

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

Request for Consultations by the United States

Addendum

The following communication, dated 10 July 2007, from the delegation of the United States to the delegation of China and to the Chairman of the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

As you know, on 5-6 June 2007, the United States and the People's Republic of China ("China") first held consultations 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 and foreign suppliers of audiovisual services (including distribution services) for audiovisual home entertainment products. My authorities have now instructed me to request supplemental 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*, 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 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, (1) certain measures that provide less favourable distribution opportunities for imported films for theatrical release than for like domestic films, and (2) certain measures that provide less favourable 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. This request supplements and does not replace the request for consultations circulated as WT/DS363/1.

I. Distribution of Films for Theatrical Release

Various measures of China appear to provide distribution opportunities for imported films for theatrical release that are less favourable than the distribution opportunities for domestically produced films for theatrical release.

In this connection, the measures at issue include the following:

- (1) the Regulations on the Administration of the Films Industry¹;
- (2) the Provisional Rules on the Entry Criteria for Operating Film Enterprises²; and
- (3) the Provisional Specific Implementing Rules for Reforming Film Distribution and Exhibition³;

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

The measures at issue appear to establish a dual distribution system for films for theatrical release. It appears that imported films can be distributed within China only by two entities and only on a nationwide basis. By contrast, it appears that 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 interprovincial basis.

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 *Protocol on the Accession of the People's Republic of China*,⁴ 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 Report of the Working Party on the Accession of China⁵). 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*.

II. Distribution of Sound Recordings

Various measures of China appear to impose market access restrictions or discriminatory requirements on foreign service suppliers seeking to engage in the digital distribution of sound recordings and to impose discriminatory restrictions on sound recordings imported in physical form.

In this connection, the measures at issue include:

- (1) the Interim Regulations on Internet Culture Administration⁶ (the "Interim Regulations");
- (2) the Circular of the Ministry of Culture on Relevant Issues of Implementation of the Interim Regulations on Internet Culture Administration⁷;

¹ State Council Order No. 342, adopted on 12 December 2001, promulgated on 25 December 2001 and effective as of 1 February 2002.

² 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.

³ 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).

⁴ WT/L/432, 23 November 2001 (the "Accession Protocol").

⁵ WT/MIN(01)/3 (the "Working Party Report").

⁶ 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).

⁷ Wen Shi Fa [2003] No. 27, issued by the Ministry of Culture (4 July 2003).

- (3) the Catalogue for Guidance of Foreign Investment Industries⁸;
- (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 Sector⁹; and
- (5) the Several Opinions on the Development and Regulation of Network Music¹⁰;

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

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, however, 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 favourable treatment than that accorded to Chinese suppliers of sound recording distribution services. The measures at issue appear to provide that any "imported" music (which appears to include music in which certain rights are held by a foreign-owned or foreign-invested enterprise) is subject to content review before digital distribution. However, music in which such rights are held by Chinese enterprises without foreign investment is subject to registration but not prior content review before digital distribution. 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 favourably than like sound recording distribution enterprises that are wholly Chinese-owned.

In Sector 2D of China's Schedule of Specific Commitments on Services (the "Schedule"),¹¹ 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

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

¹¹ WT/L/432, Annex 9, and WT/MIN(01)/3/Add.2.

in China by service suppliers of other Members. 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 Articles XVI and XVII of the GATS.

The measures at issue also appear to require that sound recordings imported into China in physical form but intended for digital distribution must undergo content review prior to such distribution within China; domestically produced sound recordings appear not to be 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 favourably than sound recordings produced in China in physical form. 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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The measures cited in this request for consultations also appear to nullify or impair the benefits accruing to the United States directly or indirectly under the cited agreements.

We look forward to receiving your reply to the present request and to fixing a mutually convenient date for consultations.
