WORLD TRADE ORGANIZATION

WT/DS363/AB/R
21 December 2009

CASES CITED IN THIS REPORT

Short title	Full case title and citation
Brazil – Retreaded Tyres	Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, 1527
Canada – Aircraft	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377
Canada – Autos	Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VII, 3043
Canada – FIRA	GATT Panel Report, *Canada – Administration of the Foreign Investment Review Act*, L/5504, adopted 7 February 1984, BISD 30S/140
Canada – Periodicals	Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, 449
Canada – Periodicals	Panel Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/R and Corr.1, adopted 30 July 1997, as modified by Appellate Body Report WT/DS31/AB/R, DSR 1997:I, 481
Canada – Provincial Liquor Boards (EEC)	GATT Panel Report, *Canada – Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies*, DS6304, adopted 22 March 1988, BISD 35S/37
Chile – Price Band System (Article 21.5 – Argentina)	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS207/AB/RW, adopted 22 May 2007, DSR 2007:II, 513
China – Auto Parts	Appellate Body Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R, adopted 12 January 2009
China – Publications and Audiovisual Products	Panel Report, *China –Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R and Corr.1, circulated to WTO Members 12 August 2009
Colombia – Ports of Entry	Panel Report, *Colombia – Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/R and Corr.1, adopted 20 May 2009
Dominican Republic – Import and Sale of Cigarettes	Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, 7367
EC – Asbestos	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
EC – Chicken Cuts	Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, 9157
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Short title	Full case title and citation
EC – Hormones	Appellate Body Report, EC Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
EC – Poultry	Appellate Body Report, European Communities – Measures Affecting the Importation of Certain Poultry Products, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, 2031
India – Autos	Panel Report, India – Measures Affecting the Automotive Sector, WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002, DSR 2002:V, 1827
India – Patents (US)	Appellate Body Report, India – Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
Japan – Alcoholic Beverages II	Appellate Body Report, Japan – Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97
Korea – Various Measures on Beef	Appellate Body Report, Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, 5
Turkey – Rice	Panel Report, Turkey – Measures Affecting the Importation of Rice, WT/DS334/R, adopted 22 October 2007, DSR 2007:VI, 2151
US – Carbon Steel	Appellate Body Report, United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779
US – Continued Zeroing	Appellate Body Report, United States – Continued Existence and Application of Zeroing Methodology, WT/DS350/AB/R, adopted 19 February 2009
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan, WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3
US – FSC (Article 21.5 – EC)	Appellate Body Report, United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities, WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, 55
US – Gambling	Appellate Body Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, 5663 (Corr.1, DSR 2006:XII, 5475)
US – Gambling	Panel Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services

Short title	Full case title and citation
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
US – Shrimp (Thailand) / US – Customs Bond Directive	Appellate Body Report, *United States – Measures Relating to Shrimp from Thailand / United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, WT/DS343/AB/R, WT/DS345/AB/R, adopted 1 August 2008
US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, 571
US – Steel Safeguards	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, 3117
US – Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717

ABBREVIATIONS OF CHINA'S MEASURES USED IN THIS REPORT

Short Title	**Full Title in United States Exhibit**	**Full Title in Chinese Exhibit**
1997 Electronic Publications Regulation	People's Republic of China, General Administration of Press and Publication, Order, No. 11 (1997) – Regulations on the Management of Electronic Publications (Panel Exhibit US-15)	Order of the General Administration of Press and Publication of the People's Republic of China (No. 11) (1997) – Provisions on the Administration of Electronic Publications (Panel Exhibit CN-39)
2001 Audiovisual ctal fo9 Tc 0 Tduct7 TD .0016 Tction		

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
1993 Scheduling Guidelines	Scheduling of Initial Commitments in Trade in Services, Explanatory Note, MTN.GNS/W/164, 3 September 1993
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
AVHE	audiovisual home entertainment
CDs	compact discs
China's Accession Protocol	Protocol on the Accession of the People's Republic of China, WT/L/432
China's Accession Working Party Report	Report of the Working Party on the Accession of China, WT/ACC/CHN/49 and WT/ACC/CHN/49/Corr.1
China's GATS Schedule	The People's Republic of China, Schedule of Specific Commitments, GATS/SC/135
CNPIEC	China National Publications Import and Export (Group) Corporation
CPC	1991 United Nations Provisional Central Product Classification
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
DVDs	digital video discs
GAPP	China's General Administration of Press and Publication
GATS	General Agreement on Trade in Services
GATT 1994	General Agreement on Tariffs and Trade 1994
Harmonized System	Harmonized Commodity Description and Coding System of the World Customs Organization
Importation Procedure	China's Examination and Approval for Establishing a Publication Import Business Unit (State Council Order No. 343) (2005) (Panel Exhibit US-8)
MOC	China's Ministry of Culture
Panel	Panel in China – Publications and Audiovisual Products
Panel Report	Panel Report, China – Publications and Audiovisual Products

Abbreviation	Description
State plan requirement	requirement in Article 42 of the Publications Regulation that the approval of publication import entities conform to China's State plan for the total number, structure, and distribution of publication import entities
State-ownership requirement	requirement in Article 42(2) of the Publications Regulation that publication import entities be wholly State-owned enterprises
Sub-Distribution Procedure	

WORLD TRADE ORGANIZATION
APPELLATE BODY

China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products

China, Appellant/Appellee
United States, Other Appellant/Appellee

Australia, Third Participant
European Communities[1], Third Participant
Japan, Third Participant
Korea, Third Participant
Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Third Participant

AB-2009-3

Present:

Hillman, Presiding Member
Oshima, Member
Ramírez-Hernández, Member

I. Introduction

1. China and the United States each appeals certain issues of law and legal interpretations developed in the Panel Report, China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (the "Panel Report").[2] The Panel was established to consider a complaint by the United States concerning a series of Chinese measures regulating activities relating to the importation and distribution of: reading materials (for example, er9m0 TPvr Tsudiv,

Accession Working Party Report")[5] because, by limiting trading rights to wholly Chinese State-owned enterprises, the measures restrict the right of enterprises in China, foreign enterprises, and foreign individuals, to import the relevant products into China.[6] The United States alleged violations of paragraphs 5.1 and 5.2 of China's Accession Protocol, and of paragraph 1.2 of China's Accession Protocol to the extent that it incorporates commitments referred to in paragraphs 83 and 84 of China's Accession Working Party Report.[7]

3. Additionally, the United States claimed that certain of China's measures are inconsistent with Article XVI and/or Article XVII of the General Agreement on Trade in Services (the "GATS") because they:

(a) prohibit foreign-invested enterprises in China from engaging in certain types of distribution of reading materials and electronic distribution of sound recordings;

(b) limit the commercial presence for the distribution of AVHE products within China to Chinese-foreign contractual joint ventures with majority Chinese ownership; or

(c) impose on those foreign-invested enterprises in China that are permitted to engage in the distribution of AVHE products or certain reading materials requirements that are more burdensome than those applicable to domestic distributors.[8]

4. Finally, the United States claimed that certain of China's measures are inconsistent with Article III:4 of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994") because they:

(a) restrict the distribution of certain imported reading materials within China by requiring that, unlike the situation for like domestic products, distribution be conducted only by wholly Chinese State-owned enterprises, only through subscription, and only to subscribers approved by the Chinese Government;

(b) limit to wholly Chinese-owned enterprises the distribution of certain imported reading materials, while the distribution of like domestic products is not so limited;

(c) discriminate against imported sound recordings intended for electronic distribution within China by subjecting them to more burdensome content review requirements than like domestic products; or

[5]WT/ACC/CHN/49 and WT/ACC/CHN/49/Corr.1.
[6]Panel Report, para. 2.3(a).
[7]Panel Report, para. 3.1(a).
[8]Panel Report, paras. 2.3(b) and 3.1(b) and (c).

(d) discriminate against imported films for theatrical release by limiting the distribution of such imported films to two wholly Chinese State-owned enterprises, while the distribution of like domestic products is not so limited.[9]

5. The Panel addressed each of the Chinese legal instruments challenged by the United States.[10] The Panel considered procedural objections raised by China and found that claims in respect of several measures were not within the Panel's terms of reference in accordance with the requirements of Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU").[11] The Panel also determined that two of the instruments challenged by the United States were not "measures" within the meaning of Article 3.3 of the DSU.[12]

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[9]

6. The Panel then considered whether China's measures are consistent with China's trading rights commitments in paragraphs 1.2, 5.1, and 5.2 of China's Accession Protocol and in paragraphs 83(d) and 84(a) and (b) of China's Accession Working Party Report. China's trading

commitments under the Accession Protocol".[16] Instead, the Panel "proceed[ed] on the assumption that Article XX(a) is available to China as a defence for the measures [the Panel had] found to be inconsistent with [China's] trading rights commitments under the Accession Protocol" and examined, based on that assumption, "whether the relevant measures satisfy the requirements of Article XX(a)."[17] The Panel determined that none of the provisions of China's measures that it had found to be inconsistent with China's trading rights commitments are "necessary to protect public morals" within the meaning of Article XX(a) of the GATT 1994, and that China therefore had not established that the provisions are justified under that exception.[18]

8.

9. Regarding the distribution of AVHE products, the Panel found that several provisions permitting distribution by foreign-invested contractual joint ventures only when the Chinese partner holds a majority share are inconsistent with Article XVI:2(f) of the GATS.[23] With respect to certain

11.

II. Arguments of the Participants and the Third Participants

A. Claims of Error by China – Appellant

14. China's appeal concerns three aspects of the Panel Report. First, China appeals the Panel's finding that China's trading rights commitments under paragraphs 1.2 and 5.1 of China's Accession Protocol and paragraphs 83(d) and 84(a) and (b) of China's Accession Working Party Report, which apply only to trade in goods, apply to China's measures concerning films for theatrical release and unfinished audiovisual products[38]

content of films and the services related to such content. China claims that, in so finding, the Panel committed errors of law and legal interpretation, and failed to conduct an objective assessment of the facts before it, in violation of Article 11 of the DSU. Because the Panel's findings of inconsistency regarding Article 30 of the Film Regulation and Article 16 of the Film Enterprise Rule were based on

content, and are not about goods. The plain wording of Articles 1, 2, 5, 24 through 29, and 31 of the Film Regulation indicates that this measure focuses on content that can be commercially exploited, rather than on "the material used for the[] exploitation".[47] In China's view, the Appellate Body has the authority to, and should, examine these other Articles in the Film Regulation in order to determine the meaning and scope of Article 30. The Appellate Body has, in prior disputes, found that the assessment of the WTO-consistency of municipal law is a process of legal characterization, and thus an issue of law subject to appellate review under Article 17.6 of the DSU.[48] Moreover, China

provisions are inconsistent with China's trading rights commitments in paragraphs 1.2 and 5.1 of China's Accession Protocol and paragraphs 83(d) and 84(a) and (b) of China's Accession Working Party Report.

(b) Article 5 of the 2001 Audiovisual Products Regulation and Article 7 of the Audiovisual Products Importation Rule

22. China asserts that the Panel erred in finding that Article 5 of the 2001 Audiovisual Products Regulation and Article 7 of the Audiovisual Products Importation Rule, which concern unfinished audiovisual products[58] imported for publication, are inconsistent with China's obligation under paragraph 1.2 of China's Accession Protocol and paragraph 84(b) of China's Accession Working Party Report to grant in a non-discretionary manner the right to trade. China seeks to have these findings reversed on the specific ground that the Panel erred in finding that China's obligation to grant in a non-disc( )-10.2(n)6.6(Prot5(rag1(r.6( )-11.m) Repo5(rag1()-5.95(o)6.6(i)-6.-6.3(ght.2((i)-6.t(A)-8(5(o)6.6(c-11.6rad)6.2(in)

Should the Appellate Body do so, China further requests the Appellate Body to complete the analysis and find that China's measures are justified under Article XX(a) of the GATT 1994.

25. China points out that cultural goods and services have a very specific nature "[a]s vectors of identity, values and meaning"[60], in that they do not merely satisfy a commercial need, but also play a crucial role in influencing and defining the features of society. Noting that this specificity of cultural goods has been affirmed by the UNESCO Universal Declaration on Cultural Diversity and by the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, China requests the Appellate Body to be "mindful"[61] in the present appeal of the specific nature of cultural goods.

(a) The State-Ownership Requirement

26. China requests the Appellate Body to reverse the Panel's finding that the requirement in Article 42(2) of the Publications Regulation that publication import entities be wholly State-owned (the "State-ownership requirement") is not "necessary to protect public morals" in China within the meaning of Article XX(a) of the GATT 1994. China alleges that the Panel misrepresented China's arguments relating to the State-ownership requirement, and that these misrepresentations result in errors of law and a failure by the Panel to make an objective assessment of the matter before it, in violation of Article 11 of the DSU.

27. China alleges that the Panel mistakenly reduced an argument that China made to "a mere 'cost analysis'"[62] and failed to recognize that China's argument in fact related to the balance reached between the performance of a public policy function and the cost associated with performing this public policy function. China asserts that it explained to the Panel that the Chinese Government could not require enterprises with private investment in China to bear the substantial cost of performing the public policy function of content review, but could require only those enterprises in which the State owns all equity to bear the cost of conducting content review.[63]

28. China asserts that the Panel also misrepresented its argument that only wholly State-owned enterprises are capable of satisfying the reqegpublic inecti th6

that its argument was not only about cost, but also about the capacity to perform content review in a

(c) The Restrictive Effect of the Measures

30. China alleges that the Panel erred in extending its assessment of the restrictive effect of the measures at issue, notably, to those wishing to engage in importing, in particular on their right to trade. China contends that, in so doing, the Panel placed an "unsustainable burden of proof"[68] on China. In China's view, the Panel's reasoning is circular because it relied on the restrictive effect of the measures both in finding that the measures at issue constitute a violation of China's obligation to grant the right to trade and in finding that the measures are not "necessary" within the meaning of Article XX(a) of the GATT 1994. China contends that, by considering the restrictive effect of the measures on those wishing to engage in importing in the context of both the analysis of consistency

involvement is much more limited. China takes issue with the Panel's statement that the cost of content review, if performed exclusively by the

(e) Completion of the Analysis

34. Should the Appellate Body find that China's measures are "necessary" under Article XX(a) of the GATT 1994, China requests the Appellate Body to complete the analysis and find that the measures comply with the requirements of the chapeau of Article XX and that Article XX(a) is available as a defence to a violation of China's trading rights commitments under its Accession Protocol. China refers, in this regard, to the arguments that it ma

Article 3.2 of the DSU in failing to apply the *in dubio mitius* principle and not adopting an interpretation that was less onerous to China.[78]

(a) Article 31 of the Vienna Convention

38. China observes that, under Article 31 of the Vienna Convention, "ordinary meaning", "context", and "object and purpose" cannot be considered in isolation from one another. Rather, Article 31 sets out a single rule and an integrated process of treaty interpretation requiring an analysis not only of each of these elements, but also of the interaction of the various elements with each other. Thus, the ordinary meaning of a term cannot and should not be finally determined before a panel has examined such meaning in the relevant context and in the light of the object and purpose of the treaty. According to China, the Panel failed to perform such a "holistic approach"[79] to treaty interpretation when it interpreted the phrase "sound recording dist

in fact inconclusive."[83] China maintains that the Panel should therefore have proceeded to examine the two possible dictionary meanings in the light of the relevant context and the object and purpose of the treaty.

40.

of the term it seeks to interpret.[89] It follows, in China's view, that, because the various dictionary definitions were inconclusive, the Panel should have undertaken a careful examination of each possible meaning in the relevant context and in the light of the object and purpose of the treaty.

