



**PRC Telecoms, Media & Technology Law Newsflash**  
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**WTO DECIDES ON PUBLICATIONS AND AUDIOVISUAL PRODUCTS DISPUTE  
BETWEEN THE UNITED STATES AND CHINA**

**Introduction**

On 10 April 2007, the US requested consultations with China concerning PRC regulations that restrict trading and distributing rights for publications, audiovisual products and films of foreign suppliers. Pursuant to the request of the US government, the WTO Dispute Settlement Body (**DSB**) assembled a panel of experts which issued its report dated 12 August 2009. The panel found numerous Chinese regulations inconsistent with China's WTO obligations, which findings were substantially upheld by the Appellate Body's report of 21 December 2009.

In general, the reports found that the PRC regulations (a) do not allow all Chinese and foreign enterprises and individuals the right to import the publications, audiovisual products and films, (b) fail to provide equal trading and importing rights in all goods to all enterprises, and (c) accord less favorable treatment to foreign suppliers than to their Chinese counterparts with respect to distribution services for publications and audiovisual products.

The Appellate Body recommended that the DSB request China to bring the relevant regulations into conformity with its WTO obligations. Without question, this case has significant implications for China's policy on the management and control of foreign suppliers and service providers in the media, publishing and audiovisual sectors.

This newsletter summarizes the reports' key findings and reasoning, and analyses possible consequences.

**Issues Involved**

1. In relation to publications - such as books, magazines, newspapers and electronic publications -, PRC regulations prohibit foreign investment in the master distribution and import of publications, restrict such import to certain approved state-owned entities and set forth additional requirements for the establishment of foreign-invested enterprises engaging in the wholesale of publications. The Appellate Body upheld the findings of the Panel that:

- By prohibiting foreign investment in the import of publications, China has failed to provide trading rights in all goods to all enterprises in China and to grant trading rights to foreign-invested enterprises in a non-discretionary way;
  - China has deprived service suppliers of other WTO members of any opportunity to compete with like Chinese service suppliers in supplying master distribution of reading materials;
  - China is acting inconsistently with its national treatment commitment by prohibiting foreign-invested enterprises from engaging in the wholesale of imported publications either on subscription basis or through market distribution. Such prohibition is also expected to modify adversely the conditions of competition in the marketplace between imported and like domestic products. Such action is thus inconsistent with China's obligations to provide no less favorable treatment to the like imported products. Additional requirements imposed by the PRC regulations on foreign-invested wholesalers of publications with respect to the registered capital and term of operation are also discriminatory against foreign investors; and
  - China has failed to justify that the approval requirements are "necessary" to protect its public morals or that the "discriminations" are for fiscal or customs purposes or as normal business regulations.
2. In relation to audiovisual products, similar to the rationale applied in the publications sector, the Appellate Body upheld the Panel's finding that China has acted inconsistently with its commitments by prohibiting foreign investment in the import of audiovisual products and restricting such import to certain approved entities.
- It also confirmed that, by requiring contractual JVs in which the Chinese party should have a "dominant" position to engage in the distribution of audiovisual products, China has discriminated against the foreign investor.
- With regard to the electronic distribution of sound (online music) in particular, the regulations at issue prohibit foreign investment in network cultural activities and online audiovisual program services. However, such prohibited services encompass "sound recording distribution services" where China has committed full trading and importing rights and national treatment, notably through electronic means.
3. In relation to films, the relevant regulations prohibit foreign investment in film importation and restrict the import and theatrical release of films to certain approved entities. Such restriction is inconsistent with China's agreement to provide trading rights in all goods of all enterprises since films do not fall under the "exception" catalogues in China's WTO commitment.

## **WTO Requirements**

In line with the *Understanding on the Rules and Procedures Governing the Settlement of Disputes*, after circulation of the Appellate Report:

- The DSB needs to decide whether to adopt or reject the report within 30 days, and a rejection is only possible by DSB's consensus, which is virtually unlikely since the DSB is made up of all WTO members;
- Upon the adoption of the report by the DSB, China must inform the DSB of its intentions in any implementation. If immediate implementation is impracticable, China will have a "reasonable period of time" of up to 15 months to do so; and
- If China does not withdraw the conflicting regulations at issue within the aforesaid "reasonable period of time", it must negotiate with the US for mutually acceptable compensation. As a last resort, the US may suspend concessions or other obligations under the WTO agreements on a discriminatory basis vis-à-vis China, pending the withdrawal of the questioned regulations or an agreement on a satisfactory solution.

## **Conclusion**

Since its accession in 2001, China has a responsive record for implementing WTO dispute settlement mechanism, either by withdrawing the questioned regulations or reaching other agreements with the complainants. However, in the case of its media sector, China has for decades been adopting policies so as to tighten state control, and is most sensitive to any penetration of foreign influence. Accordingly, the latest WTO case has presented the Chinese policymakers with a dilemma.

Changing the regulations at issue will dismantle the state's tight grasp on the importation and distribution channels of media products, and will frustrate the apparent policy objective of the Chinese government. However, refusing to make the necessary adjustments following such clear and public rulings under the WTO framework will entail significant economic consequences for China's export-driven economy, which still relies heavily upon its trade relationship with the US.

Nevertheless, at the end of the day, even if China agrees to withdraw the questioned regulations, it does not necessarily mean that China's media market will be opened up for the benefit of the foreign entertainment giants. Disagreement may still arise as to the implementation of the measures pursuant to the report. Even if Beijing decides to change the regulations, invisible policy barriers against foreign investment in these sectors may well remain and which will be much more difficult to overcome.

In short, the WTO reports may not necessarily bring about their expected consequences, or at least not in the short-term. Indeed, on the contrary, they may for the moment only represent a hollow victory for the US. On a practical level, resolution of the current dispute may still be protracted. No foreign media concern should be naïve enough to believe that they should immediately begin to amend their China business

plans on the back of the rulings. After all, the media industry which the Chinese government has traditionally guarded closely will be one of the last sectors, if not the last one, that China would open up to the outside world without a fight. In the meantime, global media and entertainment companies should be realistic, persistent and creative in their continuing efforts to set up successful and sustainable businesses in China.

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