal Law, which criminalized the production and distribution of counterfeiting products, and the Supreme Court's and the Supreme People's Procuratorate's Interpretation of Practical Problems Concerning Criminal Cases of Production and Distribution of Counterfeiting Products were applicable to some of the IPR infringement cases, mainly trademark offences. Relevant regulations could also be found in Articles 54 and 59 of the Trademark Law, Article 58 of the Patent Law, Article 47 of the Copyright Law, Article 24 of the Software Regulations, Article 40 of the New Species of Plant Regulations, and Article 21 of the Anti-Unfair Competition Laws. Those infringing offences, once proved criminal, would be brought to justice by the Criminal Law.

42. Regarding the interpretation of the notion "identical trademarks", he said that Article 5 of the Advice on the Practical Problems Concerning Administrative Enforcement Regarding Trademark, which had been promulgated by the State Administration for Industry and Commerce, provided that "identical trademark means the characters, pictures and patterns or the combinations of the characters and pictures on two trademarks are identical or have no visual difference by comparison". Article 9 of the Supreme Court's Interpretation on Practical Questions Concerning Applicable Laws Governing Civil Disputes on Trademarks, which had been promulgated on 12 October, 2001, stated that "an identical trademark defined in Item 1 of Article 52 of the Trademark Law means, by comparison, the trademark being accused of infringement generally has no visual difference from the registered trademark of the plaintiff". Article 10 of this Interpretation also defined the principle on judgement of identical or similar trademarks as "(1) set the attention of the relevant public as the standard; (2) comparison should be made not only to trademarks as a whole, but also to the major parts of them". The process should only be undertaken when the compared objects were separated and isolated. Therefore, he inferred that identical trademarks in legal terms made a difference to what "identical" meant in daily language.

43. "Goods of the same class" meant goods that were completely identical, or of the same category and class, or with the same name, that share basically the same nature and function. "Goods of the same class" had bigger extension than "identical goods". The practical judgement of "goods of the same class" was usually subject to comprehensive assessment by the judge based upon the general knowledge of the public of certain products and the classification of goods by the international classification list of goods and services, with the trademark registration. He clarified that the classification list was not the only benchmark for judgement, but an important standard for reference. To sum up, one of the important criteria to tell whether two products were of the same class was whether they shared the same product name, though they might have different practical functions. However, those goods with different names could also be defined as goods of the same class as long as they bore the same practical function or scope.

44. He reiterated that "identical trademark" was different from what "identical" meant in daily language. China's standard for judgement was whether marks had no visual difference. According to this understanding, this standard generally conformed to the principle of being "not distinguished in essential aspects". He recalled that, as he had already stated, commercial import and export actions constituted a "sale" in real terms. However, under these circumstances, a party involved could be criminally liable for smuggling or illegal operations.

45. With respect to the criminalization of copyright piracy which was not for the purposes of profit, he said that although some infringing acts did not constitute acts of crime according to

Articles 217 and 218 of the Criminal Law, that did not mean that they were not criminal acts. They could constitute the crime of intentional property damaging or the crime of construction impediment. China had noticed that some foreign countries, including the United States, the United Kingdom, and Japan, did not specify the aim of making profits as a subjective element for copyright crimes. China was taking this factor into consideration and weighing up the possibility of integrating it into its legal system. Regarding whether China had undertaken criminal, administrative or civil prosecutions against individuals or entities who used the Internet to obtain access to computer systems, he said that though the acts *per se* did not constitute the copyright crimes defined by Articles 216 and 217 of the Criminal Law, their following acts usually did.

46. In regard to the financial threshold for criminal prosecution, he said that the financial threshold was a major element, but by no means the complete element in IP-related crimes. The record of the administrative penalty for counterfeiting and piracy and serious consequences could all be regarded as factors in crime determination. On the other hand, financial threshold was a generic term which might refer to sales volume, value of goods, illegal profits or damages to the right owner. It could also exist in various forms like money or commodities, as they could be transferred in money terms. As to the so-called illegal business amounts, he said that on the one hand, the illegal business amounts could be determined using other evidence, such as written documents from the purchaser, witness, testimony, and assessment on goods. On the other hand, in cases where the illegal business amount could not be verified, the constitution of crime could be determined through other factors.

47. With respect to counting the value of infringing imports, he said that the Customs would follow the Customs Law, the Customs Regulation for Protection of Intellectual Property Rights and other administrative regulations. The Customs had cooperation with traditional authorities, including public security, according to the Regulation on Transfer of Suspected Criminal Cases by the Administrative Agencies, and other laws or regulations.