42. Turning to the Panel's examination of the context for "Sound recording distribution services", China claims that, in addition to its failure to engage in an analysis of context with respect to the relevant alternative dictionary meanings, the Panel further erred in concluding that the various elements that it examined as relevant context supported its original understanding of the ordinary meaning of this phrase as encompassing the distribution of intangible sound recordings by electronic means. Rather, argues China, a proper contextual analysis would also have been inconclusive. China makes a number of specific arguments relating to the Panel's analysis of: (i) the other elements inscribed under sector 2.D (Audiovisual Services) in China's GATS Schedule; (ii) sector 4 (Distribution Services) of China's GATS Schedule, as well as the GATS Schedules of other WTO Members; and (iii) the relevant GATS provisions themselves.

43. China claims that the Panel's interpretation of the context provided by the heading "Audiovisual Services" in China's GATS Schedule also appears inconclusive. This is so because the Panel's finding that the relevant sector may extend to services relating to content not embedded in physical products "does not rule out the possibility that China could have scheduled commitments concerning services related only to physical products."[90] As for the Panel's interpretation of the entry "Videos (...) distribution services" in China's GATS Schedule, China submits that the Panel should have relied on dictionary definitions from the time of China's accession to the WTO and taken note of the use of the plural term "video tapes" in the entry in the 1991 Services Sectoral Classification List that corresponds to this part of China's Schedule.[91] China maintains that, had the Panel done so, it would have understood that the word "videos" in China's entry on "Videos (...) distribution services" refers to countable, physical copies of content recorded on video tapes. Instead, the Panel erred in finding that this entry extends to the distribution of intangibles. China adds that, even admitting that the entry "Videos (...) distribution services" extends to intangibles, does not mean that all other distribution commitments under sector 2.D also extend to intangibles. With respect to the sub-sector "Cinema Theatre Services" (relating to the construction and renovation of cinema theatres) within

insertion under sector 2.D of services that would normally fall under other sectors has not had the effect of excluding services that would normally fall under sector 2.D and, on the other hand, the Panel's conclusion that "Sound recording distribution services" includes the distribution of intangibles unless indicated otherwise.

44. China also considers that the Panel's analysis of the respective coverage of sector 2.D (Audiovisual Services) and sector 4 (Distribution Services) of China's GATS Schedule was flawed and ignored the logic of China's Schedule. The Panel appeared to take the view that, had China's relevant entries under "Audiovisual Services" been intended to cover exclusively audiovisual products in physical form, they would have been inserted under "Distribution Services", where the distribution of physical goods is generally covered. Yet, as China explained to the Panel, China's GATS Schedule was structured so as to group subclasses of services relating to audiovisual products under sector 2.D because of their audiovisual content, thereby enabling China to include limitations relating to content review for all products under that specific sector. Indeed, in China's view, the Panel itself seems to have acknowledged this logic when

46. China submits that the Panel's analysis of object and purpose was flawed because the Panel failed to take account of the existence of several alternative meanings of "Sound recording distribution services". The Panel failed to identify properly the object and purpose of the treaty relevant to the ordinary meaning espoused by China. The Panel failed, in particular, to take account of important principles that would have provided relevant guidance in its interpretation, namely, following the positive-list principle, the reaching of a balance of concessions, and the principle of

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(b) Article 32 of the Vienna Convention

49. China contends that the Panel's approach to Article 32 of the Vienna Conventioof the

in 1999 does not, as such, suggest any intention on the part of China to undertake a specific commitment on these services.

52. In the light of the above, China claims that the Panel failed to apply properly the customary rules of treaty interpretation codified in Article 32 of the Vienna Convention, acted inconsistently with

Panel properly found that these provisions of the Chinese measures relating to films for theatrical release "either directly regulate who may engage in importing of 'hard-copy cinematographic films' or necessarily affect who may engage in importing of such goods."[108]

55. The United States maintains that China's arguments on appeal "are premised on an artificial dichotomy between film as mere content (which China contends is not a good) and the physical carrier on which content may be embedded (which China views as a good)."[109] However, the United States emphasizes that its claim in this dispute concerns measures regulating the importation of an integrated product—a film for theatrical release—which consists of a carrier medium containing content. The United States argues that, contrary to China's assertion that the United States shifted the focus of its claim from "films for theatrical release" to "hard-copy cinematographic films", the good subject to the United States' claim—hard-copy cinematographic film used for projecting motion pictures—has always been a tangible good.

56. The United States highlights that China stated before the Panel that "only entities designated by [China's State Administration on Radio, Film and Television] SARFT can import foreign films for public show".[110] China further submitted that, "[i]f the importation of such foreign motion picture requires importation of exposed and developed cinematographic film containing such motion picture, the importation entity will import such cinematographic film."[111] In the United States' view, these statements prove that China's measures affect the importation of a good and that they are inconsistent with China's trading rights commitments due to their restrictions on who may import the good. Moreover, arguing that the measures are focused on content and not on the importation of hard-copy cinematographic films amounts to asserting that goods containing content should not be treated as goods. Such logic would imply that measures regulating books, which also contain content, would

material (i.e., physical medium) on which the film is printed, or the film stock."[113]

provide the service in question"[120], and argues that China concedes in this statement that films for theatrical release are goods.

60. Finally, the United States submits that the Panel's finding on the applicability of China's trading rights commitments to the measures concerning films for theatrical release would not undermine China's right to conduct content review. The United States stresses that China has not invoked Article XX(a) of the GATT 1994 as a defence with respect to the United States' claims that the measures concerning films for theatrical release are inconsistent with China's trading rights commitments. Moreover, even if China had invoked such a defence before the Panel, it would have failed because the restriction on who may import films does not contribute to the protection of public morals in China. The United States emphasizes that it has not challenged in this dispute China's right to prohibit the importation of specific goods that do not pass the content review, and thus this right is not being undermined. The United States argues that granting trading rights to all enterprises would not prevent China from barring the importation of specific products carrying prohibited content.

(b) Article 5 of the 2001 Audiovisual Products Regulation and Article 7 of the Audiovisual Products Importation Rule

61. The United States requests the Appellate Body to uphold the Panel's findings that Article 5 of the 2001 Audiovisual Products Regulation and Article 7 of the Audiovisual Products Importation Rule are subject to, and inconsistent with, China's obligation to grant in a non-discretionary manner the right to trade under paragraph 1.2 of China's Accession Protocol and paragraph 84(b) of China's Accession Working Party Report.

62. The United States recalls that the Panel rejected China's argument that the measures concerning unfinished audiovisual products are not subject to China's obligation to grant in a non-discretionary manner the right to trade. On appeal, China dos not repeat the arguments that it made before the Panel—that the measures concerning unfinished audiovisual products do not regulate trade in goods, but rather regulate trade in services. Rather, the United States notes, China merely asserts that the Panel's analysis of the 2001 Audiovisual Products Regulation and the Audiovisual Products Importation Rule is in error to the extent it incorporates the analysis related to films for theatrical release.

[120]United States' appellee's submission, para. 135 (quoting China's appellant's submission, para. 242).

63. The United States underlines that, as the Panel also noted, unfinished audiovisual products are classified under both the 2007 Harmonized System[121] and China's own Schedule of Concessions for goods.[122] This supports the Panel's finding that unfinished audiovisual products are goods. The Panel rightly found that Article 5 of the 2001 Audiovisual Products Regulation would necessarily affect

misrepresent China's argument relating to the cost of content review. By stating that, in China's view, privately owned enterprises cannot be expected to pay for performing a public interest function[124], the Panel fully captured China's argument. The Panel further noted that non-State-owned publication import entities could be expected to face cost-based incentives related to content review and respond to dissuasive sanctions just as State-owned enterprises do under the current Chinese measures, and

(b) The Exclusion of Foreign-Invested Enterprises

68. The United States requests the Appellate Body to uphold the Panel's findings that the provisions[130] prohibiting foreign-invested enterprises from engaging in the importation of the relevant products do not make a material contribution to the protection of public morals in China. The United States disagrees with China that the Panel's findings concerning the exclusion of foreign-invested enterprises from importing are "by necessary implication"[131] in error because the Panel relied on its finding with respect to the State-ownership requirement to conclude that the provisions excluding foreign-invested enterprises from importing do not contribute to the protection of public morals in China. Rather, according to the United States, because the Panel's analysis and finding set out in relation to the State-ownership requirement were correct, and since the Panel's reasoning was based on a necessary implication from that finding, the Panel's analysis of China's measures excluding foreign-invested enterprises was also correct.

69. Regarding China's argument that foreign-invested enterprises "may not have" the required understanding and knowledge of the applicable standards of public morals to ensure the level of protection sought by China, the United States asserts that it is not clear that China presented this argument to the Panel. In addition, the United States argues that China's concern that such enterprises "may not have" certain qualifications does not logically lead to the conclusion that these enterprises do not or could not have these qualifications. Regarding China's allegation that the Panel's finding on the exclusion of foreign-invested enterprises contradicts the finding made earlier by the Panel—that requiring qualified review personnel contributes materially to the protection of public morals in China—the United States contends that there is no contradiction because China provides no reason to believe that foreign-invested enterprises would be unable to hire such personnel. The United States adds that the Panel found, instead, in its analysis of the State-ownership requirement, that foreign-invested enterprises could attract qualified personnel.[132]

75. In addition, the United States asserts that the proposed alternative would be essentially the same as the one described by the wholly State-owned China National Publications Import and Export (Group) Corporation (the "CNPIEC") in its 2006 report on operations. The fact that the CNPIEC has implemented such a system serves to rebut China's argument that implementing such a system would raise substantial technical difficulties for the Chinese Government.[141] The United States acknowledges that the number of publications to be reviewed by the Government would increase under the suggested alternative. However, the United States maintains that import statistics for audiovisual products, for which the Chinese Government conducts content review pursuant to Article 28 of the 2001 Audiovisual Products Regulation, demonstrate that Chinese authorities are able to perform content review of a large number of publications.[142]

(e) Completion of the Analysis

76. The United States submits that the Appellate Body should reject China's request to complete the analysis. China's request is conditioned upon the Appellate Body finding that China's measures are "necessary" within the meaning of Article XX(a) of the GATT 1994, which the United States has argued that the Appellate Body should not do.

77. In addition, the United States emphasizes that China bears the burden of proof with respect to each of the three issues in respect of which it requests completion of the analysis: (i) whether the other alternative measures proposed by the United States are "genuine" and "reasonably available"[143]; (ii) whether China's measures satisfy the requirements of the chapeau to Article XX of the GATT 1994; and (iii) whether Article XX(a) is available to China as a defence to an inconsistency with its obligation to grant the right to trade under its Accession Protocol. Although China refers to its arguments before the Panel, it has not met this burden because it has not identified, for any of those three issues, factual findings by the Panel or undisputed facts that would enable the Appellate Body to complete the analysis. Rather, China has left to the Appellate Body "the entire burden"[144] of identifying the means to complete the analysis, and may have placed the United States in the position of having to respond for the first time to the asserted factual basis for completion of the analysis during the oral hearing in the appeal. Thus, contends the United States, the Appellate Body should not complete the analysis on any of these issues.

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3. The Scope of China's GATS Schedule Entry on "Sound Recording Distribution Services"

78. The United States requests the Appellate Body to uphold the Panel's finding that China's commitment on "Sound recording distribution services" in sector 2.D of its GATS Schedule includes the electronic distribution of sound recordings. This finding led the Panel to hold that the relevant

terms in the abstract, but it examined which of the meanings was to be attributed to the relevant term in China's GATS Schedule. China's arguments do not establish that the Panel erred in its analysis of ordinary meaning. To the contrary, asserts the United States, the Panel record fully supports the Panel's conclusion that the ordinary meaning of the term "Sound recording distribution services" in China's GATS Schedule encompasses the distribution of sound recordings through both physical and non-physical media.

81. The United States also argues that the Panel correctly concluded that the relevant context supported the Panel's interpretation of the ordinary meaning of "Sound recording distribution services" as covering the distribution of sound recordings through both physical and non-physical media. The United States emphasizes that, contrary to China's assertions, the Panel did not rely on any element of the context as "conclusive", and the Panel did not "rule out"[149] the possibility that China could have scheduled commitments covering only physical products.

82. Regarding the interpretation of the term "distribution", the United States argues that the Panel correctly found that this term encompasses the distribution of intangible products. As the GATS itself makes clear, the term "distribution" is not limited to the distribution of goods or tangible objects. Article XXVIII(b) of the GATS defines the supply of a service as including its "distribution", and services are not tangible objects. The United States adds that, in this part of its analysis, the Panel specifically examined, and properly rejected, China's argument that the meaning of "distribution" should be limited to the distribution of physical goods.

83. The United States agrees with the Panel's analysis of the sector heading "Audiovisual Services" in China's GATS Schedule, and in particular with its observation that this heading does not limit entries falling within its scope to services relating only to physical products. Regarding the entry "Videos (...) distribution services" in China GATS Schedule, the United States disagrees with China that the Panel should have relied upon the definition of the term "video" offered by dictionaries edited at the time of the conclusion of China's accession negotiations. Such an argument is untenable for the purpose of determining whether a particular technological means for supplying a service is covered by a Member's GATS commitments.[150] The United States recalls its argument before the Panel that the GATS is technologically neutral in the sense that it does not contain any provisions that distinguish

[149]United States' appellee's submission, footnote 119 to para. 87 (quoting China's appellant's submission, para. 134).

[150]The United States adds that, following China's logic, a commitment on "videos" undertaken in 2002 would not encompass DVDs, even though DVDs had alrea

between the different technological means through which a service may be supplied, as well as the observation by the panel in US – Gambling that a market access commitment entails that other Members' service suppliers enjoy the right to supply a service through all means of delivery unless otherwise specified in the relevant Member's Schedule.[151] The United States submits that, if China had wanted to exclude the distribution of sound recordings through electronic means from its commitment on "Sound recording distribution services", it could have explicitly done so in its Schedule. Regarding the use of the plural "videos" instead of the singular "video" in China's GATS Schedule, the United States points out that China's analysis appears to flow from a flawed premise, because the relevant entry in the Services Sectoral Classification List is "video tape production and distribution services", and the word "video" in this entry is used as an adjective rather than as a noun. The United States adds that many nouns, such as "idea", can refer to intangible concepts that are countable, whether they are referred to in the singular or in the plural form.

84. The United States claims that the Panel correctly found that the relationship between sector 4 (Distribution Services) and sector 2.D (Audiovisual Services) in China's GATS Schedule supports the conclusion that sector 2.D includes the distribution of audiovisual products in non-physical form. [illegible]

86. Regarding the object and purpose of the GATS, the United States claims that none of the arguments presented by China provides any guidance as to whether China undertook a commitment on the electronic distribution of sound recordings. The preamble of the GATS cannot be read as requiring an interpreter to depart from the customary rules of treaty interpretation codified in the Vienna Convention, as this would not be consistent with Article 3.2 of the DSU. Moreover, the

89. The United States observes that, in relation to the Panel's finding that Members were aware of the technical and commercial viability of the electronic distribution of sound recordings at the time of China's WTO accession, China has shifted its argument to state that "this fact alone does not establish that they intended to make a commitment on such services."[152] China's assertions that the distribution of electronic sound recordings was not allowed in China at the time of its accession, and that China did not adopt measures regulating the electronic distribution of sound recordings until 2003, were not "ignored"[153]

of the

reasonably available alternatives", introduce "confusion".[162] For the United States, this is because the term "necessary" appears to have been used in a different sense in the intermediate finding than in the ultimate finding that the State plan requirement was not "necessary" given that a reasonably available alternative measure had been identified.

