

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

Request for the Establishment of a Panel by the United States

The following communication, dated 10 October 2007, from the delegation of the United States to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 10 April 2007, the United States requested consultations with the Government of the People's Republic of China ("China") pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXII of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), and Article XXII of the *General Agreement on Trade in Services* ("GATS") with respect to (1) certain measures that restrict trading rights with respect to imported films for theatrical release, audiovisual home entertainment products (*e.g.*, video cassettes and DVDs), sound recordings, and publications (*e.g.*, books, magazines, newspapers, and electronic publications), and (2) certain measures that restrict market access for, or discriminate against, foreign suppliers of distribution services for publications, foreign suppliers of audiovisual services (including distribution services) for audiovisual home entertainment products, and foreign suppliers of sound recording distribution services.¹ On 10 July 2007, the United States requested supplemental consultations with China pursuant to Articles 1 and 4 of the DSU, Article XXII of the GATT 1994, and Article XXII of the GATS with respect to certain market access concerns related to the distribution of imported films for theatrical release and the distribution of imported sound recordings, as well as sound recording distribution services. Specifically, the US concerns related to (1) certain measures that provide less favorable distribution opportunities for imported films for theatrical release than for like domestic films, and (2) certain measures that provide less favorable opportunities for foreign suppliers of sound recording distribution services and for the distribution of imported sound recordings than are provided to like service suppliers and like products.²

The United States held consultations with China on 5-6 June, 2007, and 31 July 2007. Those consultations provided some helpful clarifications but unfortunately did not resolve the dispute.

¹ WT/DS363/1.

² WT/DS363/1/Add.1.

I. Trading Rights

The United States considers that China is acting inconsistently with its obligations under its protocol of accession to the World Trade Organization³ ("WTO") and under the GATT 1994 by not allowing all Chinese enterprises and all foreign enterprises and individuals to have the right to import into the customs territory of China the following products (collectively, the "Products"): films for theatrical release, publications (*e.g.*, books, magazines, newspapers, and electronic publications), audiovisual home entertainment products (*e.g.*, video cassettes and DVDs), and sound recordings.

In the Accession Protocol, China committed to fully open the right to trade, with some limited exceptions not applicable here, within three years after accession. Despite those commitments, China reserves to certain Chinese state-designated and wholly or partially state-owned enterprises the right to import the Products. It also appears that China accords treatment less favorable to foreign individuals and enterprises, including those not invested or registered in China, than that accorded to enterprises in China with respect to the right to trade (and in particular, with respect to the right to import the Products into China).

In this connection, the measures at issue involve:

- (1) the Regulations on Administration of the Films Industry⁴;
- (2) the Provisional Rules on the Entry Criteria for Operating Film Enterprises⁵;
- (3) the Administrative Regulation on Publishing⁶;
- (4) the Administrative Regulations on Audiovisual Products⁷;
- (5) the Catalogue for Guidance of Foreign Investment Industries⁸;
- (6) the Several Opinions of the Ministry of Culture, State Administration of Radio, Film and Television, General Administration of Press and Publication, National Development and Reform Commission and the Ministry of Commerce on Introducing Foreign Investment into the Cultural Sector⁹;
- 7) the Measures for the Administration of Import of Audio and Video Products¹⁰;

³ *Protocol on the Accession of the People's Republic of China*, WT/L/432, 23 November 2001 (the "Accession Protocol").

⁴ State Council Order No. 342, adopted at the 50th executive meeting of the State Council on 12 December 2001, promulgated on 25 December 2001.

⁵ Decree No. 43, jointly issued by the State Administration of Radio, Film and Television and the Ministry of Commerce, promulgated on 10 October 2004 and effective as of 10 November 2004.

⁶ State Council Order No. 343, adopted at the 50th executive meeting of the State Council on 12 December 2001, promulgated on 25 December 2001.

⁷ State Council Order No. 341, adopted at the 50th executive meeting of the State Council on 12 December 2001, promulgated on 25 December 2001.

⁸ Order [2004] No. 24, jointly issued by the National Development and Reform Commission and the Ministry of Commerce (30 November 2004).

⁹ Wen Ban Fa [2005] No. 19, jointly issued by the Ministry of Culture, the State Administration of Radio, Film and Television, the General Administration of Press and Publication, the National Development and Reform Commission, and the Ministry of Commerce (6 July 2005).

