

conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*, 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 Accession Working Party Report; and therefore
- (b) upholds the Panel's conclusions, in paragraph 8.1.2(c)(ii), (iii), (vi), and (vii) of the Panel Report⁷²⁶, that Article 30 of the *Film Regulation* and Article 16 of the *Film Enterprise Rule* 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;
- (c) finds that the Panel did not err, in paragraphs 7.652 and 7.674 of the Panel Report, 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, in 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; and therefore
- (d) upholds the Panel's conclusions, in paragraph 8.1.2(d)(i) and (v) of the Panel Report⁷²⁷, that Article 5 of the *2001 Audiovisual Products Regulation* and Article 7 of the *Audiovisual Products Importation Rule* are inconsistent with China's obligation, in 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.

⁷²⁵See also Panel Report, para. 7.1311.

⁷²⁶See also Panel Report, paras. 7.571, 7.576, 7.594, 7.598, and 7.599.

⁷²⁷See also Panel Report, paras. 7.657 and 7.680.

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

- (a) finds that, by virtue of the introductory clause of paragraph 5.1 of China's Accession Protocol, China may, in this dispute, invoke Article XX(a) of the GATT 1994 to justify provisions found to be inconsistent with China's trading rights commitments under its Accession Protocol and Working Party Report;
- (b) with respect to the Panel's analysis of the contribution made by the relevant provisions of China's measures⁷²⁸ to the protection of public morals within the meaning of Article XX(a):
 - (i) finds that the Panel did not err, in paragraphs 7.860 and 7.863 of the Panel Report, in its finding regarding the contribution made by the State-ownership requirement in Article 42 of the *Publications Regulation*;
 - (ii) finds that the Panel did not err, in paragraphs 7.865 and 7.868 of the Panel Report, in its finding regarding the contribution made by the provisions excluding foreign-invested enterprises from engaging in the importation of the relevant products⁷²⁹; and
 - (iii) finds that the Panel erred, in paragraph 7.836 of the Panel Report, 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;
- (c) finds that the Panel did not err in taking into account the restrictive effect that the relevant provisions and requirements have on those wishing to engage in importing⁷³⁰;

⁷²⁸Articles 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*.

⁷²⁹Such exclusion is 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*.

⁷³⁰See Panel Report, paras. 7.788, 7.827, 7.835, 7.847, 7.862, and 7.867.

- (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 Report⁷³¹, 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 Report⁷³², that the provisions of China's measures⁷³³ 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.

⁷³¹See also, Panel Report, para. 7.913.

⁷³²See also, Panel Report, para. 7.1311.

⁷³³Article 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:

Jennifer Hillman
Presiding Member

Shotaro Oshima
Member

Ricardo Ramírez-Hernández
Member