93. As for the substance of the intermediate finding made by the Panel, the United States is of the view that the Panel erred in finding that, in the absence of reasonably available alternatives, the State plan requirement can be characterized as "necessary" to protect public morals in China. The United States disputes, in particular, that the State plan requirement makes a material contribution to the protection of public morals in China. Referring to the Appellate Body reports in US – Gambling and Korea – Various Measures on Beef, the United States maintains that the State plan requirement is not significantly closer to the pole of "indispensable" than to the opposite pole of "simply making a contribution".[163]

94. The United States highlights multiple problems with the Panel's analysis of the State plan requirement. First, the Panel did not actually examine the State plan, because China did not submit the State plan, nor did it provide any information about the content of the State plan, or any past or future plan. Instead, China simply stated that the State plan "concern[s] the quantity, geographical and product coverage of publication import entities".[164] The absence of information about the content of the State plan meant that the Panel was precluded from assessing the actual State plan and its impact, and was reduced to speaking in generalities. The United States emphasizes that the Panel could not have properly weighed the contribution—if any—that the State plan made to achieving China's objectives on the basis of the general assertions made by China.

95. Secondly, the United States contends that, because China did not provide the requested information, the Panel could not know what China meant when it asserted that there was a "limited number"[165] of publication import entities, nor what rationale was used to justify such limit. The United States also points to evidence that was before the Panel showing that, in 2006, there were 806 publishers of domestic books and electronic publications, almost 20 times more than the 42 approved State-owned import entities in China.[166]

content review, it was unclear how China could argue that a large number of content reviewers would undermine the consistency or quality of content review or affect whether the performance of that review met the standard set by China.

96. Thirdly, the United States submits that the Panel failed to recognize the contradiction between the requirement that publication import entities have branches in a large number of customs areas and the rationale given for limiting the number of importing entities. Other evidence before the Panel demonstrates that, while China appears to limit the number of publication import entities, it simultaneously expands the number and location of actual content reviewers beyond such limited numbers by requiring import entities to have branches that can cover many locations. This, according to the United States, undermines the alleged benefits that the Panel presumed to flow from any limit the State plan may place on the number of import entities, such as easier interaction between Government authorities and the approved import entities to enhance consistency, and providing more time to conduct annual inspections.

97. Fourthly, the United States contends that the Panel did not properly take into account the role of the GAPP in content review. The Panel stated that a limitation on the number of publication import entities would allow the GAPP to devote more time to conduct its annual *ex post* controls of publication import entities' compliance with content review requirements. In the absence of information regarding the nature of these annual inspections, however, it is, according to the United States, impossible to assess how much of an additional burden—if any—would be caused by an increase in the number of importing entities. For example, if the annual review involved actual review of the imported publications, the workload for the GAPP would be a function of the number of titles imported rather than of the number of publication import entities. The United States adds that, because each branch of a publication import entity submits a report to the GAPP, the workload is at least as much a function of the number of branches as it is a function of the number of entities approved as publication import entities.

98. Finally, the United States takes issue with certain Panel statements regarding the restrictive impact of the State plan requirement. In addition to the fact that the Panel could not have assessed such restrictive impact in the absence of specific information on the State plan, the Panel's statement that this requirement does not *a priori* exclude particular types of enterprises in China from establishing an import entity is unclear. The State plan requirement might not exclude particular types of enterprises from establishing an import entity, but it nevertheless is intended to limit the number of publication import entities and thereby constitutes a restriction.

99.

102.

104. With respect to the United States' argument concerning the relationship between the numerical limitation on publication import entities and the requirement for an extensive geographical presence, China submits that this argument is premised on a misrepresentation of the way in which inspections are carried out by the GAPP. According to China, it is the import entities themselves, rather than the branches of the import entities, that are subject to annual review by the GAPP. The various branches of import entities are obliged to submit inspection materials to the administration of press and publication in their locality on an annual basis, and this local authority then issues an examination opinion. Each branch must then submit its annual summary report and the local authority's examination opinion to its parent company, which in turn submits them to the GAPP for annual inspection. China also points to evidence it submitted demonstrating that, in cases of non-compliance, it is the import entity itself, rather than any of its branches, that is subject to sanction under applicable law.[176]

105. Regarding the United States' argument that the total workload for the GAPP may be a function of the number of titles imported rather than the number of publication import entities, China contends that this argument is based on a misrepresentation of the character of the GAPP's annual

E. Arguments of the Third Participants

restrictiveness of that measure".[182] Observing that WTO Members rely heavily on previous panel and Appellate Body reports in relation to Article XX of the GATT 1994 in order to defend their measures

who may import or export goods "where this is incidental (or necessary) to the regulation of the relevant goods".[186] The Panel in effect found that none of the measures at issue correspond to "core" measures regulating trade, but left open the question of whether the measures are consequential, incidental, and/or necessary to measures regulating trade in the relevant goods, that is, to measures prohibiting certain content or requiring content review prior to importation. Because the availability of Article XX(a) depends on the answer to this question, the European Communities considers that the Panel erred in law by examining China's Article XX(a) defence on an *arguendo* basis. A detailed substantive analysis under Article XX(a) should follow, and depend upon, a positive finding that Article XX(a) applies—yet the Panel made no such finding. Before undertaking its Article XX(a) analysis, therefore, the Panel should first have shown that "the measures found to be inconsistent with [China's] trading rights commitments are incidental (in the sense of 'necessary') to the regulation of the relevant goods".[187] Moreover, the Panel's *arguendo* approach was not helpful for effectively resolving the dispute between the parties because China does not know whether it can adopt "less GATT-inconsistent (less restrictive) alternative measures, such as those pointed out by the United States"[188] without running the risk of a renewed and successful WTO challenge of such measures.

112. With respect to the analysis of the "necessity" of the State-ownership requirement, the European Communities does not believe that the Panel misrepresented China's arguments, erred in law, or failed to make an objective assessment of the matter before it, in violation of Article 11 of the DSU. The European Communities does not share China's position that the costs relating to a "public policy function"[189] cannot be imposed on privately owned enterprises, and points to the example of marketing approval procedures for pharmaceutical products or other highly regulated goods, the costs of which are borne by private enterprises and then passed on to consumers. Privately owned enterprises could also perform the task of content review if properly trained staff were employed. Even if the activity of content review must be carried out by State entities, it does not follow that prohibiting the importation of such products by privately owned enterprises is necessary for the protection of public morals. Rather, explains the European Communities, privately owned enterprises could, before importing or marketing the products, submit the products to be imported to the State entity responsible for carrying out the content review, and pay that entity a fee.

113. Concerning China's argument that the Panel erred in interpreting Article XX(a) of the GATT 1994 as requiring the Panel to also weigh the restrictive impact that the measures at issue may have "on those wishing to engage in importing", in particular on their right to trade, the European

[186]European Communities' third participant's submission, para. 8 (referring to Panel Report, para. 7.276).
[187]European Communities' third participant's submission, para. 11.
[188]European Communities' third participant's submission, para. 12.
[189]European Communities' third participant's submission, para. 16.

evidence or information".[196] China did not sustain its burden of demonstrating why it is necessary for the protection of public morals that all entities—other than those that are wholly State-owned—be excluded from importing publications; nor did China demonstrate why private traders would not and could not meet the importation requirements of the Chinese Government. With respect to China's argument that it is "necessary" for importers of publications to be wholly State-owned, because only wholly State-owned enterprises can understand the criteria for content review and applicable standards of public morals in China, Japan points to Article X:1 of the GATT 1994, which requires not only that measures be published, but that they be published "in such a manner as to enable governments and traders to become acquainted with them." This requirement of transparency shows that China may not fail to publish or disclose regulatory criteria for a product and then channel all imports of that product through wholly State-owned enterprises that the Government has fully informed regarding the actual detailed criteria applied to the product. Furthermore, Japan argues that China failed to explain why alternative measures are not reasonably available, and that China does not raise new arguments on appeal that would justify a reversal of the Panel's finding in this regard.

120. Japan supports the Panel's reading of China's GATS Schedule commitments, and characterizes as "troubling"[197] the notion that new services are necessarily unbound. Given that China's Schedule refers to the 1991 United Nations Provisional Central Product Classification (the "CPC"), which is exhaustive, the only relevant questions are: (i) where in the CPC a service is covered; and (ii) whether a new service falls within the scope of an existing commitment. Japan emphasizes that China's GATS Schedule entry on "Sound recording distribution services" does not specify any limitation on the means by which distribution may be carried out. The Panel correctly found that this commitment includes the electronic distribution of sound recordings, and properly interpreted the meaning of this entry through recourse to Articles 31 and 32 of the Vienna Convention. Japan adds that use of the in dubio mitius principle would be "wholly inappropriate in interpreting an individually bargained commitment".[198] h.3303 269

discussion of factual, rather than legal, issues. Korea cautions that the parties should not be given a second chance to discuss the facts, but adds that the Appellate Body should closely scrutinize the Panel's findings so as to determine whether the Panel complied with its duties under Article 11 of the DSU.

122. As regards China's defence under Article XX(a) of the GATT 1994 and the Panel's intermediate finding concerning the necessity of the State plan requirement, Korea recalls that China bore the burden of demonstrating that the contested measure satisfies the requirements of Article XX(a). Even if the State plan was not available in written form during the Panel proceedings, non-written evidence, such as a Government official's explanation of the content and implementation of the plan, could have been used to establish a *prima facie* case. Korea finds it difficult to understand how the Panel could have evaluated the effect of the State plan without actually reviewing it. According to Korea, to the extent that the Panel erroneously applied the *prima facie* threshold with respect to the State plan requirement, the Panel may have failed to properly discharge its duties under Article 11 of the DSU.

123. In Korea's view, the Panel's analysis of China's GATS Schedule entry "Sound recording distribution services" was done in an extensive and comprehensive manner in accordance with the interpretative principles of the *Vienna Convention* and relevant Appellate Body jurisprudence, notably, the "holistic approach"[199] set out in *EC – Chicken Cuts*. In Korea's view, Article 11 of the DSU requires a panel to interpret a particular term to the extent that the interpretation of the term is essential to resolve the dispute. In this case, the Panel extensively explained its step-by-step approach to the interpretation of the term "Sound recording distribution services". The Panel was certainly aware of the existence of different definitions, but it appears to have made a specific choice that it believed was the most appropriate to resolve the dispute. The Panel also reviewed the context and the object and purpose of the GATS so as to confirm the dictionary meaning of the term and checked the relevant preparatory work including the circumstances of the conclusion of the treaty. For all of these reasons, Korea believes that the Panel correctly considered all relevant elements of interpretation separately and collectively before reaching its conclusion and did not, as China portrays it, engage in a "cherry-picking"[200] exercise.

[199]Korea's third participant's submission, paras. 21 and 22 (referring to Appellate Body Report, *EC – Chicken Cuts*, para. 176).
[200]

III. Issues Raised in This Appeal

124. The following issues are raised in this appeal:

(a) Whether the Panel erred in finding that China's measures pertaining to films for theatrical release and unfinished audiovisual products are subject to China's trading rights commitments and, more specifically:

(i) whether the Panel erred in finding that Article 30 of the Film Regulation and Article 16 of the Film Enterprise Rule are subject to China's trading rights commitments as set out in paragraphs 1.2 and 5.1 of China's Accession Protocol and paragraphs 83(d) and 84(a) and (b) of China's Accession Working Party Report, and whether, in making this finding, the Panel failed to make an objective assessment of the facts, in violation of Article 11 of the DSU;

(ii) whether the Panel erred in finding that Article 5 of the 2001 Audiovisual Products Regulation and Article 7 of the Audiovisual Products Importation Rule are subject to China's obligation to grant in a non-discretionary manner the right to trade, as set out in paragraph 1.2 of China's Accession Protocol and paragraph 84(b) of China's Accession Working Party Report, and whether, in making this finding, the Panel failed to make an objective assessment of the facts, in violation of Article 11 of the DSU;

(b) Whether, by virtue of the introductory clause of paragraph 5.1 of China's Accession Protocol, Article XX(a) of the GATT 1994 may be invoked by China in this dispute as a defence to the violations of its trading rights commitments; and whether, in finding that China had not demonstrated that the provisions[201] that China sought to justify under Article XX(a) of the GATT 1994 are "necessary" to protect public morals:

[201] Articles X:2 and X:3 of the List of Prohibited Foreign Investment Industries in the Catalogue, in conjunction with Articles 3 and 4 of the Foreign Investment Regulation; Article 4 of the Several Opinions; Article 41, and Article 42 in conjunction with Article 41, of the Publications Regulation; Article 27 of the 2001 Audiovisual Products Regulation; Article 8 of the Audiovisual Products Importation Rule; and Article 21 of the Audiovisual (Sub-)Distribution Rule

(i) the Panel erred in law, or failed to make an objective assessment of the matter before it, in violation of Article 11 of the DSU, in its analysis of the

IV. Overview of the Measures at Issue and the Panel's Findings

A. Introduction

125. This dispute concerns measures of China relating to the importation into China, and/or distribution within China, of certain products consisting of reading materials, audiovisual products, sound recordings, and films for theatrical release.

126. The United States alleged before the Panel that the measures at issue: (i) fail to grant the right to trade[204] to enterprises in China and foreign enterprises and individuals[205], in violation of China's obligations under the Protocol on the Accession of the People's Republic of China to the WTO ("China's Accession Protocol")[206] and the Report of the Working Party on the Accession of China to the WTO ("China's Accession Working Party Report")[207]; (ii) deny market access to, or discriminate against, foreign service suppliers in breach of China's scheduled commitments under Articles XVI and XVII, respectively, of the GATS; and/or (iii) discriminate against imported products, as compared to like domestic products, in violation of Article III:4 of the GATT 1994.

127. China asked the Panel to reject the claims of the United States on several grounds, including that some of China's measures are not subject to the obligations invoked by the United States, and that certain other measures are justified under Article XX(a) of the GATT 1994 because they form part of a content review system that prohibits the importation of cultural goods with content that could have a negative impact on public morals in China.[208]

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[204]The Panel's treatment of China's commitments in respect of the right to trade—that is, the right to import and export goods—is further discussed infra, in subsection IV.B.

[205]The Panel determined that each of the measures it found to be inconsistent with China's trading rights commitments applies in respect of foreign-invested enterprises in China. The term "foreign-invested enterprise" refers to one of several forms of investment projects regulated in China. (See infra, para. 142 and footnote 245 thereto) With the exception of its findings in respect of Article 30 of the Film Regulation and Article 16 of the Film Enterprise Rule (see infra, footnote 298), the Panel found that the United States had not established a claim that the challenged measures apply in respect of foreign enterprises not invested or registered in China, or foreign individuals.

[206]WT/L/432.

[207]WT/ACC/CHN/49 and WT/ACC/CHN/49/Corr.1.

[208]China also raised several preliminary objections, asserting that claims in respect of certain of China's measures were not within the Panel's terms of reference, and that certain instruments challenged by the United States are not measures that could be examined in WTO dispute settlement.

130. We note that each good or service at issue in this dispute and its related importation and distribution activities are regulated by several of China's measures. The relevant provisions of three measures examined by the Panel—that is, China's foreign investment regulations (the Foreign Investment Regulation), the Catalogue, and the Several Opinions—apply to all of the goods and services at issue in this dispute, whereas the remaining measures contain provisions that apply to only one such category of goods and services. We also note that, in respect of 15 of the challenged measures, the Panel found one or several violations of China's WTO obligations in respect of: (i) trading rights under China's Accession Protocol and Working Party Report; (ii) services under Articles XVI and XVII of the GATS; and/or (iii) goods under Article III:4 of the GATT 1994.[212]

131. The following chart illustrates the extent to which the challenged measures, the goods and services they regulate, and the relevant WTO obligations overlap. The chart: (i) lists each of the measures for which the Panel found a violation of China's WTO obligations; (ii) identifies the goods and services to which each measure applies (insofar as the goods and/or services relate to a finding of violation by the Panel); and (iii) indicates whether the Panel's findings of violation relate to China's trading rights commitments, GATS obligations, and/or GATT 1994 obligations. In addition, the chart highlights that the appeal by China and the other appeal by the United States implicate 11 of the measures for which the Panel found an inconsistency with China's WTO obligations.[213]

[212]The Panel found that the Film Distribution and Exhibition Rules was outside the Panel's terms of reference in respect of claims concerning China's trading rights commitments, and that the United States had not otherwise established a violation of China's WTO obligations in respect of the Film Distribution and Exhibition Rule and the Internet Culture Rule. (Panel Report, paras. 8.1.1(a)(i), 8.2.3(b)(ii), 8.2.4(b)(i), and 8.2.4(c)(i); see also paras. 7.60, 7.1305, 7.1654, and 7.1692)

[213]For each of the 11 measures at issue in this appeal, the specific provisions found by the Panel to be inconsistent with China's obligations under the covered agreements are set out in Annex III to this Report.