¹⁰ Decree No. 23 of the Ministry of Culture and the General Administration of Customs (17 April 2002).

- (8) the Measures for Administration of Chinese Foreign Contractual Distribution Ventures of Audiovisual Products¹¹;
- (9) the Administrative Regulations on Electronic Publications¹²; and
- (10) the Procedure for Examination and Approval of Establishment of Publication Importation Entities¹³;

as well as any amendments, related measures, or implementing measures.

China's measures thus appear to be inconsistent with China's obligations under the provisions of paragraphs 5.1 and 5.2 of Part I of the Accession Protocol,¹⁴ as well as China's obligations under the provisions of paragraph 1.2 of Part I of the Accession Protocol (to the extent that it incorporates commitments in paragraphs 83 and 84 of the Report of the Working Party on the Accession of China¹⁵). The Accession Protocol forms part of the terms of accession agreed between China and the WTO and is an integral part of the *Marrakesh Agreement Establishing the World Trade Organization*.

Furthermore, to the extent that the measures at issue impose prohibitions or restrictions other than duties, taxes or other charges on the importation into China of the Products, these measures appear to be inconsistent with China's obligations under Article XI:1 of the GATT 1994.

II. Distribution Services for Publications, Audiovisual Home Entertainment Products, and Sound Recordings

In the Accession Protocol, China made market access and national treatment commitments in the distribution services and audiovisual services sectors of its Schedule of Specific Commitments on Services (the "Schedule").¹⁶ The United States considers that, despite those commitments, China is imposing market access restrictions and discriminatory limitations on foreign service providers seeking to engage in the distribution of publications, audiovisual home entertainment products, and sound recordings inconsistently with China's obligations under the GATS. Certain of these restrictions and limitations also appear to be inconsistent with China's obligations under the GATT 1994.

In this connection, China maintains these restrictions and limitations through measures that include:

- (1) the Administrative Regulation on Publishing¹⁷;
- (2) the Administrative Regulations on Audiovisual Products¹⁸;

¹¹ Promulgated by the Ministry of Culture and Ministry of Commerce on 9 February 2004 (superceding the measures notified by China in S/C/N/219).

¹² Order No. 11 of the General Administration of Press and Publication (30 December 1997).

¹³ General Administration of Press and Publication (27 December 2005) (available at: www.gapp.gov.cn/GalaxyPortal/inner/zsww/zongsu3.jsp?articleid=4923&boardpid=1450&boardid1=1150101011150c) (visited on 9 October 2007).

¹⁴ The Products are not listed in Annex 2A or Annex 2B of the Accession Protocol.

¹⁵ WT/MIN(01)/3 (the "Working Party Report").

¹⁶ WT/L/432, Annex 9, and WT/MIN(01)/3/Add.2.

¹⁷ State Council Order No. 343, adopted at the 50th executive meeting of the State Council on 12 December 2001, promulgated on 25 December 2001.

¹⁸ State Council Order No. 341, adopted at the 50th executive meeting of the State Council on 12 December 2001, promulgated on 25 December 2001.

- (3) the Provisions on Guiding the Orientation of Foreign Investment¹⁹;
- (4) the Catalogue for Guidance of Foreign Investment Industries²⁰;
- (5) the Several Opinions of the Ministry of Culture, the State Administration of Radio, Film and Television, the General Administration of Press and Publication, the National Development and Reform Commission and the Ministry of Commerce on Introducing Foreign Investment into the Cultural Sector²¹;
- (6) the Administrative Regulations on Management of Foreign-Invested Book, Magazine and Newspaper Distribution Enterprises²²;
- (7) the Administrative Regulations on the Publication Market (revised)²³;
- (8) the Administrative Regulations on Electronic Publications²⁴;
- (9) the Administrative Measures on Subscription of Imported Publications²⁵;
- (10) the Procedure for Examination and Approval of Establishment of Chinese-Foreign Entities, Cooperative Joint Ventures, and Wholly Foreign Owned Publication Distribution Enterprises²⁶;
- (11) the Measures for Administration of Chinese Foreign Contractual Distribution Ventures of Audiovisual Products²⁷;
- (12) Interim Regulations on Internet Culture Administration²⁸;
- (13) the Circular of the Ministry of Culture on Relevant Issues of Implementation of the Interim Regulations on Internet Culture Administration²⁹; and
- (14) the Several Opinions on the Development and Regulation of Network Music³⁰;

¹⁹ State Council Order No. 346, promulgated on 11 February 2002.

