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Other Remedies

In order to ensure that materials and implements the predominant use of which has been the infringing goods be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to minimize the risks of further infringement, considering such requests, the need for proportionality between the infringement and the remedies ordered as well as the interests of third parties must be taken into account. In regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in exceptional circumstances, to permit release of the goods into the channels of commerce.

In *Intellectual Property Rights*, the Panel resolved the ambiguity surrounding the

Records of the negotiation of the TRIPS Agreement clarify that the words "other than in exceptional circumstances" in the third sentence refer *inter alia* to the consideration of the interests of third parties that infringing goods be disposed of outside the channels of commerce.

2. Intention of

respect to a specific category of infringing goods, i.e. counterfeit trademark goods:

The fourth sentence refers to a category of infringing goods, i.e. counterfeit trademark goods. It does not refer expressly to authority to order destruction or disposal outside the channels of commerce. However, the context shows that the principle of proportionality in the previous sentence guides the competent authorities' choice between the remedies specified in the first sentence and any alternative

namely those specified in the first sentence, and release into the channels of commerce, if such an order is available. The fourth sentence attaches to the scope of authority to choose between destruction or disposal outside the channels of commerce and release into the channels of commerce, if that remedy is available. Therefore, the fourth sentence of Article 46 seems pertinent to Article 59."²

3. In *China – Intellectual Property Rights*, the Panel considered that the remedies set out in the first sentence of Article 46 are not exhaustive:

"The first sentence of Article 46 provides, basically, that authorities shall have the authority to order that goods be disposed of *outside* the channels of commerce *or* destroyed. At the same time, the fourth sentence of Article 46 relates to release *into* the channels of commerce which does not correspond to either of the remedies required by the first sentence. This is an express recognition that the remedies set out in the first sentence of Article 46 are not exhaustive."³

Current as of: December 2023

² Panel Report,