Measures found by the Panel to be inconsistent with China's WTO obligations (bold indicates at issue in this appeal)	**Reading materials**	**Audiovisual products**[214]	**Films for theatrical release**[215]	**Electronic distribution of sound recordings**[216]
Foreign Investment Regulation				
Catalogue				
Several Opinions				
Publications Regulation[217]				
Imported Publications Subscription Rule				

132. Before summarizing relevant aspects of the measures at issue and the Panel's findings in respect of specific provisions of these measures, we recall the Panel's interpretation of China's obligations in respect of trading rights, and outlin

would, "in appropriate cases, permit China to restrict or limit, in a WTO-consistent manner, the class of entities or individuals who may engage in importing or exporting the good in question."[227] The Panel also addressed the specific language in paragraph 84(b) of China's Accession Working Party Report and considered that China's right to impose "WTO-consistent requirements related to importing and exporting, such as those concerning import licensing, TBT and SPS" contains, by implication, a right to impose incidental WTO-consistent requirements relating to importing and exporting.[228]

137. Turning to paragraphs 83(d) and 84(a) of China's Accession Working Party Report, the Panel considered that the function of these paragraphs is to confirm the obligation to grant the right to trade to all enterprises in China.[229] The Panel therefore took the view that the obligation set out in these paragraphs should also be understood as being without prejudice to China's right to regulate trade in a WTO-consistent manner.[230]

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[227]Panel Report, para. 7.277.

[228]Panel Report, para. 7.319. Paragraph 84(b) of China's Accession Working Party Report provides:

> With respect to the grant of trading rights to foreign enterprises and individuals, including sole proprietorships of other WTO members, the representative of China confirmed that such rights would be granted in a non-discriminatory and non-discretionary way. He further confirmed that any requirements for obtaining trading rights would be for customs and fiscal purposes only and would not constitute a barrier to trade. The representative of China emphasized that foreign enterprises and individuals with trading rights had to comply with all WTO-consistent requirements related to importing and exporting, such as those concerning import licensing, TBT and SPS, but confirmed that requirements relating to minimum capital and prior experience would not apply.

[229]Paragraph 83(d) of China's Accession Working Party Report provides:

> The representative of China also confirmed that within three years after accession, all enterprises in China would be granted the right to trade. Foreign-invested enterprises would not be required to establish in a particular form or as a separate entity to engage in importing and exporting

C. Aspects of China's Regulatory Regime for the Relevant Products

141. China explained before the Panel that the United States challenged a series of measures that establish a content review mechanism and a system for the selection of import entities for specific types of goods that China considers to be "cultural goods".[237] China emphasized particular characteristics of cultural goods, including the impact they can have on societal and individual morals.[238] It is for this reason, according to China, that it has adopted a regulatory regime under which the importation of reading materials, audiovisual products, and films for theatrical release containing specific types of prohibited content is not permitted.[239] To this end, China explained, its existing regulatory regime defines the content that China considers to have a negative impact on public morals and, in order to ensure that such content is not imported into China, establishes a mechanism for content review of relevant products that is based upon the selection of import entities.[240] China submitted that, because these import entities play an essential role in the content review process[241], and because, in the case of imported products, it is critical that content review be carried out at the border[242], only "approved" and/or "designated" import entities are authorized to import the relevant products. Both the extent of the participation of an import entity in the content review process and the means by which an entity is "approved" or "designated" to engage in

publishers of cultural goods also face limitations on the publication of prohibited content, and content review requirements.[244]

D. Measures Pertaining to All Goods and Services in This Dispute

142. We now turn to summarize the relevant aspects of the measures at issue, beginning with the three measures enacted or approved by the State Council that regulate foreign investment in China. As noted, these measures apply to all of the goods and services at issue in this dispute. The Foreign Investment Regulations was enacted by the State Council in 2002, and specifies that foreign investment in China may take the form of a foreign-invested enterprise or project, a Chinese-foreign equity joint venture, or a Chinese-foreign contractual joint venture. Article 3 provides the authority for a separate measure, the Catalogue, which is to serve as "the basis for

recordings and films for theatrical release).[247] Explaining that it understood "internet culture operation" as including the electronic distribution of

entities.[254] For electronic publications, samples are brought into China through temporary importation procedures and submitted to the GAPP for final content review. Once an electronic publication passes content review, importation approval is granted and the publication import entity presents the approval documents to customs at the time of importation.[255]

1. Measures Challenged as Inconsistent with China's Trading Rights Commitments

146. The Panel examined whether various measures challenged by the United States prohibit or otherwise affect the ability of foreign-invested enterprises to import reading materials into China. Having concluded that certain provisions of China's foreign investment regulations (the Foreign

2. Measures Challenged under the GATS and the GATT 1994

151. The Panel also made findings on various United States' claims that provisions of China's measures regulating reading materials are inconsistent with China's national treatment obligations under the GATS and the GATT 1994. None of these findings is appealed. The Panel found that certain provisions of China's measures regulating foreign investment (the Foreign Investment Regulation, the Catalogue, and the Several Opinions), as well as the 1997 Electronic Publications Regulation, violate China's national treatment commitments under Article XVII of the GATS because they prohibit foreign-invested enterprises, but not like domestic enterprises, from engaging in certain types of distribution of reading materials in China (for example, the "master distribution"[273] of books, newspapers, and periodicals; and the "master wholesale"[274] of electronic publications).[275] The Panel also found that provisions of the Publications Regulation and several departmental rules issued by the GAPP—the Imported Publications Subscription Rule, the

application process or criteria for the MOC to designate entities that may import "finished"[285] audiovisual products, Article 27 of the 2001 Audiovisual Products Regulation and Article 8 of the Audiovisual Products Importation Rule violate China's obligation, under its Accession Protocol and Working Party Report, to grant in a non-discretionary manner the right to trade.[286]

156. China does not appeal the above Panel findings of violation concerning China's regulations and rules as they apply to the importation of audiovisual products. China does appeal, however, various elements of the Panel's analysis of China's defence of these measures under Article XX(a) of the GATT 1994, as well as its ultimate finding, that the measures are not "necessary" to protect public morals within the meaning of Article XX(a).[287] As explained above, the Panel analyzed certain

Panel's findings that the provisions in these measures are inconsistent with China's trading rights commitments.[291]

2. Measures Challenged under the GATS

158. The Panel also made findings on various United States' claims that provisions of China's measures regulating audiovisual products are inconsistent with China's market access and national treatment commitments under Articles XVI and XVII, respectively, of the GATS. None of these findings are appealed. Provisions in the List of Restricted Foreign Investment Industries in the Catalogue, in conjunction with the Foreign Investment Regulations, as well as of the Audiovisual (Sub-)Distribution Rule, limit foreign participation in Chinese-foreign contractual joint ventures to no more than 49 per cent. The Panel found that these provisions result in China acting inconsistently with its market access commitment under Article XVI:2(f) of the GATS, not to impose, unless otherwise scheduled, limitations on the participat

regulations (the Foreign Investment Regulations, the Catalogue, and the Several Opinions)[295] prohibit foreign-invested enterprises from engaging in the importation of films for theatrical release, the Panel found the provisions inconsistent with China's obligation to grant the right to trade under China's Accession Protocol and Working Party Report.[296] These findings are not appealed.

161. The Panel also examined Article 30 of the Film Regulation and Article 16 of the Film Enterprise Rules, which require that the business of importing films shall be conducted by film import enterprises that are designated or approved by the SARFT.[297] The Panel determined that these provisions prohibit all enterprises in China, includ2dr

H. Measures Pertaining to the Electronic Distribution of Sound Recordings

163. The Panel examined whether the measures of China challenged by the United States prohibit foreign-invested enterprises from distributing sound recordings through electronic means, such as the Internet. The Panel reviewed Article X:7 of the List of Prohibited Foreign Investment Industries in the Catalogue, in conjunction with Articles 3 and 4 of the Foreign Investment Regulations, Article 4 of the Several Opinions, as well as provisions in two administrative documents—Article II of the Circular on Internet Culture and Article 8 of the Network Music Opinions. The Panel determined that these provisions prohibit foreign-invested enterprises from engaging in the electronic distribution of sound recordings, while like domestic service suppliers are not similarly prohibited. Having also concluded that China's scheduled national treatment commitments cover the distribution of sound recordings in electronic form, the Panel found that these provisions are inconsistent with Article XVII of the GATS.[302]

164. China challenges these findings on appeal. China disputes the Panel's conclusion that the entry "Sound recording distribution services" in

Article XX(a). Finally, China appeals the Panel's finding that the entry "Sound recording distribution services" in China's GATS Schedule covers the electronic distribution of sound recordings, and therefore seeks reversal of the Panel's finding that certain provisions of the measures regulating such distribution are inconsistent with China's scheduled national treatment commitments under Article XVII of the GATS.

V. The Applicability of China's Trading Rights Commitments to Measures Pertaining to Films for Theatrical Release and Unfinished Audiovisual Products

A. The Applicability of China's Trading Rights Commitments to Article 30 of the Film Regulation and Article 16 of the Film Enterprise Rule

166. With respect to China's measures pertaining to films for theatrical release, the Panel found that Article 30 of the Film Regulation and Article 16 of the Film Enterprise Rule[304]:

(a) result in China acting inconsistently with paragraph 84(b) of China's Accession Working Party Report and, hence, paragraph 1.2 of China's Accession Protocol; and

(b) result in China acting inconsistently with paragraph 5.1 of its Accession Protocol as well as paragraphs 83(d) and 84(a) of China's Accession Working Party Report and, hence, paragraph 1.2 of China's Accession Protocol.[305]

167. Paragraph 5.1 of China's Accession Protocol imposes on China the obligation to ensure that, with the exception of certain goods set out in Annex 2A (which are not at issue in this dispute), "all enterprises in China shall have the right" to import and export all goods "throughout the customs territory of China".[306] Paragraphs 83(d) and 84(a) of China's Accession Working Party Report confirm China's obligation to grant the right to trade.[307] In addition, paragraph 84(b) of China's Accession Wor s]TJ6.6044 07k s(s]TJ05ti)-5]TJ6g07k

168. It is not disputed that, pursuant to the relevant provisions of China's measures pertaining to films for theatrical release, namely, Article 30 of the Film Regulation and Article 16 of the Film Enterprise Rule, only enterprises "designated" or "approved"[309] by the SARFT may engage in the business of importing films into China. The Panel considered that China's measures pertaining to films for theatrical release "necessarily affect" the import of goods.[310] Thus, the Panel found that China had acted inconsistently with paragraphs 1.2 and 5.1 of China's Accession Protocol and paragraphs 83(d) and 84(a) of China's Accession Working Party Report by failing to ensure that all

and because the delivery materials containing the content of films are mere accessories of such

theatres".[331] We are also not persuaded that the Panel somehow relieved the United States of its burden of showing that China's measures are subject to China's trading rights commitments.

2. The Panel's Assessment of China's Measures Pertaining to Films for Theatrical Release

175. We turn now to China's specific allegations of errors regarding the Panel's assessment of Article 30 of the *Film Regulation* and Article 16 of the *Film Enterprise Rule*. To recall, these provisions prohibit any entities other than those designated/approved[332] by the SARFT from conducting the business of importing films. Neither the *Film Regulation* nor the *Film Enterprise Rule* specifies any criteria to be satisfied in order to obtain designation/approval to import. Moreover, the only designated/approved importer is the China Film Import and Export Corporation, which is a Chinese wholly State-owned enterprise.[333]

176. In the light of the similarity of the two provisions at issue and of China's arguments regarding the applicability of its trading rights commitments to them, the Panel found that the reasons that led it to conclude that Article 30 of the *Film Regulation* is subject to China's trading rights commitments also applied, *mutatis mutandis*, to Article 16 of the *Film Enterprise Rule*.[334] On appeal, China presents arguments with respect to the Panel's finding regarding Article 30 of the *Film Regulation*, stating that the same arguments apply, *mutatis mutandis*, to the Panel's findings concerning Article 16 of the *Film Enterprise Rule*.[335] In the following analysis, therefore, we will focus on the Panel's analysis, and China's arguments on appeal, concerning Article 30 of the *Film Regulation*.

177. We recall that a panel's assessment of the meaning and content of a Member's municipal law is subject to appellate review in order to determine whether the panel erred in its finding regarding the consistency of the Member's municipal law with the WTO agreements.[336] For example, in *China – Auto Parts*

Article 17.6 of the DSU places some constraints on the Appellate Body's review of some elements of a panel's analysis of municipal law. Where, for instance, a panel resorts to evidence of how a municipal law has been applied, the opinions of experts, administrative practice, or pronouncements of domestic courts, the panel's findings on such elements are more likely to be factual in nature[338], and the Appellate Body will not lightly interfere with such findings.[339]

178. In this dispute, the issue of whether the Panel correctly characterized Article 30 of the Film Regulation as subject to China's trading rights commitments is a legal issue within the scope of these appellate proceedings. With this in mind, we examine the Panel's assessment of Article 30 of the Film Regulation and the errors alleged by China with regard to such assessment in the following three subsections. We begin with a brief review of the parties' arguments during the Panel proceedings with regard to Article 30 of the Film Regulation and the Panel's analysis and findings on that provision. We then turn to China's specific allegations of error, beginning with China's contention that the Panel erred in assessing the meaning of the Chinese term "Dian Ying" in Article 30 of the Film Regulation. Finally, we examine China's assertion that the Panel failed to establish how Article 30 of the Film Regulation, which, according to China, regulates content and services associated with such content, "necessarily affect[s]"[340] who may import goods.

(a) The Panel's Findings on Article 30 of the Film Regulation

179. Before the Panel, China and the United States each submitted English translations of the measures at issue. In the translations of the Film Regulation submitted by both parties, the term "film" is used in Article 30. China maintained that the term "film" was translated from the Chinese term "Dian Ying" which, in China's view, refers to "motion pictures" or, in other words, the content of "film as an artistic work" to be projected in theatres.[341] China therefore argued that Article 30 regulates who may import the content of films, rather than who may import physical goods. The United States responded that the Chinese term "Dian Ying" could be translated as either "film" or "motion picture", and that, in any event, "the good at issue is film for theatrical release, i.e., a physical carrier medium that has content embedded on it".[342]

180. The Panel sought the advice of the independent translator at the United Nations Office at Nairobi (the "UNON"). Specifically, the Panel asked the independent translator to provide a translation to English of the Chinese term "Dian Ying" in, inter alia, Article 30 of the

[338]Appellate Body Report, US – Corrosion-Resistant Steel Sunset Review, para. 168.
[339]Appellate Body Reports, China – Auto Parts, para. 225.
[340]Panel Report, para. 7.543.
[341]Panel Report, para. 7.530.
[342]Panel Report, para. 7.534.