²⁰ Order [2004] No. 24, jointly issued by the National Development and Reform Commission and the Ministry of Commerce (30 November 2004).

²¹ Wen Ban Fa [2005] No. 19, jointly issued by the Ministry of Culture, the State Administration of Radio, Film and Television, the General Administration of Press and Publication, the National Development and Reform Commission, and the Ministry of Commerce (6 July 2005).

²² Order No. 18 of the General Administration of Press and Publication and the Ministry of Foreign Trade and Economic Cooperation (17 March 2003).

²³ Promulgated by the General Administration of Press and Publication on 16 July 2003, revised on 16 June 2004.

²⁴ Order No. 11 of the General Administration of Press and Publication (30 December 1997).

²⁵ Order No. 27 of the General Administration of Press and Publication (adopted at the fourth conference of the General Administration of Press and Publication on 9 September 2004 and published on 31 December 2004).

²⁶ General Administration of Press and Publication (27 December 2005).

²⁷ Promulgated by the Ministry of Culture and Ministry of Commerce on 9 February 2004 (superceding the measures notified by China in S/C/N/219).

²⁸ Promulgated in Order No. 27 of the Ministry of Culture (10 May 2003), amended by Order No. 32 of the Ministry of Culture (1 July 2004).

²⁹ Wen Shi Fa [2003] No. 27, issued by the Ministry of Culture (4 July 2003).

³⁰ Ministry of Culture (20 November 2006); available at:
http://www.ccnt.gov.cn/xwzx/whbzhxw/t20061211_32440.htm (visited on 9 October 2007).

as well as any amendments, related measures, or implementing measures.

A. Publications (e.g., books, newspapers, periodicals, and electronic publications)

In Sectors 4A-4E of its Schedule, China undertook market access and national treatment commitments with respect to the supply through commercial presence in China by service suppliers of other Members of, *inter alia*, distribution services for publications.

The measures at issue, however, appear to prohibit foreign service suppliers (including wholly or partially foreign-owned or foreign-invested enterprises) from engaging at least in types of distribution described in these measures as the "master distribution" or "master wholesaling" of publications. The measures at issue also appear to prohibit foreign service suppliers (including wholly or partially foreign-owned or foreign-invested enterprises) from engaging in the distribution of "electronic publications" (a term that refers to a subset of publications) generally, whether at the "master wholesale" level, the "wholesale" level, or otherwise.

Furthermore, to the extent that some foreign service suppliers are allowed to engage in some aspects of the distribution of publications, there appear to be discriminatory requirements concerning such suppliers' registered capital and such suppliers' operating term, as well as discriminatory limitations (e.g., limitations by type, content, or origin of publication) on the publications that such suppliers may distribute.

The measures at issue therefore appear to accord to foreign suppliers of distribution services for publications treatment less favorable than that accorded to Chinese suppliers of distribution services for publications. Moreover, the measures at issue do not appear to fall within the terms, limitations, conditions, or qualifications on market access or national treatment that China has specified in its Schedule for the distribution of publications through commercial presence in China by service suppliers of other Members. Accordingly, the measures at issue appear to be inconsistent with China's obligations under Article XVII of the GATS.

In addition, the measures at issue also appear to establish different distribution opportunities for imported and domestically produced books, newspapers and periodicals. Imported books, newspapers and periodicals are restricted in their distribution opportunities. Certain foreign service suppliers that are allowed to distribute books, newspapers and periodicals are not allowed to distribute imported books, newspapers and periodicals. By contrast, domestically produced books, newspapers and periodicals are not restricted in this way. Accordingly, the measures at issue also appear to be inconsistent with China's obligations under Article III:4 of the GATT 1994 and the provisions of paragraph 5.1 of Part I of the Accession Protocol as well as China's obligations under the provisions of paragraph 1.2 of Part I of the Accession Protocol (to the extent that it incorporates commitments in paragraph 22 of the Working Party Report).

