

**CHINA – MEASURES AFFECTING TRADING RIGHTS
AND DISTRIBUTION SERVICES FOR CERTAIN PUBLICATIONS
AND AUDIOVISUAL ENTERTAINMENT PRODUCTS**

Notification of an Appeal by China
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 20(1) of the Working Procedures for Appellate Review

The following notification, dated 22 September 2009, from the Delegation of the People's Republic of China, is being circulated to Members.

Pursuant to Article 16.4 and Article 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the *Working Procedures for Appellate Review*, China hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report in *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (WT/DS363/R, as amended by WT/DS363/R/Corr.1), and certain legal interpretations developed by the Panel in this Report.¹

1. China seeks review by the Appellate Body of the Panel's legal conclusions set out in paragraphs 7.913 and 8.2(a)(i) and (ii)² of the Panel Report that China's measures³ are not justified under Article XX(a) of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"). The Panel committed errors of law and legal interpretation in concluding that none of the relevant measures are "necessary" to protect public morals, within the meaning of Article XX(a) of the GATT 1994. In particular:

- 1) The Panel erred in law and failed to make an objective assessment of the matter before it, in violation of Article 11 of the DSU, in considering that the state-ownership requirement in Article 42 of the *Publications Regulation* makes no material contribution to the protection of public morals in China.⁴
- 2) To the extent that it based its findings on its reasoning concerning Article 42 of the *Publications Regulation*, the Panel also erred in law in considering that the exclusions relating to foreign-invested enterprises in Articles X.2 and X.3

¹For ease of reference, China hereafter refers to this Report as the "Panel Report".

²China makes reference to sub-section (a) under paragraph 8.2 on page 466 of the Panel Report.

³The *Catalogue* and the *Foreign Investment Regulation* (Articles X.2 and X.3 as well as Articles 3 and 4); the *Several Opinions* (Article 4) ; the *Publications Regulation* (Article 42 in conjunction with Article 41, and Article 41); the *2001 Audiovisual Products Regulation* (Article 27); the *Audiovisual Products Importation Rule* (Article 8); and the *Audiovisual (Sub-)Distribution Rule* (Article 21).

⁴See, e.g., Panel Report, paras. 7.850, 7.852–7.863.

of the *Catalogue*, Articles 3 and 4 of the *Foreign Investment Regulation*, Article 4 of the *Several Opinions* and Article 21 of the *Audiovisual (Sub-)Distribution Rule* make no material contribution to the protection of public morals in China.⁵

- 3) The Panel erred in interpreting Article XX(a) of the GATT 1994 as requiring the Panel to also weigh the restrictive impact that the measures at issue may have on those wishing to engage in importing, in particular on their right to trade.⁶
- 4) The Panel committed errors of law and legal interpretation, and failed to make an objective assessment of the facts, in violation of Article 11 of the DSU, in considering that at least one of the alternative measures referred to by the United States was an alternative "reasonably available" to China.⁷

Should the Appellate Body reverse the Panel's findings that China's measures are not "necessary" to protect public morals, within the meaning of Article XX(a) of the GATT 1994, China requests that the Appellate Body complete the Panel's analysis and find that China's measures are fully justified under Article XX(a) of the GATT 1994.

2. China seeks review by the Appellate Body of the Panel's legal conclusions set out in subsection 3.(b)(i) of section VIII of the Panel Report⁸ that the *Circular on Internet Culture* (Article II), the *Network Music Opinions* (Article 8), the *Several Opinions* (Article 4) and Article X:7 of the *Catalogue*, in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*, are inconsistent with Article XVII of the GATS. The Panel's legal conclusions are based on errors of law and legal interpretation in applying the customary rules of interpretation of public international law as codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("the Vienna Convention"), to China's GATS schedule. Such errors led, *inter alia*, to the erroneous finding that China's schedule to the GATS includes specific commitments on the electronic distribution of sound recordings in non-physical form under Sector 2.D "sound recording distribution services", contrary to Articles 3.2 and 19.2 of the DSU.⁹ In particular:

- 1) The Panel erred in its analysis of the ordinary meaning to be given to the terms "sound recording distribution services", taken in their context and in light of the object and purpose of the Treaty.¹⁰
- 2) The Panel erred in concluding that an analysis of China's GATS schedule based on supplementary means of interpretation under Article 32 of the Vienna Convention confirmed its earlier analysis, under Article 31 of the Vienna Convention, of China's commitment on sound recording distribution services.¹¹

⁵See, e.g., Panel Report, paras. 7.851, 7.864–7.868.

⁶See, e.g., Panel Report, paras. 7.787–7.788, 7.847–7.849, 7.862–7.863, 7.867–7.868.

⁷See, e.g., Panel Report, paras. 7.886–7.909.

⁸Panel Report, page 467.

⁹See, e.g., Panel Report, para. 7.1265.

¹⁰See, e.g., Panel Report, paras. 7.1173–7.1220.

¹¹See, e.g., Panel Report, paras. 7.1221–7.1247.

- 3) Consequently, the Panel erred in law in finding that China's measures¹² are inconsistent with China's national treatment commitments under Article XVII of the GATS.

3. China seeks review by the Appellate Body of the Panel's legal conclusions, set out in paragraphs 7.576, 7.598, 7.599, 7.706 and sub-section 2.(c)(ii), (iii), (vi) and (vii) of Section VIII of the Panel Report,¹³ that Article 30 of the *Film Regulation* and Article 16 of the *Film Enterprise Rule* are inconsistent with China's trading rights commitments under China's Accession Protocol. The Panel's conclusions are based on errors of law and legal interpretation, and on a failure to make an objective assessment of the facts before it, contrary to Article 11 of the DSU. Such errors led, inter alia, to the erroneous finding that the challenged measures are inconsistent with certain provisions of China's Accession Protocol, contrary to Articles 3.2 and 19.2 of the DSU. In particular, the Panel erred in concluding that China's trading rights commitments are applicable to the Chinese measures at issue, despite the fact that these measures do not regulate hard-copy cinematographic film, which is the subject of the US claim.¹⁴

4. China seeks review by the Appellate Body of the Panel's legal conclusions set out in paragraphs 7.706 and sub-section 2.(d)(i), (ii), (v), (vi) and (x) of section VIII of the Panel Report that Article 5 of the *Audiovisual Products Regulation* and Article 7 of the *Audiovisual Products Importation Rule* are inconsistent with China's trading rights commitments under China's Accession Protocol. The Panel's findings concerning these measures are based on the same reasoning as the one on which the Panel based its findings concerning Article 30 of the *Film Regulation* and Article 16 of the *Film Enterprise Rule*.¹⁵

¹²The *Circular on Internet Culture* (Article II); the *Network Music Opinions* (Article 8); the *Several Opinions* (Article 4); and the *Catalogue* (Article X:7, in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*).

¹³Panel Report, pages 464–465.

¹⁴See, e.g., Panel Report, paras. 7.528–7.560, 7.584.

¹⁵See, e.g., Panel Report, paras. 7.649–7.651, 7.674.