Film Regulation. In order to assist the translator, the Panel provided the Chinese text of the provision and the arguments by China and the United States regarding the English translation of the term. In response to the Panel's request, the independent translator of the UNON confirmed that the term "film" was a "satisfactor[y]"[343] English translation. Noting that the meaning of this term has a "broad scope"[344], however, the translator went on to state that "there is considerable merit in China's contention that ... the term 'Dian Ying' on its own is intended exclusively to refer to the content of a film (i.e., the artistic work) and not to the material (i.e., the physical medium) on which the film is printed, or the film stock."[345]

181. The Panel did not expressly adopt the independent translator's advice or make its own determination of the meaning of the term "film" ("Dian Ying

182. On this basis, the Panel found that, "if the term 'films' were understood as meaning 'contents that can be commercially exploited by projection in theatres', ... in those cases where relevant content is to be imported on hard-copy cinematographic film, [Article] 30 would necessarily affect who may engage in importing of hard-copy cinematographic films".[351] The Panel added that "[t]his is because only licensed and designated film import entities are allowed to be engaged in the business or activity of importing relevant contents, including in cases where the carrier to be used to bring the contents into China is" hard-copy cinematographic film.[352] Thus, having found that Article 30 would necessarily affect the importation of hard-copy cinematographic films, and given that China did not dispute that this provision restricts who may import films, the Panel found that Article 30 of the Film Regulations is subject to China's trading rights commitments.[353]

(b) The Meaning of the Chinese Term "Dian Ying" in Article 30 of the Film Regulation

183. On appeal, China contends that the Panel's finding that Article 30 would "necessarily affect" who may engage in the importation of a good was in error, because the Panel should have "clearly rule[d] out"[354] "hard-copy cinematographic film" as a possible meaning of the term "film" ("Dian Ying

184. As shown in our above review of the Panel's analysis of Article 30 of the Film Regulation, the Panel's finding that this provision affects who may engage in the import of goods did not hinge on the issue of whether the term "film" ("Dian Ying") refers to hard-copy cinematographic film or to content alone. Rather, the Panel found it unnecessary to determine the meaning of the term because it found that, even assuming, as contended by China, that the term "Dian Ying" in Article 30 refers exclusively to content, this provision "would necessarily affect"[359] the import of a good whenever the content was brought into China via a physical delivery material. Thus, the Panel's finding was made irrespective of the precise meaning of the term "Dian Ying", because it found that Article 30 restricts who may import films, and necessarily affects who may import a good when the content of films is carried by physical, hard-copy cinematographic films. The Panel explicitly stated that it would have reached the same conclusion – that China's trading rights commitments apply to Article 30—even assuming that the term "Dian Ying" had the meaning put forward by China. Consequently, the independent translator's opinion concerning the meaning of the term "Dian Ying" did not serve as a basis for the Panel's ultimate finding.

185. China further contends that the plain language of the Film Regulation supports China's position that the measure is about "the regulation of content, not goods".[360] In support of its argument, China refers to Articles 1, 2, 5, 24 to 29, and 31 of the Film Regulation, which, according to China, show that the measure is focused on the content that can be commercially exploited, rather than the material used for the exploitation of films. China maintains, in this regard, that the Appellate

187. In addressing a claim that a panel mischaracterized a Member's municipal law, the Appellate

189.

Regulation might have on trade in goods, therefore, are merely "incidental [and] practical"[373] and are not subject to China's trading rights commitments.

192. In response, the United States contends that, as the Panel correctly found, the mere fact that the import transaction involving hard-copy cinematographic films may not be the "'essential feature' of the exploitation of the relevant film"[374] does not preclude the application of China's trading rights commitments to the Film Regulation. The United States further submits that a film for theatrical release is a good even if its commercial value resides primarily in its utility in the supply of film projection services, and a measure restricting who may import a good is subject to China's trading rights commitments.

193. We understand China to argue that, because the Film Regulation regulates trade in services, it should be excluded from scrutiny under China's trading rights commitments, which are applicable only to trade in goods. We note, in this regard, that the Appellate Body has found that a measure

goods may not affect *who* has the right to trade those goods. In this dispute, however, it is uncontested that Article 30 of the *Film Regulation* restricts *who* may engage in the importation of films. The issue raised by China's appeal is whether *what* is imported by the entity designated under Article 30 is a *good*

of those goods, are somehow removed from the scope of applicability of China's trading rights

persuaded that the Panel's finding leads to any "absurd results which in turn may seriously undermine the rights of WTO Members".[390]

198. In sum, we see no error in the Panel's finding that Article 30 of the Film Regulations is subject to China's trading rights commitments, in that it "necessarily affect[s] who may engage in importing

B. The Applicability of China's Trading Rights Commitments to Article 5 of the 2001 Audiovisual Products Regulation and Article 7 of the Audiovisual Products Importation Rule

201. China appeals the Panel's finding that Article 5 of the 2001 Audiovisual Products Regulation and Article 7 of the Audiovisual Products Importation Rule[395]

202.

Article XX(a) in order to justify the following provisions of China's measures that the Panel found to be inconsistent with China's trading rights commitments[406]:

(a) Articles X:2 and X:3 of the List of Prohibited Foreign Investment Industries in the Catalogue, in conjunction with Articles 3 and 4 of the Foreign Investment Regulation;

(b) Article 4 of the Several Opinions;

(c) Article 41, and Article 42 in conjunction with Article 41, of the Publications Regulation;

(d) Article 27 of the 2001 Audiovisual Products Regulation;

(e) Article 8 of the Audiovisual Products Importation Rule; and

(f) Article 21 of the Audiovisual (Sub-)Distribution Rule[407]

206. Before the Panel, China argued that the introductory clause of paragraph 5.1 is an exception to China's obligation to grant the right to trade. China argued that this clause constitutes the expression of a general right of WTO Members to adopt or maintain certain measures that pursue legitimate policy objectives. According to China, the "right to regulate trade" means the right to take measures for the purpose of regulating trade, and the right to import and export goods is one element of such trade. China submitted that reference to the "WTO Agreement" is a reference to the WTO Agreement and all its Annexes. Since Ch

agreements applicable to trade in goods, including the GATT 1994 and Article XX thereof. Accordingly, China argued that it has the right under paragraph 5.1 to impose restrictions and conditions on the right to import and export, provided that these measures are consistent with Article XX of the GATT 1994. China asserted that such right to regulate trade does not amount to a right to exclude products from the scope of China's trading rights commitments, but rather to adopt or maintain measures that are consistent with the WTO Agreement. To interpret the "without prejudice" clause differently would, in China's view, fail to give meaning to all of the words in paragraph 5.1.[408]

207. The United States, on the other hand, emphasized that paragraph 5.1 of China's Accession Protocol provides a specific, self-contained, complete, and agreed set of products excepted from China's obligation to grant the right to trade, namely, those listed in Annexes 2A and 2B. The United States argued that the "right to regulate trade" does not permit China to reserve certain products to State trading because this would render these Annexes superfluous and amount not simply to regulating trade, but to eliminating China's trading rights commitments altogether. The United States also argued that the right to regulate trade in a manner consistent with the WTO Agreement applies to measures addressing the goods being traded rather than the traders of those goods. The United States considered that the introductory clause of paragraph 5.1 allows China to require that goods being imported into China satisfy other requirements allowed under the WTO Agreement, such as import licensing, TBT, and SPS requirements, but cannot detract from China's commitments to allow all foreign enterprises, all foreign individuals, and all enterprises in China to trade in the goods being regulated.[409]

208. At the outset of its analysis, the Panel stated that:

> ... China's invocation of Article XX(a) presents complex legal issues. We observe in this respect that Article XX contains the phrase "nothing in this Agreement", with the term "Agreement" referring to the GATT 1994, not other agreements like the Accession Protocol. The issue therefore arises whether Article XX can be directly invoked as a defence to a breach of China's trading rights commitments under the Accession Protocol, which appears to be China's position, or whether Article XX could be invoked only as a defence to a breach of a GATT 1994 obligation.[410]

[408]China's arguments are summarized in paragraphs 7.239-7.241, 7.244, and 7.245 of the Panel Report.
[409]The United States' arguments are summarized in paragraphs 7.242 and 7.243 of the Panel Report.
[410]Panel Report, para. 7.743.

209. The Panel did not resolve this issue. Instead, the Panel decided first to analyze the merits of China's defence under Article XX(a) before deciding whether Article XX(a) is available as a defence to a breach of China's trading rights commitments under its Accession Protocol.[411] The Panel

212. On appeal, the United States notes the approach taken by the Panel, and states that its response to China's appeal of the Panel's analysis under Article XX(a) of the GATT 1994 is "without prejudice to the question of whether Article XX(a) is applicable or provides a defense for China in this dispute."[414]

213. We observe that reliance upon an assumption arguendo is a legal technique that an adjudicator may use in order to enhance simplicity and efficiency in decision-making. Although panels and the Appellate Body may choose to employ this technique in particular circumstances, it may not always provide a solid foundation upon which to rest legal conclusions. Use of the technique may detract from a clear enunciation of the relevant WTO law and create difficulties for implementation. Recourse to this technique may also be problematic for certain types of legal issues, for example, issues that go to the jurisdiction of a panel or preliminary questions on which the substance of a subsequent analysis depends. The purpose of WTO dispute settlement is to resolve disputes in a manner that preserves the rights a

Article XX(a) as a defence to a violation of China's trading rights commitments.[417] Thus, these parts of the Panel's analysis rest upon an uncertain foundation as a result of the absence of a ruling on the applicability of Article XX(a) in this case. In addition, the absence of clarity on the issue of whether China may rely on Article XX(a) as a defence to a violation of paragraph 5.1 of its Accession Protocol may leave the participants uncertain as to the regulatory scope that China enjoys in implementation and as to whether any implementing measure is, in fact, consistent with China's WTO obligations or susceptible to further challenge in proceedings under Article 21.5 of the DSU.[418]

215. In our view, assuming *arguendo* that China can invoke Article XX(a) could be at odds with the objective of promoting security and predictability through dispute settlement, and may not assist in the resolution of this dispute, in particular because such an approach risks creating uncertainty with respect to China's implementation obligations. We note that the question of whether the introductory clause of paragraph 5.1 allows China to assert a defence under Article XX(a) is an issue of legal interpretation falling within the scope of Article 17.6 of the DSU. For these reasons, we have decided to examine this issue ourselves.

216. The first two sentences of paragraph 5.1 of China's Accession Protocol provide:

> Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement, China shall progressively liberalize the availability and scope of the right to trade, so that, within three years after accession, all enterprises in China shall have the right to trade in all goods throughout the customs territory of China, except for those goods listed in Annex 2A which continue to be subject to state trading in accordance with this Protocol. Such right to trade shall be the right to import and export goods.

217. We recall that China argued that the introductory clause of paragraph 5.1 of its Accession Protocol enables it to justify, under Article XX(a) of the GATT 1994, measures found to be inconsistent with its trading rights commitments. In examining whether this is so, we must seek to

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[417]In its analysis of the "restrictive impact" of the inconsistent measures, the Panel found it "appropriate", in this case, "to consider two different types of restrictive impact":

> ... not only the restrictive impact the measures at issue have on imports of relevant products, but also the restrictive effect they have on those wishing to engage in importing, in particular on their right to trade. In our view, if Article XX is assumed to be a direct defence for measures in breach of trading rights commitments, it makes sense to consider how much these measures restrict the right to import.

(Panel Report, para. 7.788 (emphasis added)) We address China's appeal of this finding in section VI.B.3 of this Report.

[418]The European Communities expresses similar concerns regarding the uncertainty that may result absent a ruling on the applicability of Article XX(a) in the circumstances of this case. (European Communities' third participant's submission, para. 12)

understand the meaning of that introductory clause, as

accruing to WTO Members, namely, the power of Members to take specific types of regulatory measures in respect of trade in goods when those measures satisfy prescribed WTO disciplines and meet specified criteria; and (ii) certain rights to take regulatory action that derogates from obligations under the WTO Agreement – that is, to relevant exceptions.

224. Certain paragraphs of China's Accession Working Party Report, which elaborate China's trading rights commitments, also provide context for and inform the scope of the WTO-consistent governmental regulation that may not be impaired by China's obligation to grant the right to trade. Paragraph 84(b), in particular, seems to us to identify a subset of governmental regulation that constitutes an exercise of regulatory powers that the covered agreements affirmatively recognize as accruing to WTO Members. This paragraph specifies that "foreign enterprises and individuals with trading rights ha[ve] to comply with all WTO-consistent requirements related to importing and exporting, such as those concerning import licensing, TBT and SPS."[426] We read this as a confirmation that China's obligation to grant the right to trade cannot impair China's power to impose WTO-consistent import licensing, TBT, and SPS measures.[427]

225. As stated, we see the language of paragraph 84(b) as shedding light on the types of regulatory measures in respect of trade in goods that the covered agreements affirmatively recognize that China may take, provided that such regulatory measures satisfy prescribed disciplines and meet specified conditions. We note, in this regard, that the types of WTO-consistent requirements that may, under paragraph 84(b), be imposed by China are not limited to requirements that apply directly to goods themselves[428], nor to requirements that apply to the activity of importing or exporting.[429] We also

[426]The Panel explained that it viewed this sentence as providing that:

> ... even though they are foreign enterprises and individuals "with trading rights" (in that the Accession Protocol prescribes that they must be granted such rights), such enterprises and individuals must still comply with "all WTO-consistent requirements related to importing and exporting, such as those concerning import licensing, TBT and SPS".

(Panel Report, para. 7.262)

[427]The disciplines that the WTO Agreement, including its Annexes, imposes upon a Member's use of SPS, TBT, and import licensing measures seek to ensure that such measures may be employed only in particular circumstances and subject to specific conditions. These disciplines preserve the power of Members to adopt certain measures in the drtainothriA po7-6.5(4(s)8.4)12.7(t)-1te7.2( )6r-.6(a)d.3(h)-13(ed)5.1( )-(rtai)5.3(o7-6go.4)1o.4 hrpr rtait h thor

note that the words "such as" in paragraph 84(b) of China's Accession Working Party Report ("WTO-consistent requirements related to importing and exporting, such as those concerning import licensing, TBT and SPS") indicate that import licensing, TBT, and SPS requirements illustrate, but do not exhaust, the type of WTO-consistent requirements relating to trade that may be imposed by China even if their imposition entails some limitation on the right of enterprises in China to import and export all goods.

226. We recall, in this respect, our understanding of the relationship between the introductory clause and the remainder of the first sentence of paragraph 5.1. Under paragraph 5.1, China undertakes a commitment in respect of traders, in the form of a commitment to grant to all enterprises in China the right to import and export goods. At the same time, this commitment, or obligation, is made subject to, and may not detrimentally affect, China's right to regulate trade in a manner

have been found to be inconsistent with Article III:4 or Article XI:1 of the GATT 1947 or 1994.[432] In addition, the Illustrative List in Annex 1 to the Agreement on Trade-Related Investment Measures (the "TRIMs Agreement") sets out a number of requirements imposed on enterprises

out obligations that are closely linked to China's trading rights commitments.[433] Rather, whether China may, in the absence of a specific claim of inconsistency with the GATT 1994, justify its measure under Article XX of the GATT 1994 must in each case depend on the relationship between the measure found to be inconsistent with China's trading rights commitments, on the one hand, and China's regulation of trade in goods, on the other hand.

230. All of the above suggests to us that the introductory clause of paragraph 5.1 should be interpreted as follows. Any exercise of China's right to regulate trade will be protected under the introductory clause of paragraph 5.1 only if it is consistent with the WTO Agreement. This will be the case when China's measures regulating trade are of a type that the WTO Agreement recognizes that Members may take when they satisfy prescribed disciplines and meet specified conditions. Yet, these are not the only types of WTO-consistent measures that may be protected under the introductory clause of paragraph 5.1. Whether a measure re

to regulate trade in a manner consistent with the WTO Agreement and, as such, may not be impaired by China's trading rights commitments.