B. Audiovisual Home Entertainment Products

In Sector 2D of its Schedule, China undertook market access and national treatment commitments with respect to the supply through commercial presence in China by service suppliers of other Members of distribution services for a range of products including, *inter alia*, audiovisual home entertainment products, such as video cassettes and DVDs.

The measures at issue, however, appear to prohibit foreign service suppliers (including wholly or partially foreign-owned or foreign-invested enterprises) from engaging in a type of distribution described in these measures as the "master distribution" or "master wholesaling" of audiovisual home entertainment products. In addition, to the extent that foreign services suppliers are permitted to engage in any distribution of those products, the measures at issue appear to impose

requirements that the service be supplied through a form of entity that Chinese persons control, or in which Chinese persons have a dominant position, or for which there are limitations concerning the participation of foreign capital. The measures at issue also appear to impose discriminatory limitations on foreign service suppliers' operating term in China; such limitations do not appear to be applied to Chinese suppliers of distribution services for audiovisual home entertainment products.

The measures at issue therefore appear to impose restrictions on the market access of foreign service suppliers of audiovisual distribution services for audiovisual home entertainment products. The measures at issue also appear to accord to foreign suppliers of audiovisual distribution services for audiovisual home entertainment products treatment that is less favorable than that accorded to Chinese suppliers of audiovisual distribution services for audiovisual home entertainment products. Moreover, the measures at issue do not appear to fall within the terms, limitations, conditions, or qualifications on market access or national treatment that China has specified in its Schedule for the distribution of such products through commercial presence in China by service suppliers of other Members. The measures at issue therefore appear to be inconsistent with China's obligations under Articles XVI and XVII of the GATS.

C. Sound Recordings

In Sector 2D of its Schedule, China undertook market access and national treatment commitments with respect to the supply of sound recording distribution services through cross-border supply and through commercial presence in China by service suppliers of other Members.

The measures at issue, however, appear to place market access restrictions and discriminatory requirements on foreign service suppliers seeking to engage in the digital distribution of sound recordings. For example, the Interim Regulations on Internet Culture Administration (the "Interim Regulations") define "internet cultural activities" as including activities such as wholesaling and retailing of "internet cultural products" on the internet (including to mobile telephones). The Interim Regulations further define "internet cultural products" as including various kinds of "network audiovisual products," including both audiovisual products that have been produced specifically for transmission over the internet and products that are the result of the transformation of an audiovisual product existing in physical form into a format that can be transmitted over the internet. It appears, therefore, that the definition of "internet cultural products" extends to digital sound recordings, and that the definition of "internet cultural activities" extends to the digital distribution of such products.

The Interim Regulations and the other measures at issue appear to prohibit any foreign-owned or foreign-invested entity from obtaining the licenses necessary to engage in "internet cultural activities." As a result, the measures at issue appear to prohibit any foreign-owned or foreign-invested entities from digital distribution of "internet cultural products," including sound recordings in digital form.

In addition, even if foreign-invested entities can engage in the distribution of sound recordings in digital form, the measures at issue appear to accord foreign suppliers of sound recording distribution services less favorable treatment than that accorded to Chinese suppliers of sound recording distribution services. The measures at issue provide that any "imported" music (which appears to include music in which certain rights, such as the rights described in the first sentence of Article 41 of the Copyright Law of the People's Republic of China, are held by a foreign-owned or foreign-invested enterprise) is subject to content review by the Chinese Government before digital distribution. However, music in which such rights are held by Chinese enterprises without foreign investment is not subject to such content review before digital distribution within China.

Consequently, it appears that foreign-owned and foreign-invested sound recording distribution enterprises in China, as well as enterprises that supply cross-border sound recording

distribution services, are treated less favorably than like sound recording distribution enterprises that are wholly Chinese-owned. Moreover, the measures at issue do not appear to fall within the terms, limitations, conditions, or qualifications on market access or national treatment that China has specified in its Schedule with respect to the supply of these services. The measures at issue therefore appear to be inconsistent with China's obligations under Article XVII of the GATS.

III. Distribution of Films for Theatrical Release

The United States also considers that China is acting inconsistently with its obligations under the GATT 1994 and the Accession Protocol by providing distribution opportunities for imported films for theatrical release that are less favorable than the distribution opportunities for domestically produced films for theatrical release.