48. China was considering the revision of the Customs Regulation for the Protection of Intellectual Property Rights according to the TRIPS Agreement and to China's promises upon its accession to the WTO. He also said that the customs had the administrative authority over the import or export of pirated goods over the Internet. The customs and other IPR agencies would make a decision on infringement according to the Customs Regulation for Protection of Intellectual Property Rights, the Patent Law, the Trademark Law, and the Copyright Law.

49. Regarding the number of criminal cases of intellectual property rights infringement, he said that there had been 301 persons and 128 cases in 1998, 379 persons and 248 cases in 2000, and 702 persons and 408 cases in 2002. A total of 1,273 criminal cases relating to intellectual property rights had been closed within the five years, and 2,104 persons had been sentenced. At present, the Supreme People's Court was drafting the judicial interpretation on the application of law in criminal cases of intellectual property rights' infringement, which would include the criteria for conviction and imposing penalties. The interpretation would be adopted and published by the Supreme People's Court after strict examination.

50. The cost of confiscation and disposal of counterfeiting goods undertaken by the Customs shall be borne by right holders. According to Articles 14 and 15, and other relevant provisions of the Regulation on the Customs Protection of Intellectual Property Rights, the applicant who requested the Customs to detain suspected infringing goods should provide a bond to the Customs. After a relevant administrative determination, judicial judgement or adjudication came into effect, the Customs should refund the remainder of the bond, from which the cost of storage, custody, and disposal of the goods as well as the compensation fees to the interested parties for the loss induced by the inappropriate application had been deducted.

51. The Chinese Government had always been engaged in fighting against "localism". The State Council's Provisions on Prohibiting Regional Blockage in Market Economic Activities, published on 21 April, 2001, showed the positive attitude of China against localism in the field of intellectual property rights. China protected right holders in strict accordance with the laws and administrative regulations on the protection of intellectual property rights which were in complete conformity with the WTO TRIPS Agreement. China was now making every effort to implement the obligations of the TRIPS Agreement.

52. With respect to measures against piracy of software, he said that the guiding ideology of the Activity Plan for Fighting against Pirated Software, which was published in June 2003, was to resolutely crack down on various piracy and infringing acts in respect of software and to promote the development of the Chinese software industry. The working objective was to establish a fair and orderly software market and to realize the fundamental improvement in the social environment of software copyright protection. The Activity Plan was a provisional measure, while the crackdown on various piracy acts was a long-term and standing task. At present, a crack-down on software piracy was included in this Plan in the light of the current situation of China, and it was possible for this Plan to include anti-piracy work in other respects later.

53. Article 47 of the revised Copyright Law had added a provision on legal liability for infringing the right of communication through an information network. The principles of illegal application were the same as the liabilities for various infringing acts, whether on-line or off-line, including ISP liability. Although the issue concerning ISP liability was not within the framework of the TRIPS Agreement, China was making an active and serious study of the issue. Other countries' relevant legislation, in particular that of the United States and the European Communities, had aroused general concerns in China.

54. Regarding the regulations of the export of counterfeit and pirated goods, he said that in the year 2002, the Chinese customs had seized a total of 573 cases worthy of RMB 95.62 million, including four worth RMB 230,000 and 569 cases worth RMB 95.39 million.

55. Regarding the relationship between civil, criminal and administrative enforcement, he said that theoretically an administrative punishment did not preclude the subsequent criminal enforcement for the same act. According to the Provisions on the Removal of Suspected Crime Cases by Administrative Enforcement Agencies of 2001, which had been enacted by the State Council, cases of suspected crime of violating the Copyright Law should be removed to judicial authorities. Consequently, it was infrequent that a criminal enforcement came after an administrative punishment.

56. He further said that, in 2003, the NCAC had launched three special actions. In February, the NCAC had launched the Special Action for Striking Piracy during the World Intellectual Property Leader's Meeting. According to incomplete figures, the copyright administrative departments in Beijing, Shanghai, Tianjing, Chongqing, and the provinces of Liaoning, Jilin, Hainan, Guangdong, Fujian, Zhejiang, Anhui, Jiangxi, Jiangsu, Yunnan, Guizhou, Gansu, Shanxi and Inner Mongolia had checked 2,588 markets, 30 schools, and 77 enterprises, imposed administrative punishments on 1,430 infringing or pirating entities, imposed a forfeit of RMB 1,339.5 thousand, suppressed 816 shops, and removed five cases to judicial authorities, and investigated one underground compact disc press. In July, the NCAC combined with the General Administration for Press and Publication, Ministry of Education, and the National Anti-Piracy and the Pornography Working Committee, had launched the 2003 Autumn Special Action for Striking Pirated Textbooks and Assistant Teaching Materials. This action was still under way at present. In August, the NCAC had launched the 2003 Special Action for Striking Pirated Software. On the first day of this action, 250,000 infringing copies alone of software had been confiscated in Beijing, Shanghai, and the provinces of Sichuan and Guangdong. The local agencies of industrial and commercial administration would also step up the efforts in clamping down on trademark infringements. Furthermore, he said that local administrative authorities for industry

and commerce conducted routine monitoring and investigation to discourage counterfeit markets. If any counterfeit goods were found in the market, they would strictly enforce the relevant laws and regulations. He added that the relevant IPR agencies undertook enforcement actions every year at the Canton Trade Fair.