231. Turning to the specific measures that China seeks to justify in this case, we note that China asserted, before the Panel, that its measures form part of a broader regulatory scheme covering the goods at issue. According to China, it regulates these goods through a content review mechanism, for both imported and domestic goods, that operates to prevent the dissemination of cultural goods with a content that has a negative impact on public morals in China. In other words, China emphasized that the requirements and provisions found to be inconsistent with China's trading rights commitments under its Accession Protocol and Working Party Report all form part of a broader regime regulating trade in the specific goods at issue.

232. The Panel examined the relationship between each of the provisions it found to be inconsistent with China's trading rights commitments, as well as China's content review mechanism for the relevant products. The Panel found that certain of the inconsistent provisions, notably Articles 41 and 42 of the Publications Regulation, are contained in a legal instrument that, itself, sets out such a content review mechanism.[434] With respect to other provisions contained in instruments that do not themselves incorporate a content review mechanism, the Panel accepted China's argument that these "are not isolated measures [but] are the result of its system of selecting importers with the content review mechanism in mind".[435] We also note that there was much evidence before the Panel concerning the extensive nature of China's content review system for the relevant goods[436], and that the United States did not contest that the provisions restricting trading rights are part of China's system for reviewing the content of the relevant goods.[437] Moreover, the United States challenged, as inconsistent with Article III:4 of the GATT 1994, various provisions regulating the distribution of the relevant goods within China, several of which are contained in the same Chinese measures as other provisions regulating importation of those goods that the Panel found to be inconsistent with China's trading rights commitments.[438]

233. For all these reasons, we consider that the provis

upon the introductory clause of paragraph 5.1 of its Accession Protocol and seek to justify these provisions as necessary to protect public morals in China, within the meaning of Article XX(a) of the GATT 1994. Successful justification of these provisions, however, requires China to have demonstrated that they comply with the requirements of Article XX of the GATT 1994 and, therefore, constitute the exercise of its right to regulate trade in a manner consistent with the WTO Agreement. The Panel found that China had not successfully made out such a defence, and we now turn to review that finding.

B. The "Necessity" Test under Article XX(a) of the GATT 1994

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conformity with China's State plan requirement can be characterized as "necessary", in the absence of reasonably available alternatives, to protect public morals in China.[442]

236. We begin by addressing "some concerns"[443]

reasonably available alternatives"[449] introduces confusion, because the term "necessary" is used in a different sense in this intermediate finding, on the one hand, and in its ultimate finding—that the State plan requirement is not "necessary" in view of a reasonably available alternative—on the other hand.[450]

238. In response to questioning at the oral hearing in this appeal, the United States clarified that it is not raising a claim of error with respect to the way in which the Panel applied the "necessity" test.[451] Instead, the United States stated that it would welcome clarification from the Appellate Body that an Article XX analysis should be approached in an integrated fashion. The United States acknowledged that, in analyzing the "necessity" of a measure, a panel cannot simultaneously assess all relevant factors and undertake the necessary "weighing and balancing" with respect to the contested measure and proposed alternative measures.

239. The Appellate Body has previously considered the proper approach to take in analyzing the "necessity" of a measure in several appeals, in particular: Korea – Various Measures on Beef (the

comparison of the challenged measure and possible alternatives should be undertaken, and the results considered in the light of the importance of the objective pursued.[453]

241. In Brazil – Retreaded Tyres

alternative measures that may be less trade restrictive while making an equivalent contribution to the relevant objective. These three reports also all recognize that a comprehensive analysis of the "necessity" of a measure is a sequential process. As such, the process must logically begin with a first step, proceed through a number of additional steps, and yield a final conclusion.

243. In the present case, the Panel was required to assess the "necessity" within the meaning of Article XX(a) of multiple provisions that it had found to be inconsistent with China's trading rights commitments. The Panel did so in a number of step

contemplated under the "weighing and balancing" test. The Panel did not, however, complete all of the analytical steps relevant to each provision in consecutive paragraphs of its Report. With respect to the State plan requirement, for example, the Panel completed the first part of its "weighing and balancing" exercise, and expressed a "conclusion" on the "necessity" of that requirement.[473] Having done so, however, it did not turn to the next step in its analysis—the assessment of the alternatives proposed by the United States—until seven pages later.[474]

248. In separating parts of its overall analysis of specific provisions in this way, the Panel may have created some confusion. In particular, the Panel's use of the word "conclude" in setting out its intermediate findings risks misleading a reader, as does its characterization of certain requirements as "necessary" before it had considered the availability of a less restrictive alternative measure. Yet, a careful reading of the Panel's analysis of the necessity of the State plan requirement, in its entirety, makes clear that the Panel included all relevant factors in its weighing and balancing exercise,

2. The Contribution of China's Measures to the Protection of Public Morals in China

250. In this subsection, we address claims by China that the Panel erred in finding that the State-ownership requirement and the provisions excluding foreign-invested enterprises from being approved or designated import entities[475] are not "necessary" to protect public morals in China; as well as the claim by the United States that the Panel erred in finding that the State plan requirement can be characterized as "necessary", in the absence of reasonably available alternatives, to protect public morals in China. All these claims of error relate to the Panel's analysis of the contribution made by China's measures to the protection of public morals in China.

251. We recall the Appellate Body's finding, in *Korea – Various Measures on Beef*, that the term "necessary", in the abstract, refers to a range of degrees of necessity.[476] The Appellate Body explained that determining whether a measure is "necessary" involves a process of weighing and balancing a series of factors that prominently include the contribution made by the measure to secure compliance with the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.[477] The greater the contribution a measure makes to the objective pursued, the more likely it is to be characterized as "necessary".[478]

252. In *Brazil – Retreaded Tyres*, the Appellate Body clarified how the analysis of the contribution made by a challenged measure to the achievement of the objective pursued is to be undertaken. The Appellate Body noted that a party seeking to demonstrate that its measures are "necessary" should seek to establish such necessity through "evidence or data, pertaining to the past or the present", establishing that the measures at issue contribute to the achievement of the objectives pursued.[479] In examining the evidence put forward, a panel must always assess the actual contribution made by the measure to the objective pursued.

253. However, this is not the only type of demonstration that could establish such a contribution. The Appellate Body explained that a panel is not bound to find that a measure does not make a contribution to the objective pursued merely because such contribution is not "immediately observable" or because, "[i]n the short-term, it may prove difficult to isolate the contribution [made

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[475]These exclusions are set out in the following provisions: Articles X:2 and X:3 of the List of Prohibited Foreign Investment Industries in the *Catalogue*, in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*, Article 4 of the *Several Opinions*, and Article 21 of the *Audiovisual (Sub-)Distribution Rule*.

[476]Appellate Body Report, *Korea – Various Measures on Beef*, para. 161.

[477]Appellate Body Report, *Korea – Various Measures on Beef*, para. 164.

[478]Appellate Body Report, *Korea – Various Measures on Beef*, para. 163.

[479]Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

properly conduct content review, make clear that the Panel did not limit itself to considering the cost of compliance with the requirement of a suitable organization and qualified personnel.[488]

259. At the outset of our analysis, we note that China argued before the Panel that:

> State-owned enterprises are entrusted with the content review because China considers that only State-owned enterprises should be called on to bear the cost of the review, which relates solely to the public interest.[489] (footnote omitted)

260. We also note that, in response to a question by the Panel as to the reasons for permitting only wholly State-owned enterprises to import the relevant products, China stated:

> The reason behind this requirement is that the cost incurred in the course of the content review is substantial and relates solely to the public interest. The government believes that it can only require wholly state-owned enterprises, in which the state owns all equity, to bear the burden and it is not in a position to require private investors to bear this burden.[490]

261. The Panel reflected this argument as follows:

> China does not contend that publication import entities need to be wholly state-owned because they perform a public policy function. Rather, China contends that they need to be wholly state-owned because content review is costly. In China's view, privately-owned

263. Overall, however, we do not see that the Panel failed to consider the public policy component of China's argument. While the Panel's analysis[493] focuses on the cost component, this alone does not establish that the Panel ignored the public policy component of China's argument. As we see it, in assessing China's argument, the Panel decided to consider first whether content review was indeed costly, as China asserted. The Panel requested China to provide an estimate of such costs to import entities. China replied that it was unable to do so. China explained, however, that the cost of content review consists of: (i) human resources cost; (ii) cost of equipment, facilities, and premises used for content review; and (iii) losses incurred from compensation for customers in case of failure of ordered publications to pass content review.[494] Having noted that it had been presented with only very limited evidence in this regard, the Panel found that China had not demonstrated that the cost associated with content review would be so high that it would be unreasonable to impose it on private enterprises[495], or that only wholly State-owned enterprises "are able, or should be expected, to bear the cost associated with content review".[496] The Panel also observed that "it is not apparent that wholly state-owned enterprises would be inherently more careful in conducting content review than privately owned ones."[497] Moreover, the two-pronged nature of China's argument is properly reflected in the Panel's statement that, "[i]n China's view, privately-owned enterprises cannot be expected to pay for performing a public interest function."[498] This demonstrates that the Panel did not consider the cost

state-owned enterprises."[499] This reference to what was "stated above" seems to relate to China's response to the Panel's previous question relating to the State-ownership requirement: "The reason behind this requirement is that the cost incurred in the course of the content review is substantial and relates solely to the public interest."[500]

266. The Panel reflected this argument as follows:

> ... China advances an additional argument in support of the state

explains why the Panel would have found that the State-ownership requirement is necessary to the protection of public morals in China if the Panel had properly understood China's arguments, nor identifies evidence in the Panel record demonstrating that some amount of private investment in an import entity would preclude the hiring of qualified personnel or the establishment of a suitable organizational structure. We do not agree that the Panel would have come to the conclusion that the State-ownership requirement makes a contribution to the protection of public morals in China if it had considered China's argument in a different way. China did not establish a connection between the exclusive ownership of the State in the equity of an import entity and that entity's contribution to the

(Sub-)Distribution Rules that Chinese-foreign contractual joint ventures for the sub-distribution of audiovisual products do not have, and cannot obtain, the right to import audiovisual products.[507] The Panel considered that these provisions excluding foreign-invested enterprises from engaging in importing are intended to reflect the fact that other measures stipulate that only wholly State-owned enterprises are permitted to import the relevant products.[508]

272. China contends that the Panel relied on its finding concerning the State-ownership requirement to conclude that the provisions excluding foreign-invested enterprises from engaging in

the finding made earlier by the Panel, that requiring qualified review personnel contributes materially to the protection of public morals in China, the United States contends that there is no contradiction because China provides no reason to believe that foreign-invested enterprises would be unable to hire qualified personnel.

275. At the outset, we note that the Panel's finding concerning the exclusion of foreign-invested enterprises was based on the same reasoning as its finding relating to the State-ownership requirement. The Panel referred back to its previous finding that it was not persuaded that requiring publication import entities to be wholly State-owned contributes to the protection of public morals in China because they are the only enterprises in China that are able, or should be expected, to bear the cost associated with content review.[513] Having considered that the provisions prohibiting foreign-invested enterprises from engaging in the importation of the products at issue reflect the same prohibition as the State-ownership requirement, "by necessary implication"[514], the Panel was also not persuaded that the provisions prohibiting foreign-invested enterprises from being approved or designated import entities of the relevant products contribute to the protection of public morals in China.

276. We also observe that China's appeal of the Panel's finding relating to the provisions excluding foreign-invested enterprises from engaging in the importation of the relevant products relies upon the same reasons as those advanced by China with respect to the Panel's finding on the State-ownership requirement. We consider that the exclusion of foreign-invested enterprises and the requirement that

277.

make a material contribution to the protection of public morals.[520] Weighing this contribution together with the other relevant factors, the Panel took account:

> … first of all, of the fact that the protection of public morals is a highly important governmental interest and that China has adopted a high level of protection of public morals within its territory. We must take account, in addition, of the fact that the requirement of conformity with the State plan is apt to make a material contribution to the protection of public morals; that it is unclear to what extent, if any, it limits overall imports of relevant products, but that it is nonetheless likely to minimize unnecessary delays in importing; and that it does not *a priori* exclude particular types of enterprise in China from establishing an import entity. Weighing these factors, we conclude that, in the absence of reasonably available alternatives, the State plan requirement in Article 42 of the *Publications Regulation* can be characterized as "necessary" to protect public morals in China.[ot]

282. China did not provide the State plan or specific information about its content to the Panel. In response to a request by the Panel to provide the "Sta

284. In its other appeal, the United States contends that the Panel erred in reaching an intermediate finding that the State plan requirement makes a material contribution to the protection of public morals in China. Referring to the Appellate Body reports in *US – Gambling* and *Korea – Various Measures on Beef*, the United States maintains that the State plan requirement is not significantly closer to the pole of "indispensable" than to the opposite pole of "simply making a contribution".[533]

285. The United States alleges that, because China did not submit the State plan, nor provide any information about the content of the plan, the Panel did not actually examine the State plan. Thus, the Panel could not have known what China meant when it asserted that there was a "limited number"[534] of publication import entities. In addition, the United States submits that the requirement that

maintains that this response, together with "circumstantial evidence"[535] contained in several exhibits submitted to the Panel, provided a sufficient basis for the Panel's finding that the State plan requirement makes a material contribution to the protection of public morals in China. In addition, China submits that the Panel correctly inferred that imposing a limit on the number of publication import entities allows the GAPP to devote more time to conduct its annual inspections of such entities' compliance with content review requirements.[536]

288. We recall that, in *US – Gambling* the Appellate Body stated that a panel must independently and objectively assess the "necessity" of the measure before it, based on the evidence in the record.[537] The Appellate Body also affirmed that it is for the responding party to make a *prima facie* case that its measure is "necessary" by putting forward evidence and arguments that enable the panel to assess the challenged measure in the light of the relevant factors to be "weighed and balanced".[538]

289. In the present case, the burden of demonstrating that its measures are "necessary" to protect public morals within the meaning of Article XX(a) of the GATT 1994 resided with China. In order to meet this burden, China was required to present arguments and adduce evidence relating to the contribution of the State plan requirement to the protection of public morals in China, thus enabling the Panel to determine the "necessity" of that requirement.

290. Before turning to the substance of the United States' other appeal, we wish to address a preliminary matter. The Panel stated at the outset of its analysis that it would "consider whether [the co

review requirements. The Panel exhibit that China relies upon as supporting the latter argument[550] does not explain the scope of annual inspections carried out by the GAPP, or specify the parameters of the verification carried out by the GAPP. Rather, it simply stipulates what kind of documentation

> ... we think that in the case before us, an additional factor should be taken into account. Specifically, we think that we should weigh not only the restrictive impact the measures at issue have on imports of

302. The United States contends that the Panel did not err in taking into account the restrictive effect on those wishing to engage in importing but was simply "adapting"[559] the weighing and balancing approach taken by the Appellate Body in *US – Gambling* and *Brazil – Retreaded Tyres* to the particular situation it confronted in this dispute. For the United States, it was "logical"[560] for the Panel to consider the restrictive effect of the measures not only on imports but also on enterprises because, in the present case, the Panel was, on an *arguendo* basis, applying Article XX(a) to a situation where the Panel had found an inconsistency with respect to China's obligations concerning the treatment of enterprises, rather than an inconsistency regarding China's obligations concerning the treatment of goods.

