

China Law Update

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China Appeals WTO Ruling Against Chinese Import Restrictions on Publications and Entertainment Products

On September 22, 2009, China made its last-minute appeal of the August 12, 2009 World Trade Organization ("WTO") panel ruling on Chinese publication and entertainment distributions restrictions, invoking "public morals" as a defense. The case was brought to the WTO by the United States in April 2007, attracting extensive attention from both sides. The appeal again escalates the trade tensions between the two partners, following the United States' imposition of tariffs on tires from China and appeal of another WTO ruling on China's protection and enforcement of intellectual property rights.

The Panel Report

The 460-page panel report largely upheld the United States' claims that China was not providing enough access for imports of publications and audio-visual products, as promised under WTO agreement. The report called on China to bring certain measures in compliance with WTO rules. It is the first time a the WTO panel has ruled on trading rights and "public morals" defense of GATT Article XX, the exception clause of General Agreements on Tariffs and Trade.

Trading Rights and GATT Article XX

The case mainly focused on China's commitment under China's Accession Protocol on trading rights. Trading rights, i.e., rights to import and export, are not included in the Uruguay Round Agreements and only apply to countries that acceded to the WTO after it was founded in 1995. The panel found that while China has the right to regulate trade in a manner consistent with WTO guidelines, it should ensure that all Chinese enterprises, including foreign-invested enterprises registered in China, to have the right to import goods. The panel found that the requirements that publishing entities be wholly state-owned with suitable organizations and qualified personnel, and must conform to the State plan were inconsistent with China's obligation under WTO. China's restriction on rights to import hard -copy cinematographic films for theatrical release and master copies for audiovisual products imported for publication were inconsistent with its trading rights commitment.

China invoked the "public morals" provision in the exception clause, GATT Article XX, to defend the above-mentioned measures. The panel stated that "public morals" will be defined on a national, country-specific basis as in *US-Gambling*. However, the panel found that the above-

mentioned measures failed to satisfy the "necessity standard" under the Chapeau of Article XX because the U.S. has identified less-restrictive measures to achieve the same objectives such as allowing private firms to import goods and the government to review their content. After weighing the contribution of the measures to protect public morals against the restrictive impact on trade and availability of alternatives, the panel found those measure to be inconsistent with WTO rules and China's commitments under the WTO.

National Treatment and Market Access

China's measures "prohibiting foreign service suppliers from wholesaling imported reading materials" were found to be adversely modifying conditions of competition, and thus in violation of Article XVII (the national treatment provision) of the General Agreement on Trade in Services ("GATS"), since Chinese suppliers were allowed to do so. Another measure prohibiting foreign investment in sound recording distribution was found to be inconsistent with China's market access commitment under GATS Article XVI. The panel also found that, regarding reading materials, the subscription regime and sub-distributors regime for imported books, which are different from those for domestic books in Article 41- 43 of the *Publications Regulation*, were inconsistent with China's national treatment obligation under GATT Article III: 4.

Conclusion

The WTO's Appellate Body will have two to three months to reinvestigate the U.S.-China dispute, and it may uphold, modify or reverse the panel ruling.

The Appellate Body's decision may impact the market conditions in China for foreign companies in the publishing and entertainment industries who plan to invest in China. More importantly, if the WTO requires China to conform the measures which give exclusive trading rights to wholly state-owned entities to current WTO rules, China's domestic companies who want access to this market will also require their "trading rights" in the future.

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