57. The representative of Japan recalled that, at the first transitional review in 2002, his delegation had raised questions about five issues, namely further improvement of enforcement including judicial procedures, patent examination procedures, protection of well-known trademarks, licensing regulations on patents and know-how, and the system requiring foreign patent applicants to use representative offices designated as those for foreign applicants. He expressed his appreciation of the efforts by the Chinese Government to improve the situation, for example by increasing the number of representative offices designated as those for foreign applicants and amending the system pertaining to protection of well-known trademarks. However, given the current situation and problems, such as the damage caused by counterfeiting and piracy and delays in granting patents, he expected China to make further efforts. In this regard, of particular importance were further improvements in enforcement including the active implementation of criminal prosecution, amendments of the guidelines for criminal prosecution and elimination of delays in granting patents.

58. With respect to the issue of further improvements of enforcement, he said that the Chinese Government's enforcement was inadequate in view of Part II of the Protocol and Articles 41 and 61. A recent Japanese survey had shown that the majority of Japanese companies investing in China were still suffering damage from counterfeiting in China. Improvement of enforcement was of greatest importance for the protection of intellectual property rights in China. He requested that enforcement be improved, in particular, in respect to the following three aspects: (i) Criminal procedures: in his view, criminal prosecution was the most effective way to deal with violators. According to the survey, approximately 10% of the Japanese companies that had been harmed by counterfeiting had been subject to repeated violations of their rights since December 2002. However, the conviction rate was extremely low. Therefore, he hoped that China would actively pursue criminal prosecutions and apply stronger punishments to boost the deterrent effect. The present standard for prosecuting criminal cases included a threshold of a certain level of sale proceeds from counterfeit goods. Changes to this standard would be needed. (ii) Administrative procedures: he expressed his hope that China would take stronger administrative measures, including imposing stiffer fines and increasing the number of seizures, to ensure an active and smooth administrative control of the problem. (iii) Localism: he appreciated China's reply that it would make aggressive efforts to correct the localism. He hoped to see the introduction and actual implementation of measures in this area. Some Japanese companies that had requested the seizure of counterfeit goods indicated that they had come across cases of localism where authorities had refused to seize goods because they had been produced by a major local company. He called on the central government to strengthen the surveillance of local authorities in order to eliminate localism.

59. Regarding patent examination processes, he said that the average pendency of the examination of Japanese patent applications was 36.8 months and that measures had been taken, including an increase in the number of examiners. Some Japanese companies had expressed their satisfaction at these measures to ameliorate delays in granting patents. However, as regards one patent application, examination had not yet begun after 65 months. Some Japanese companies had reported that the problem of examination delays had not yet been resolved, particularly in the area of advanced technology such as liquid-screen displays, PCs and IC cards. As a result of such delays, licence agreements could not be concluded for investment in China and it was not possible to obtain compensation for damages caused by counterfeit goods. In the light of Article 62.2 of the TRIPS Agreement and the need for improved transparency, he asked China to consider the following two matters: first, enhancing transparency by regularly disclosing data on the pendency of patent

examination, thereby promoting mutual understanding between the countries concerned; and second, accelerating patent examination.

60. In regard to the protection of well-known trademarks, he welcomed the increased clarity resulting from the rules relating to the approval and protection of famous trademarks. He hoped that the protection of foreign well-known trademarks would be strengthened without discrimination on the basis of nationality and that approval procedures would be simplified. He also hoped that China would disclose information on the status of domestic and foreign approvals following the enactment of the new ordinances that had been effective since June 2003.

61. As to licensing regulations on patents and know-how, he expressed his appreciation of certain improvements in this area, both in regard to the Export and Import Administrative Ordinance and the legal system. However, he was concerned that the disparity between domestic contract law and the licensing regulations would raise issues relating to national treatment. In addition, some Japanese companies had reported there had been cases where the information on the abolishment of some laws and regulations at the time of China's accession to the WTO had not been sufficiently transmitted to regional authorities. Therefore, he wished that China would ensure proper enforcement by regional authorities of laws and regulations reflecting the relevant revisions.