303. At the outset of our analysis, we recall that the assessment of the restrictive effect of a measure on international trade is part of the "weighing and balancing" approach for assessing "necessity"—including within the meaning of Article XX(a) of the GATT 1994—employed by WTO panels and the Appellate Body.[561] The text of Article XX(a), however, refers only to measures "necessary to protect public morals". It does not, therefore, provide explicit guidance on the question of whether, in assessing "necessity", a panel may take into account only the restrictive effect the

305. The Appellate Body's "necessity" analysis in

308. We turn next to China's allegation that the Panel committed a "logical error" in finding that the provisions of its measures are not "necessary" for essentially the same reasons as the ones for which the Panel found those provisions to be in violation of China's trading rights commitments. China suggests that the restrictive effect of a measure could be relevant to a panel's analysis of whether a measure is consistent with an obligation, or its analysis of whether that measure can be justified under an exception, but that it could not be relevant for both questions. We disagree. The fact that the restrictive effect of a measure is relevant in one context does not preclude that it may also be relevant in the other. In analyzing whether the provisions of China's measures are inconsistent with Article 5.1 of China's Accession Protocol, the Panel assessed whether the provisions restrict the enterprises that may engage in importing. Thereafter, in analyzing whether the provisions could be

requirement, assessed its restrictive effect on imports and on potential importers.[569] In our view, this demonstrates that the Panel correctly assessed the restrie restri

4. Reasonably Available Alternative Measure

312. We turn next to China's appeal with respect to the Panel's analysis of whether a less restrictive measure is reasonably available to China as an alternative means of realizing its objective of protecting public morals. To recall, the Panel found that the suitable organization and qualified personnel requirement and the State plan requirement are "necessary" to protect public morals in China, in the absence of reasonably available alternatives.[575] In order to reach a final determination as to whether or not China had demonstrated the "necessity" of these two requirements, the Panel turned to consider alternative measures proposed by the United States and, in particular, the proposal that the Chinese Government be given sole responsib

products imported into China.[579] Under this proposed alternative, there would be no restriction on who could import the relevant products, and import entities would have no role in the content review process. Rather, the Chinese Government would conduct content review and take a final decision before any imported products could clear customs.[580]

316. In the first part of its analysis of this proposed alternative measure, the Panel assessed the contribution the alternative measure would make to the protection of public morals, and its restrictive impact, and then compared these to the Panel's previous analysis of those same factors with respect to the suitable organization and qualified personnel requirement and the State plan requirement. The Panel found that:

> ... implementing the [United States'] proposal would make a contribution that is at least equivalent to that of the relevant two [requirements]. At the same time, the [United States'] proposal would have a significantly less restrictive impact on importers—in fact, it would have no such impact—without there being any indication that it would necessarily have a more restrictive impact on imports of relevant products than [these requirements].[581]

317. In the second part of its analysis, the Panel considered whether the United States' proposal was an alternative that is "reasonably available" to China and found that China had not demonstrated that the alternative proposed by the United States would impose an undue burden on China.[582] China's appeal focuses on this finding by the Panel.

318. Before examining China's appeal, we set out pertinent interpretations from previous Appellate Body reports concerning the question of what constitutes a "reasonably available alternative", as well as the appropriate allocation of the burden of proof in relation to such alternatives. In Korea – Various Measures on Beef and EC – Asbestos, the Appellate Body clarified that, as part of an overall evaluation of "necessity" using the "weighing and balancing" process, a panel must examine whether the responding party could reasonably be expected to employ an alternative measure, consistent (or less inconsistent) with the covered agreements, that would achieve the objectives pursued by the measure at issue. An alternative measure may be found not to be "reasonably available" where it is

[579]As further alternatives, the United States proposed that a foreign-invested enterprise could develop the expertise to conduct content review for a particular type of product. The foreign-invested enterprise could complete the review and then import the publication into China, or it could perform the content review either while importation is underway and/or once the importation was complete, but before the good is released into commerce in China. Alternatively, the foreign-invested enterprise importing the good into China could hire specialized domestic entities with the appropriate expertise to conduct the content review process before, during,

those who wish to engage in importing"

Chinese authorities already carry out content review of films imported for theatrical release, electronic publications, and audiovisual products. In addition, the United States asserts, China has not responded to the Panel's observation that China could charge fees to defray additional expense involved in its performance of content review and that, in fact, Article 44 of the Publications Regulation already provides for that option. The United States adds that, because the Chinese Government owns 100 per cent of the equity in th

of having non-incorporated offices of the Government of China conduct content review would necessarily be higher than the cost of having incorporated State-owned enterprises conduct such review.[599] The Panel observed that, in any event, China had not provided any data or estimate that would suggest that the cost to the Chinese Government would be unreasonably high or even prohibitive, and that Article 44 of the Publication Regulations already authorizes the Government to charge fees for providing a content review service, which could lessen any financial burden associated with the proposed alternative measure.[600]

326. After having set out the above reasoning, the Panel determined that China had not "demonstrated that the alternative proposed by the United States would impose on China an undue burden, whether financial or otherwise"[601] and that, accordingly, China had not "demonstrated that the alternative proposed by the United States is not 'reasonably available' to it."[602]

327. We are not persuaded that the Panel erred in the above analysis. The Panel did not find that the proposed alternative measure involves no cost or burden to China. As the Appellate Body report in US – Gambling makes clear, an alternative measure should not be found not to be reasonably available merely because it involves some change or administrative cost.[603] Changing an existing measure may involve cost and a Member cannot demonstrate that no reasonably available alternative exists merely by showing that no cheaper alternative exists. Rather, in order to establish that an alternative measure is not "reasonably available", the respondent must establish that the alternative measure would impose an undue burden on it, and it must support such an assertion with sufficient evidence.[604]

328. In the present case, China did not provide evidence to the Panel substantiating the likely nature or magnitude of the costs that would be associated with the proposed alternative, as compared to the current system. Nor has China, in its appeal, pointed to specific evidence in the Panel record

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332. Accordingly, having reviewed the Panel's analysis of the limited evidence before it, as well as the additional arguments made by China on appeal, we find that the Panel did not err, in

United States has demonstrated that the proposed alternative would be less restrictive and would make a contribution that is at least equivalent to the contribution made by the measures at issue to securing China's desired level of protection of public morals. China, in turn, has not demonstrated that this alternative is not reasonably available. This does not mean that having the Chinese Government assume sole responsibility for conducting content review is the *only* alternative available to China, nor that China *must* adopt such a scheme. It does mean that China has not successfully justified under Article XX(a) of the GATT 1994 the provisions and requirements found to be inconsistent with China's trading rights commitments under its Accession Protocol and Working Party Report. It follows, therefore, that China is under an obligation to bring those measures into conformity with its obligations under the covered agreements, including its trading rights commitments. Like all WTO Members, China retains the prerogative to select its preferred method of implementing the rulings and recommendations of the DSB for measures found to be inconsistent with its obligations under the covered agreements.

C. Summary and Conclusion on Article XX(a) of the GATT 1994

336. We have found above that: (i) by virtue of the introductory clause of paragraph 5.1 of China's Accession Protocol, China may, in this case, invoke Article XX(a) of the GATT 1994 to justify the provisions and requirements found to be inconsistent with its trading rights commitments under its Accession Protocol and Accession Working Party Report; (ii) the Panel did not err in its finding regarding the contribution to the protection of public morals in China made by the State-ownership requirement in Article 42(2) of the *Publications Regulation*; (iii) the Panel did not err in its finding regarding the contribution to the protection of public morals made by the provisions excluding foreign-invested enterprises from engaging in the importation of the relevant products; (iv) the Panel erred in finding that the State plan requirement in Article 42 of the *Publications Regulation* is apt to make a material contribution to the protection of public morals and that, in the absence of a reasonably available alternative, it can be characterized as "necessary" to protect public morals in China; (v) the Panel did not err in taking account of the restrictive effect that the measures at issue have on those wishing to engage in importing as part of its assessment of the restrictive effect of the provisions of China's measures found to be inconsistent with its trading rights commitments; and (vi) the Panel did not err in finding that at least one of the alternative measures proposed by the United States is an alternative "reasonably available" to China.[614]

[614]In the light of these findings, we need not address China's request that we complete the analysis and find its measures to be "necessary" to protect public morals within the meaning of Article XX(a) and consistent with the chapeau of Article XX of the GATT 1994.

337. For all these reasons, we uphold the Panel's conclusion, in paragraph 8.2(a)(i) of the Panel Report, that China has not demonstrated that the relevant provisions are "necessary" to protect public morals, within the meaning of Article XX(a) of the GATT 1994 and that, as a result, China has not demonstrated that these provisions are justified under Article XX(a).[615]

VII. Scope of China's GATS Schedule Entry "Sound Recording Distribution Services"

A. Introduction

338. We now turn to the Panel's analysis of the scope of China's GATS Schedule entry on "Sound recording distribution services". The Panel interpreted China's GATS Schedule and reached the conclusion that the entry "Sound recording distribution services", under the heading of "Audiovisual Services" in sector 2.D of that Schedule, "extends to the distribution of sound recordings in non-physical form, notably through electronic means".[616] On this basis, the Panel proceeded to find that:

> [t]he

Article 31 of the Vienna Convention.[619] Moreover, China contends that, since the application of Articles 31 and 32 of the Vienna Convention yields an "inconclusive"[620] result, the Panel should have, in the face of "such a high level of ambiguity", applied the in dubio mitius principle and "refrained from adopting the interpretation which was the least favourable to China."[621]

342. The United States responds that the Panel did not err in its analysis under Articles 31 and 32 of the Vienna Convention and correctly found that China's GATS commitment on "Sound recording distribution services" in sector 2.D of its Schedule includes the electronic distribution of sound recordings. Thus, the United States contends that the Panel correctly found that the relevant measures are inconsistent with Article XVII of the GATS "as each prohibits foreign-invested enterprises, including service suppliers of other Members, from engaging in the electronic distribution of sound recordings, while like domestic service suppliers are not similarly prohibited."[622]

343. Below, we review discrete elements of the Panel's analysis of China's GATS Schedule entry in the light of the specific claims of error raised by China on appeal. Before doing so, we outline the overall approach employed by the Panel.

344. In seeking to ascertain the meaning of the entry "Sound recording distribution services", the Panel began by consulting dictionary definitions of the terms "sound recording" and "distribution services". According to the Panel, dictionary definitions suggested that China's commitment covers the distribution of sound recordings in electronic form.[623] The Panel then turned to analyze the context in which the relevant entry is situated. Specifically, the Panel examined: (i) the immediate context provided by the heading of, as well as various other entries within, sector 2.D (Audiovisual Services) of China's GATS Schedule; (ii) the context provided by China's commitment on distribution services in sector 4 (Distribution Services) of its GATS Schedule; (iii) certain provisions of the GATS itself; and (iv) certain GATS Schedules of other Members. The Panel found that several of these contextual elements suggested that "Sound recording distribution services" covers the distribution of sound recordings in electronic form. The Panel considered that the remaining contextual elements are "consistent with"[624], do not "address"[625], or do not "contradict"[626], such a view. Overall, the Panel considered that its analysis of context supported the view that the entry "Sound recording distribution services" in China's GATS Schedule covers the distribution of content

[619] China's appellant's submission, para. 79.
[620] China's appellant's submission, para. 197.
[621] China's appellant's submission, para. 194.
[622] United States' appellee's submission, para. 71 (quoting Panel Report, para. 7.1311).
[623]

in non-physical form.[627] Next, the Panel reviewed the object and purpose of the GATS, as reflected in the preamble of that Agreement, and found that its interpretation of China's commitment on "Sound recording distribution services" was "consistent with" this object and purpose.[628] Having thus interpreted the entry "Sound recording distribution services" in China's GATS Schedule in the light of the various elements prescribed under Article 31 of the Vienna Convention, the Panel "reached the preliminary conclusion that [China's] commitment extends to sound recordings distributed in non-physical form, through technologies such as the Internet."[629]

345. The Panel considered it useful to have recourse to supplementary means of interpretation under Article 32 of the Vienna Convention to confirm this preliminary conclusion.[630] Under Article 32 of the Vienna Convention, the Panel reviewed the Services Sectoral Classification List[631] and the 1993 Explanatory Note on Scheduling of Initial Commitments in Trade in Services (the "1993 Scheduling Guidelines")[632], as preparatory work, and certain circumstances surrounding the conclusion of China's Accession Protocol and GATS Schedule. The Panel found that the relevant preparatory work "confirmed" its view, under Article 31 of the Vienna Convention, of the scope of the entry in China's GATS Schedule.[633] As for the circumstances surrounding the conclusion of the treaty, the Panel was not persuaded that these circumstances supported China's position that "Sound recording distribution services" cannot extend to the electronic distribution of sound recordings.

B. Article 31 of the Vienna Convention

347.

350. The Panel began its interpretation of this entry by reviewing several dictionary meanings of the terms "recording" and "distribution". The Panel found that the definition of "recording"—"Recorded material; a recorded broadcast, performance"[641]—was the most relevant for the purpose of interpreting the term "recording" in the entry "Sound recording distribution services" in China's GATS Schedule.[642] The Panel then considered that the term "recorded material" in this dictionary definition meant the "material that is recorded" and not the "recording material".[643] Based on this definition, the Panel reasoned that the term "recording" cannot be limited to sound embedded on physical media, but refers to the content, regardless of the technology of storage or distribution of the sound.[644]

351. Regarding the term "distribution", the Panel analyzed one dictionary definition—"the dispersal of commodities among consumers affected by commerce."[645] The Panel observed that the term "commodity" in this definition is further defined as a "thing of use or value; spec a thing that is

"distribution" ("the process of marketing and supplying goods, especially to retailers"[651]), which, according to China, would limit the scope of the entry "Sound recording distribution services" to the distribution of such recordings on physical carriers. China adds that the "only conclusion" that the Panel could properly have reached at this stage of its analysis was that "dictionary definitions were inconclusive".[652]

353. The United States responds that the Panel considered all the definitions submitted by the parties and properly examined which meaning was to be attributed to the relevant terms in China's GATS Schedule.[653] The United States contends that the Panel correctly found that "sound recording" means "recorded material"[654]

355. Moreover, the definitions of "distribution"[660] submitted by China do not necessarily support the meaning ascribed to this term by China. While each of these dictionaries—the Shorter Oxford English Dictionary and The American Heritage Dictionary of the English Language—offers a definition of "distribution" that refers to "goods" or "commodities", both also refer to alternative meanings for the term as encompassing the dispersal of tangible as well as intangible products, as the Panel observed.[661]

356. In its analysis of dictionary definitions for purposes of discerning the ordinary meaning of the term "Sound recording distribution services", the Panel identified some meanings as more relevant to its analysis, but did not clearly explain why certain

also supported an interpretation of "Sound recording distribution services" as encompassing the electronic distribution of sound recordings.[667]

359. China argues that the Panel's analysis of each

362. The Panel considered the sector heading itself and found that the meaning of the term "audiovisual" ("pertaining to both hearing and vision"[670]) suggested that services scheduled under this heading (such as "Sound recording distribution services"), unless otherwise specified, relate to the production, distribution, projection, or broadcasting of content that is "sensed by the user through the faculties of hearing or vision."[671] Such context does not, in itself, rule out the possibility that China could have scheduled commitments concerning services related only to physical products under such a heading.[672]

363. Regarding the commitments scheduled by China for its entry "Sound recording distribution services", we observe that the market access and na

'distribution services' in China's entries relating to videos and to sound recording must have similar meaning".[680]

sound recording embedded in physical media would, in principle, have been covered by China's commitments on "Distribution Services".[685]

372. We therefore agree with the Panel's observation that, had China's relevant entry "Sound recording distribution services" under "Audiovisual Services" been intended to cover exclusively the distribution of audiovisual products in physical form, "there would have been no need to insert [this entry and the entry "Video (...) distribution services

structure of the GATS itself" in interpreting the relevant entry in the United States' GATS Schedule under Article 31 of the Vienna Convention[688]

375. As we have explained, the entry "Sound recording distribution services" in China's GATS Schedule is not further qualified except for a mode 3 market access limitation regarding contractual

their commitments by qualifying the scope of sectors or subsectors inscribed in the Schedule, by including or excluding modes of supply, and by listing limitations, qualifications, or conditions on

380. In sum, the context provided by the entry under the relevant heading in China's GATS Schedule, taking into account relevant qualifications or conditions, and read in the light of the GATS definitions of "trade in services" and "supply of a service" and of the provisions relevant for scheduling commitments and inscribing limitations, qualifications, and conditions, does not support an interpretation of the entry "Sound recording distribution services" as limited to the distribution of sound recordings in physical form.