China appears to establish a dual distribution system for imported and domestically produced films for theatrical release. Imported films can be distributed within China only by two entities, each of which operates on a nationwide basis. By contrast, domestically produced films can be distributed not only by those same two entities, but also by many other entities, including entities that operate on a local, provincial or other subnational basis.

In this connection, the measures at issue involve:

- (1) the Regulations on the Administration of the Films Industry³¹;
- (2) the Provisional Rules on the Entry Criteria for Operating Film Enterprises³²; and
- (3) the Provisional Specific Implementing Rules for Reforming Film Distribution and Exhibition³³;

as well as any amendments, related measures, or implementing measures.

Accordingly, the measures at issue appear to be inconsistent with China's obligations under Article III:4 of the GATT 1994 and the provisions of paragraph 5.1 of Part I of the Accession Protocol as well as China's obligations under the provisions of paragraph 1.2 of Part I of the Accession Protocol (to the extent that it incorporates commitments in paragraph 22 of the Working Party Report).

IV. Distribution of Sound Recordings

The United States considers that China is acting inconsistently with its obligations under the GATT 1994 and the Accession Protocol by providing distribution opportunities for sound recordings imported into China in physical form that are less favorable than the distribution opportunities for sound recordings produced in China.

China appears to require that sound recordings imported into China in physical form but intended for digital distribution must undergo content review by the Chinese Government prior to such distribution within China. However, domestically produced sound recordings appear not to be

³¹ State Council Order No. 342, adopted at the 50th executive meeting of the State Council on 12 December 2001, promulgated on 25 December 2001.

³² Decree No. 43, jointly issued by the State Administration of Radio, Film and Television and the Ministry of Commerce, promulgated on 10 October 2004 and effective as of 10 November 2004.

³³ Guang Fa Ban Zi [2001] No. 1519, jointly issued by the State Administration of Radio, Film and Television and the Ministry of Culture (18 December 2001).

subject to this requirement, but can instead be digitally distributed immediately. It thus appears that sound recordings imported into China in physical form are treated less favorably than sound recordings produced in China in physical form.

In this connection, the measures at issue involve:

- (1) the Interim Regulations on Internet Culture Administration³⁴;
- (2) the Circular of the Ministry of Culture on Relevant Issues of Implementation of the Interim Regulations on Internet Culture Administration³⁵;
- (3) the Catalogue for Guidance of Foreign Investment Industries³⁶;
- (4) the Several Opinions of the Ministry of Culture, the State Administration of Radio, Film and Television, the General Administration of Press and Publication, the National Development and Reform Commission and the Ministry of Commerce on Introducing Foreign Investment into the Cultural Sector³⁷; and
- (5) the Several Opinions on the Development and Regulation of Network Music³⁸;

as well as any amendments, related measures, or implementing measures.

The measures at issue therefore appear to be inconsistent with China's obligations under Article III:4 of the GATT 1994 and the provisions of paragraph 5.1 of Part I of the Accession Protocol, as well as China's obligations under the provisions of paragraph 1.2 of Part I of the Accession Protocol (to the extent that it incorporates commitments in paragraph 22 of the Working Party Report).

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Accordingly, the United States respectfully requests, pursuant to Article 6 of the DSU, that the Dispute Settlement Body establish a panel to examine these matters, with the standard terms of reference set out in Article 7.1 of the DSU.

³⁴ Promulgated in Order No. 27 of the Ministry of Culture (10 May 2003), amended by Order No. 32 of the Ministry of Culture (1 July 2004).

³⁵ Wen Shi Fa [2003] No. 27, issued by the Ministry of Culture (4 July 2003).

³⁶ Order [2004] No. 24, jointly issued by the National Development and Reform Commission and the Ministry of Commerce (30 November 2004).

³⁷ Wen Ban Fa [2005] No. 19, jointly issued by the Ministry of Culture, the State Administration of Radio, Film and Television, the General Administration of Press and Publication, the National Development and Reform Commission, and the Ministry of Commerce (6 July 2005).

³⁸ Ministry of Culture (20 November 2006); available at:
http://www.ccnt.gov.cn/xwzx/whbzhxw/t20061211_32440.htm (visited on 9 October 2007).