62. The representative of Chinese Taipei thanked the delegation of China for its comprehensive statement. As regards Article 2.1 of the TRIPS Agreement, he recalled that a communication that China had provided in the context of the transitional review in 2002 (IP/C/W/382) read as follows: "In order to perfect the provisions on right of priority, the amended Trademark Law added new provision relating to right of priority and further stipulates right of priority for goods on an international exhibition". Furthermore, he requested China to provide information on how China had ensured in the course of the past years that the provisions on the right of priority were enforced. Then he requested China to notify to the WTO in due course the "Regulations on the Recognition and Determination of Well-Known Trademarks", which had been adopted in June 2003.

63. The representative of the European Communities thanked China for its comprehensive statement. He said that document IP/C/W/413 which his delegation had submitted was self-explanatory. He said that China's implementation of its commitment to abide by the TRIPS Agreement had resulted in significant changes in China's intellectual property protection. Its legislative framework for the protection of intellectual property was in line with international standards, in particular the TRIPS Agreement. Over the past years, China had been progressively more sensitive as regards the need for reform and enforcement against counterfeiting and piracy. The Chinese police and prosecutors were more willing to accept complaints from foreign right holders. Despite these positive developments, he said that the European Communities remained concerned about the high level of counterfeiting and piracy in China. Therefore, the European Communities encouraged China to make additional efforts to curb counterfeiting and piracy. The European Communities was committed to working with the Chinese Government to create a win-win situation.

64. The European Communities welcomed the recently launched EC-China Structured Dialogue on Intellectual Property which had been signed at the EC-China Summit between the EC Trade Commissioner Lamy and Vice Minister of China's Ministry of Commerce Wei Jianguo. He expected this Dialogue to contribute to a better understanding of intellectual property systems in China and the European Communities. It would also be convenient to address China's intellectual property enforcement challenge. In conclusion, he said that the European Communities was looking forward to increasing its cooperation with China at the bilateral level, which would provide a convenient framework to further address the concerns raised in its submission.

65. The representative of the United States said that China had taken substantial steps to reform its intellectual property law and enforcement procedures. Although he appreciated the hard work of

Chinese intellectual property agencies, he did not believe that China's enforcement effort had yet adequately deterred the widespread counterfeiting and piracy in China. Therefore, he urged China to take necessary measures to correct the situation on an urgent basis. He also pledged to work cooperatively with China on a bilateral basis towards this end. Finally, he appreciated the efforts China had made in providing the Council with the detailed replies to many of the questions posed by the United States. He also appreciated that, given the time constraints, China might not have had an opportunity to prepare answers to all questions. He would follow up with China to obtain responses to the other questions.

66. The representative of Korea extended its appreciation to China for its detailed and comprehensive oral and written presentations as well as the written responses to Members' questions. He wished to know the efforts China had made regarding the establishment of legal framework for intellectual property protection and implementation of the TRIPS Agreement. He believed that the Chinese Government, as a responsible Member would continue its efforts and participate in the TRIPS Council's work in a constructive manner. Underlining the importance of enforcement, he said that enforcement could not pick up overnight. His delegation looked forward to China's further consistent effort and progress in bringing its legal texts into reality.

67. The representative of Pakistan thanked China for its comprehensive presentation. He commended China's performance in terms of the enactment of new rules and regulations, adequate review mechanism, enforcement, customs' protection and criminal prosecution. His delegation looked forward to working with China on all of these matters.

68. The representative of China thanked Members for their positive comments on the efforts and achievements China had made in implementing its TRIPS commitments. She said that China had implemented an administrative and judicial coordination mechanism with respect to intellectual property protection. During recent years, China had been one of the nations that had attracted most foreign investment in the world, which had a close connection with China's effective intellectual property protection. She hoped that Members could be relieved from their concerns relating to China's intellectual property protection, and further learn about China's law and enforcement. She said that intellectual property right holders from all Members would be protected pursuant to China's law. Counterfeiting and infringement were subject to serious investigation and punishment in China.

69. Turning to the preparation of the TRIPS Council's report to the General Council, the Chairman suggested that, given that the TRIPS Council would not have another meeting before the General Council's next meeting scheduled for 15 and 16 December 2003, the TRIPS Council agree that that he, acting on his own responsibility, prepare a brief and factual report to the General Council. The content of the cover page to the report would be similar to that submitted by the TRIPS Council in 2002, and the part of the minutes of the meeting reflecting the discussions held under this agenda item would be attached.

70. The Council took note of the statements made and agreed to proceed with the preparation of the report as suggested.
