

## **CFAC BRIEFING PAPER:**

### **CHINA'S INTERNET MEASURES VIOLATE ITS WTO OBLIGATIONS**

**November 19, 2007**

- The Government of China (“GOC”) is actively preventing U.S. Internet companies from doing business in China while at the same time promoting Chinese Internet companies engaged in the same or similar activities. It is thereby denying market access to U.S. Internet companies, discriminating against U.S. Internet companies in favor of their Chinese competitors, preventing growth in a critical economic sector and region for the U.S. technology and services industries, and violating its World Trade Organization (“WTO”) commitments.
- The California First Amendment Coalition (“CFAC”)<sup>1</sup> has prepared this preliminary briefing paper to inform the U.S. Government about the barriers affecting trade in relevant electronic goods and services and to provide the basis for further discussions about how to most efficiently remove these barriers, including through the initiation of WTO dispute settlement proceedings.

#### **BACKGROUND**

- The GOC uses a combination of sophisticated hardware and advanced software to prevent U.S. Internet companies and websites from doing business in China. The GOC maintains exclusive control of the information technology (“IT”) infrastructure that connects different computer networks within China and connects China’s computer networks to the outside world. The GOC has configured this hardware to block thousands of U.S. websites and to restrict the delivery of electronic goods and services into China. The GOC also employs advanced software at the router level to prevent persons within China from accessing certain U.S. websites or receiving certain electronic goods and services.
- The GOC requires Internet Services Providers (“ISPs”) and other companies operating in China to support this effort. For example, ISPs and Internet cafes are required to use software filtering programs to deny access to certain U.S. websites and to prevent the delivery of certain electronic goods and services. Similarly, U.S. Internet companies providing Internet search services within China are required to distort their search results so as to block certain U.S. websites and to restrict access to certain electronic goods and services.

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<sup>1</sup> CFAC is a public interest organization founded in 1988 dedicated to freedom of speech and government transparency. It is supported by foundation grants and membership contributions. CFAC’s members include private individuals, daily newspapers in California, and other individuals and entities representing both “old” and “new” media.

- As a result of the GOC's measures, the following U.S. and foreign websites, among others, have been blocked by the GOC at some point within the last 30 days in China: YouTube ([www.youtube.com](http://www.youtube.com)), BBC News ([news.bbc.co.uk](http://news.bbc.co.uk)), Wikipedia ([www.wikipedia.com](http://www.wikipedia.com)), LiveJournal ([www.livejournal.com](http://www.livejournal.com)), Tripod ([www.tripod.lycos.com](http://www.tripod.lycos.com)), Technorati ([www.technorati.com](http://www.technorati.com)), WordPress ([www.wordpress.com](http://www.wordpress.com)), Xanga ([www.xanga.com](http://www.xanga.com)), Blogeasy ([www.blogeasy.com](http://www.blogeasy.com)), Blosome ([www.blosome.com](http://www.blosome.com)), Tblog ([www.tblog.com](http://www.tblog.com)), and BlueHost ([www.bluehost.com](http://www.bluehost.com)).
- Although the GOC actively prevents U.S. Internet companies from doing business in China, it promotes Chinese Internet companies engaged in the same or similar activities. In this way, the GOC discriminates against U.S. Internet companies in favor of their Chinese competitors.
- The GOC has enacted a wide range of laws and regulations that result in *de jure* or *de facto* prohibition on the delivery of certain electronic goods and services into China and/or result in discriminatory treatment of U.S. Internet companies, including but not limited to
  - the Administrative Regulations on Publishing;<sup>2</sup>
  - the Administrative Regulations on Electronic Publications;<sup>3</sup> and
  - the Interim Regulations on Internet Culture Administration.<sup>4</sup>
- Many of the measures that prevent U.S. Internet companies from doing business in China are not publicly available. For example, the GOC maintains a list of Internet Protocol ("IP"), Domain Name Service ("DNS"), and Universal Resource Locator ("URL") addresses that it blocks on a regular basis or during special events. Separately, the GOC maintains a list of prohibited terms and phrases that are used by advanced software at the router level to determine whether U.S. websites may be accessed by persons within China and whether electronic goods and services may be delivered into China. The GOC has not published either of these lists. As a result, U.S. Internet companies remain subject to an invisible web of measures that prevent them from doing business in China.

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<sup>2</sup> See Administrative Regulation on Publishing, State Council Order No. 343, adopted at the 50th executive meeting of the State Council on 12 December 2001, promulgated on 25 December 2001, available at <http://www.lawkey.net/info/show.asp?id=2062>.

<sup>3</sup> See Administrative Regulations on Electronic Publications, Order No. 11 of the General Administration of Press and Publication (30 December 1997), Chinese version available at <http://www.jincao.com/fa/14/law14.12.htm>.

<sup>4</sup> See Interim Regulations on Internet Culture Administration, 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), available at <http://www.lawyer86.com/htm/3129.html>.