(c) GATS Schedules of Other Members

381. The Panel also reviewed the GATS Schedules of several other Members—in particular, their commitments on audiovisual and distribution services—as relevant context for its interpretation of the entry "Sound recording distribution services" in China's GATS Schedule. The Panel found that the context provided by these other GATS Schedules did not point to an interpretation in any way different from that suggested by the other contextual elements it had examined, that is, that China's entry "Sound recording distribution services" extends to sound recordings distributed in non-physical form.[693]

382. We recall that, according to the Appellate Body in US – Gambling the fact that "Members' Schedules constitute relevant context for the interpretation of subsector 10.D of the United States' Schedule" was "the logical consequence of Article XX:3 of the GATS, which provides that Members' Schedules are 'an integral part' of the GATS."[694] The Appellate Body, however, cautioned that the "use of other Members' Schedules as context must be tempered by the recognition that 'each Schedule has its own intrinsic logic'"[695], which will be different from the Schedule being interpreted.

383. The Panel considered the GATS Schedules of other Members together with other elements of context. Yet, in so doing, the Panel expressly stated that it was mindful of the fact that, although the GATS Schedules of Members are treaty text reflecting the common intentions of all WTO Members, each Schedule has "its own logic"[696] and thereby acknowledged that recourse to other Members' Schedules may be of limited utility in elucidating the meaning of the entry to be interpreted.

[693]Panel Report, para. 7.1218.
[694]Appellate Body Report, US – Gambling para. 182.
[695]Appellate Body Report, US – Gambling para. 182 (quoting Panel Report, US – Gambling para. 6.98).
[696]Panel Report, para. 7.1210 (referring to Appellate Body Report, US – Gambling para. 182; and Panel Report, US – Gambling para. 6.98).

384. Moreover, the examination of the Schedules of other Members was not a central element of the Panel's contextual analysis. The Panel did not find that the GATS commitments of other Members confirmed its interpretation of the inscription "Sound recording distribution services" in China's GATS Schedule, but simply stated that "the context provided by the Schedules of other Members, does not point to an interpretation in any way different from that suggested by the other contextual elements [it] examined".[697] In other words, whilst the Panel viewed the Schedules of other

Rather, the Panel was careful to distinguish among: elements that support such an interpretation; elements that are consistent with the interpretation; and elements that offer no guidance. In this regard, we consider that China's claim, that each of the interpretative elements reviewed by the Panel is "inconclusive" with respect to the interpretation of "Sound recording distribution services", overlooks the nature of the interpretative exercise to be undertaken under Article 31 of the Vienna Convention

3. Object and Purpose

389. We now turn to the object and purpose of the treaty. The Panel reviewed the object and purpose of the GATS, as formulated in the GATS preamble, and found that its interpretation of China's commitment on "Sound recording distribution services" is consistent with this object and purpose.[700]

390. On appeal, China argues that the Panel's interpretation of "Sor0 TD.0eh-4.3(Pa)nd foco.0eh(we76(an)7.45h-

rounds of multilateral negotiations".[703] The Panel found that its interpretation of "Sound recording distribution services" is consistent with the objectives listed in the GATS preamble.[704]

393. We do not disagree with the Panel that nothing in the GATS preamble appears to contradict an interpretation of "Sound recording distribution services" as extending to electronic distribution of sound recordings. At the same time, we observe that none of the objectives listed in the GATS preamble provides specific guidance as to the correct interpretation to be given to China's GATS Schedule entry "Sound recording distribution services".

394. The principle of progressive liberalization is reflected in the structure of the GATS, which contemplates that WTO Members undertake specific commitments through successive rounds of multilateral negotiations with a view to liberalizing their services markets incrementally, rather than immediately and completely at the time of the acceptance of the GATS. The scheduling of specific commitments by service sectors and modes of supply represents another manifestation of progressive liberalization. In making specific commitments, Members are not required to liberalize fully the chosen sector, but may limit the coverage to particular subsectors and modes of supply and maintain limitations, conditions, or qualifications on market access and national treatment, provided that they are inscribed in their Schedules. We do not consider, however, that the principle of progressive liberalization lends support to an interpretation that would constrain the scope and coverage of specific commitments that have already been undertaken by Members and by which they are bound.

395. Neither are we persuaded that, if the Panel had based its analysis on the meanings of the terms "sound recording" and "distribution" at the time of China's accession to the WTO—that is, 2001—it would have reached a different conclusion on the interpretation of the entry "Sound recording distribution services" in China's GATS Schedule. The term "sound recording" can be used to refer to "recorded content", irrespective of how it is distributed. We have already considered above that the GATS, which entered into force in 1995, contemplates in Article XXVIII(b) the distribution of

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services—that is, of intangibles. This lends support to interpreting the meaning of "distribution" as

4. Summary under Article 31 of the

C. Article 32 of the Vienna Convention

401. China claims that the Panel's approach to Article 32 of the Vienna Convention[710] was "fundamentally flawed from the outset".[711] In China's view, because the Panel should have found that its analysis pursuant to Article 31 was inconclusive, the Panel should have applied Article 32 to "determine"[712] the meaning of the terms in China's Schedule and not merely to "confirm" the erroneous preliminary conclusion that it had reached under Article 31. China contends that the Panel's analysis of the preparatory work, that is, the Services Sectoral Classification List and the 1993 Scheduling Guidelines, was largely based on the same premises as its analysis of the sector 2.D, "Audiovisual Services", in China's GATS Schedule, as context, and, for the same reasons advanced by China with respect to that element of context, should have been found by the Panel to be equally inconclusive.[713] China also argues that the Panel failed to consider whether the circumstances of the conclusion of the treaty revealed China's intention not to undertake specific commitments on the electronic distribution of sound recordings.[714]

407.

conjunction with Articles 3 and 4 of the Foreign Investment Regulations, is also inconsistent with Article XVII of the GATS."[725]

VIII. Findings and Conclusions

414. For the reasons set forth in section V of this Report, with respect to China's measures pertaining to films for theatrical release and unfinished audiovisual products, the Appellate Body:

(a) finds that the Panel did not err, in paragraphs 7.560 and 7.584 of the Panel Report, in finding that Article 30 of the Film Regulation and Article 16 of the Film Enterprise Rule are subject to China's trading rights commitments in paragraphs 1.2 and 5.1 of China's Accession Protocol and paragraphs 83(d) and 84(a) and (b) of China's

415. For the reasons set forth in section VI of this Report, the Appellate Body:

(d) finds that the Panel did not err in finding, in paragraph 7.908 of the Panel Report, that at least one of the alternative measures proposed by the United States is an alternative "reasonably available" to China; and, therefore

(e) upholds the Panel's conclusion, in paragraph 8.2.(a)(i) of the Panel Report[731], that China has not demonstrated that the relevant provisions are "necessary" to protect public morals, within the meaning of Article XX(a) of the GATT 1994 and that, as a result, China has not established that these provisions are justified under Article XX(a).

416. For the reasons set forth in section VII of this Report, the Appellate Body:

(a) finds that the Panel did not err, in paragraph 7.1265 of the Panel Report, in finding that the entry "Sound recording distribution services" in sector 2.D of China's GATS Schedule extends to the distribution of sound recordings in non-physical form, notably through electronic means; and, therefore

(b) upholds the Panel's conclusion, in paragraph 8.2.3(b)(i) of the Panel Report[732], that the provisions of China's measures[733] prohibiting foreign-invested entities from engaging in the distribution of sound recordings in electronic form are inconsistent with Article XVII of the GATS.

417. The Appellate Body recommends that the DSB request China to bring its measures, found in this Report and in the Panel Report as modified by this Report, to be inconsistent with China's Accession Protocol, China's Accession Working Party Report, the GATS, and the GATT 1994 into conformity with China's obligations thereunder.

[731]See also, Panel Report, para. 7.913.
[732]See also, Panel Report, para. 7.1311.
[733]Article II of the Circular on Internet Culture, Article 8 of the Network Music Opinions, Article 4 of the Several Opinions, and Article X:7 of the List of Prohibited Foreign Investment Industries in the Catalogue, in conjunction with Articles 3 and 4 of the Foreign Investment Regulation.

Signed in the original in Geneva this 6th day of December 2009 by:

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Jennifer Hillman

Presiding Member

_____ _____

ANNEX I

WORLD TRADE ORGANIZATION

WT/DS363/10
23 September 2009

(09-4455)

Original: English

1) The Panel erred in law and failed to make an objective assessment of the matter before it, in violation of Article 11 of the DSU, in considering that the state-ownership requirement in Article 42 of the Publications Regulation makes no material contribution to the protection of public morals in China.[4]

2) To the extent that it based its findings on its reasoning concerning Article 42 of the Publications Regulation, the Panel also erred in law in considering that the exclusions relating to foreign-invested enterprises in Articles X.2 and X.3 of the Catalogue, Articles 3 and 4 of the Foreign Investment Regulation, Article 4 of the Several Opinions and Article 21 of the Audiovisual (Sub-)Distribution Rule

2) The Panel erred in concluding that an analysis of China's GATS schedule based on supplementary means of interpretation under Article 32 of the Vienna Convention confirmed its earlier analysis, under Article 31 of the Vienna Convention, of China's commitment on sound recording distribution services.[11]

3) Consequently, the Panel erred in law in finding that China's measures[12] are inconsistent with China's national treatment commitments under Article XVII of the GATS.

3. China seeks review by the Appellate Body of the Panel's legal conclusions, set out in paragraphs 7.576, 7.598, 7.599, 7.706 and sub-section 2.(c)(ii), (iii), (vi) and (vii) of Section VIII of the Panel Report,[13] that Article 30 of the Film Regulation and Article 16 of the Film Enterprise Rule are inconsistent with China's trading rights commitments under China's Accession Protocol. The Panel's conclusions are based on errors of law and legal interpretation, and on a failure to make an objective assessment of the facts before it, contrary to Article 11 of the DSU. Such errors led, inter alia, to the erroneous finding that the challenged measures are inconsistent with certain provisions of China's Accession Protocol, contrary to Articles 3.2 and 19.2 of the DSU. In particular, the Panel erred in concluding that China's trading rights commitments are applicable to the Chinese measures at issue, despite the fact that these measures do not regulate hard-copy cinematographic film, which is the subject of the US claim.[14]

4. China seeks review by the Appellate Body of the Panel's legal conclusions set out in paragraphs 7.706 and sub-section 2.(d)(i), (ii), (v), (vi) and (x) of section VIII of the Panel Report that Article 5 of the Audiovisual Products Regulation and Article 7 of the Audiovisual Products Importation Rule are inconsistent with China's trading rights commitments under China's Accession Protocol. The Panel's findings concerning these measures are based on the same reasoning as the one on which the Panel based its findings concerning Article 30 of the Film Regulation and Article 16 of the Film Enterprise Rule.[15]

[11]See, e.g. Panel Report, paras. 7.1221–7.1247.
[12]The Circular on Interic07(n)-51(n)6.1(n)nnnhCu(Filmt1tur TD 0 Tc 0 Tw (.5(l)10.30rred in)7.3(1 .00J /TT2()-11.A)

ANNEX II

WORLD TRADE ORGANIZATION

WT/DS363/11
6 October 2009

(09-4781)

Original: English

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

Notification of an Other Appeal by the United States
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 23(1) of the Working Procedures for Appellate Review

The following notification, dated 5 October 2009, from the Delegation of the United States, is being circulated to Members.

Pursuant to Rule 23 of the Working Procedures for Appellate Review, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel in China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (WT/DS363/R & Corr.1) ("Panel Report") and certain legal interpretations developed by the Panel.

The United States seeks review by the Appellate Body of the Panel's legal conclusion that the State plan requirement in Article 42 of the Publications Regulation can be characterized as "necessary" to protect public morals in China within the meaning of Article XX(a) of the General Agreement on Tariffs and Trade 1994.[1] This conclusion is in error and is based on erroneous findings on issues of law and legal interpretations, and on the Panel's failure to carry out its obligations under Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes to make an objective assessment of the matter before it.

[1] See, e.g., Panel Report, paras. 7.829-7.836.

ANNEX III

**RELEVANT EXCERPTS FROM
CHINA'S ACCESSION PROTOCOL AND WORKING PARTY REPORT,**

China's Accession Working Party Report	Panel Exhibit US-2
Paragraphs 83(d) and 84(a) and (b)	83. The representative of China confirmed that during the three years of transition, China would progressively liberalize the scope and availability of trading rights. ... (d) The representative of China also confirmed that within three years after accession, all enterprises in China would be granted the right to trade. Foreign invested enterprises would not be required to establish in a particular form or as a separate entity to engage in importing and exporting nor would new business licence encompassing distribution be required to engage in importing and exporting. 84. (a) The representative of China reconfirmed that China would eliminate its system of examination and approval of trading rights within three years after accession. At that time, China would permit all enterprises in China and foreign enterprises and individuals, including sole proprietorships of other WTO Members, to export and import all goods (except for the share of products listed in Annex 2A to the Draft Protocol reserved for importation and exportation by state trading enterprises) throughout the customs territory of China. Such right, however, did not permit importers to distribute goods within China. Providing distribution services would be done in accordance with Chi2e encn'of Cehr w

Provisions of the Chinese Measures Relevant to This Appeal**

	United States' Translation	China's Translation
Foreign Investment Regulation	Panel Exhibit US-9	None provided
Article 3	The Catalogue of Industries for Guiding Foreign Investment and the Catalog of Priority Industries Available for Foreign Investment in the Mid-West Region, drawn up by the National Development and Reform Commission, the State Economic and Trade Commission, and the Ministry of Foreign Trade and Economic Cooperation in conjunction with relevant departments of the State Council, have been promulgated after approval by the State Council. When partial adjustments are necessary in regard to the two Catalogs, the State Economic and Trade	

	United States' Translation	China's Translation
Catalogue	Panel Exhibit US-5	Panel Exhibit CN-41
Articles X:2, X:3, and X:7 in the List of Prohibited Foreign Investment Industries	2. Publication, master distribution, and import operations of books, newspapers and periodicals 3. Publication, production, and import operations of audiovisual products and electronic publications ... 7. News websites, network audio-visual	

	United States' Translation	China's Translation
2001 Audiovisual Products Regulation	Panel Exhibit US-16	Panel Exhibit CN-2
Article 5	The state institutes a system of licensing in regard to the publishing, production,	

	United States' Translation	China's Translation
Network Music Opinions	Panel Exhibit US-34	Panel Exhibit CN-68
Article 8	Establishing strict market entry rules and strengthening regulation over content. Internet culture business units which apply to set up network music operations should comply with the "Rules." To engage in network music product operations, a unit must get a Network Cultural Business License issued by the Ministry of Culture. Foreign-invested network cultural business units are prohibited.	To regulate market access, and to enhance supervision over contents; the application for establishing an Internet cultural entity to engage in network music business shall meet the requirements of the Provisions; whoever engages in the network music works operation shall obtain the "Certificate of License for Network Cultural Operation" issued by the Ministry of Culture. It is prohibited to establish network cultural entities with foreign investment.