- Through these measures, China is violating its WTO obligations under numerous provisions of the General Agreement on Tariffs and Trade 1994 (“GATT”), the General Agreement on Trade in Services (“GATS”), and China’s Protocol of Accession.

## POTENTIAL GATT VIOLATIONS

- GATT Article III:4 -- Certain measures treat the products supplied from outside China less favorably than like products originating from domestic suppliers. In many cases, the measures only apply to non-Chinese products or to their suppliers and thus give like products originating in China a competitive advantage.
- GATT Article XI:1 -- Certain measures are applied exclusively to foreign origin products and amount to a *de jure* or *de facto* import prohibition.
- GATT Article X:1 -- The blocking and filtering measures constitute “administrative rulings of general application” that operate as a *de facto* ruling on which products are permissible to import and distribute to Chinese customers. They operate as an import prohibition or restriction or otherwise affect the sale, distribution, or other use of the products, and the GOC has failed to publish these measures.
- GATT Articles X:3(a) and (b) -- The GOC does not administer the blocking and filtering measures in a uniform, impartial, and reasonable manner, because they are unpublished and are applied in different ways to different suppliers and to different products. In addition, the GOC does not maintain any judicial or arbitral system to review the administration of these measures.

## POTENTIAL GATS VIOLATIONS

- GATS Article I:1 -- The relevant measures affect trade in services in sectors for which the GOC has made specific commitments, including value-added telecommunications services. Such services are being provided in the cross-border, commercial presence, and arguably consumption abroad modes of supply.
- GATS Article VI -- Certain measures are not administered in a reasonable, objective, and impartial manner, and tribunals and/or procedures are not available for the prompt review and remedy of administrative decisions.
- GATS Article XVI -- Certain measures impose significant limitations or prohibitions (*i.e.*, *de facto* zero quotas) on the number of U.S. service suppliers and service operations.
- GATS Article XVII -- Certain measures explicitly or implicitly treat U.S. suppliers differently and modify the conditions of competition in favor of Chinese suppliers.
- Paragraphs 5(a) and (e) of the GATS Annex on Telecommunications -- Certain measures are not necessary to meet the three listed policy objectives, particularly given the availability of less trade restrictive alternatives. Such measures also impose unreasonable

and discriminatory terms and conditions for access to public telecommunications transport networks and services (*i.e.*, the Internet).

- Paragraph 5(c) of the GATS Annex on Telecommunications -- Certain measures prevent U.S. suppliers from moving information within or across borders or accessing information contained in databases or otherwise stored in machine-readable form.
- Paragraph 5 of the GATS Reference Paper on Telecommunications -- Certain measures are not impartial and favor domestic Chinese market participants over foreign market participants or those market participants distributing imported electronic publications or content versus those distributing products originating in China.
- GATS Article III:1 -- The blocking and filtering measures are of general application and have not been published.
- Paragraph 4 of the GATS Annex on Telecommunications -- Certain measures affect access to and use of public telecommunications transport networks and services (*i.e.*, the Internet). The terms and conditions of service and applicable licensing requirements are not publicly available.

#### **POTENTIAL VIOLATIONS OF THE PROTOCOL OF ACCESSION**

- Paragraph 1.2 (incorporating the commitments in paragraphs 19 and 22 of the Working Party Report) -- Certain measures discriminate against foreign suppliers of products over the Internet by blocking foreign goods and services at the border, particularly where like products offered domestically via the Internet are not blocked.
- Paragraph 1.2 (incorporating the commitments in paragraph 122 of the Working Party Report) -- China agreed not to introduce or apply any non-tariff measures not identified in Annex 3 to the Protocol. The GOC, however, has blocked a number of imported products without explanation or justification.
- Paragraph 2.C.1 and paragraph 1.2 (incorporating the commitments in paragraphs 331, 332, and 334 of the Working Party Report) -- The GOC has failed to publish or make readily available any measures that identify the keywords and IP, DNS, and URL addresses that are blocked at the border. The GOC is also enforcing these measures to block the delivery of goods and services.
- Paragraph 2.D and paragraph 1.2 (incorporating the commitments in paragraphs 78 and 79 of the Working Party Report) -- The GOC has failed to establish tribunals, contact points, and procedures by which Internet-based suppliers can appeal the blocking of imported publications and content.

## **POTENTIAL VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS TREATIES**

- Article 19 of Universal Declaration of Human Rights -- Certain measures interfere with the “right to freedom of opinion and expression,” which includes the freedom “to seek, receive and impart information and ideas through any media and regardless of frontiers.”
- Article 19 of the International Covenant on Civil and Political Rights -- Certain measures interfere with the “right to freedom of expression,” which includes the freedom “to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

## **CONCLUSION**

- CFAC would like to discuss the above-referenced WTO violations with the Office of the U.S. Trade Representative (“USTR”) as soon as possible and requests that USTR take immediate action to investigate this matter and terminate these unlawful actions.
- CFAC is available to assist USTR in any way possible and to provide additional information upon request.