

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

AB-2009-3

Report of the Appellate Body

I.	Introduction.....	1
II.	Arguments of the Participants and the Third Participants	8
A.	<i>Claims of Error by China – Appellant</i>	8
1.	The Applicability of China's Trading Rights Commitments to Measures Pertaining to Films for Theatrical Release and Unfinished Audiovisual Products.....	8
(a)	Article 30 of the <i>Film Regulation</i> and Article 16 of the <i>Film Enterprise Rule</i>	8
(b)	Article 5 of the <i>2001 Audiovisual Products Regulation</i> and Article 7 of the <i>Audiovisual Products Importation Rule</i>	12
2.	The "Necessity" Test under Article XX(a) of the GATT 1994	12
(a)	The State-Ownership Requirement.....	13
(b)	The Exclusion of Foreign-Invested Enterprises.....	14
(c)	The Restrictive Effect of the Measures.....	15
(d)	Reasonably Available Alternative Measures	15
(e)	Completion of the Analysis	17
3.	The Scope of China's GATS Schedule Entry on "Sound Recording Distribution Services"	17
(a)	Article 31 of the <i>Vienna Convention</i>	18
(b)	Article 32 of the <i>Vienna Convention</i>	23
(c)	<i>In Dubio Mitius</i>	24
B.	<i>Arguments of the United States – Appellee</i>	24
1.	The Applicability of China's Trading Rights Commitments to Measures Pertaining to Films for Theatrical Release and Unfinished Audiovisual Products.....	24
(a)	Article 30 of the <i>Film Regulation</i> and Article 16 of the <i>Film Enterprise Rule</i>	24
(b)	Article 5 of the <i>2001 Audiovisual Products Regulation</i> and Article 7 of the <i>Audiovisual Products Importation Rule</i>	27
2.	The "Necessity" Test under Article XX(a) of the GATT 1994	28
(a)	The State-Ownership Requirement.....	28
(b)	The Exclusion of Foreign-Invested Enterprises.....	30
(c)	The Restrictive Effect of the Measures.....	30
(d)	Reasonably Available Alternative Measures	31
(e)	Completion of the Analysis	33
3.	The Scope of China's GATS Schedule Entry on "Sound Recording Distribution Services"	34
(a)	Article 31 of the <i>Vienna Convention</i>	34
(b)	Article 32 of the <i>Vienna Convention</i>	37
(c)	<i>In Dubio Mitius</i>	38
C.	<i>Claims of Error by the United States – Other Appellant</i>	39
1.	The Necessity of the State Plan Requirement within the Meaning of Article XX(a) of the GATT 1994	39
D.	<i>Arguments of China – Appellee</i>	42
1.	The Necessity of the State Plan Requirement within the Meaning of Article XX(a) of the GATT 1994	42

E.	<i>Arguments of the Third Participants</i>	45
1.	Australia.....	45
2.	European Communities.....	46
3.	Japan	49
4.	Korea.....	50
III.	Issues Raised in This Appeal	52
IV.	Overview of the Measures at Issue and the Panel's Findings	54
A.	<i>Introduction</i>	54
B.	<i>China's Trading Rights Commitments</i>	58
C.	<i>Aspects of China's Regulatory Regime for the Relevant Products</i>	62
D.	<i>Measures Pertaining to All Goods and Services in This Dispute</i>	63
E.	<i>Measures Pertaining to Reading Materials</i>	64
1.	Measures Challenged as Inconsistent with China's Trading Rights Commitments.....	65
2.	Measures Challenged under the GATS and the GATT 1994	68
F.	<i>Measures Pertaining to Audiovisual Products</i>	69
1.	Measures Challenged as Inconsistent with China's Trading Rights Commitments.....	69
2.	Measures Challenged under the GATS.....	71
G.	<i>Measures Pertaining to Films for Theatrical Release</i>	71
H.	<i>Measures Pertaining to the Electronic Distribution of Sound Recordings</i>	73
I.	<i>Matters on Appeal</i>	73
V.	The Applicability of China's Trading Rights Commitments to Measures Pertaining to Films for Theatrical Release and Unfinished Audiovisual Products	74
A.	<i>The Applicability of China's Trading Rights Commitments to Article 30 of the Film Regulation and Article 16 of the Film Enterprise Rule</i>	74
1.	The Panel's Acceptance of the Alleged "Shift" in the United States' Claim.....	76
2.	The Panel's Assessment of China's Measures Pertaining to Films for Theatrical Release.....	79
(a)	The Panel's Findings on Article 30 of the <i>Film Regulation</i>	80
(b)	The Meaning of the Chinese Term " <i>Dian Ying</i> " in Article 30 of the <i>Film Regulation</i>	82
(c)	The Alleged "Incidental and Practical" Effects on Goods of Article 30 of the <i>Film Regulation</i> and Their Relevance to the Applicability of China's Trading Rights Commitments.....	85
(d)	Conclusion	89
B.	<i>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</i>	90

VI.	China's Defence under Article XX(a) of the GATT 1994	91
A.	<i>The Availability of a Defence under Article XX(a) of the GATT 1994</i>	91
B.	<i>The "Necessity" Test under Article XX(a) of the GATT 1994</i>	104
1.	The Panel's Analytical Approach to the "Necessity" Test under Article XX(a)	105
2.	The Contribution of China's Measures to the Protection of Public Morals in China	111
(a)	The State-Ownership Requirement.....	112
(b)	The Exclusion of Foreign-Invested Enterprises	117
(c)	The State Plan Requirement	120
3.	The Restrictive Effect of the Measures.....	127
4.	Reasonably Available Alternative Measure.....	133
C.	<i>Summary and Conclusion on Article XX(a) of the GATT 1994</i>	141
VII.	Scope of China's GATS Schedule Entry "Sound Recording Distribution Services"	142
A.	<i>Introduction</i>	142
B.	<i>Article 31 of the Vienna Convention</i>	145
1.	Ordinary Meaning and the Panel's Use of Dictionary Definitions.....	145
2.	Context.....	149
(a)	China's GATS Schedule	150
(b)	Provisions of the GATS	154
(c)	GATS Schedules of Other Members	157
(d)	Summary	158
3.	Object and Purpose	159
4.	Summary under Article 31 of the <i>Vienna Convention</i>	162
C.	<i>Article 32 of the Vienna Convention</i>	163
D.	<i>Conclusions</i>	166
VIII.	Findings and Conclusions	167
ANNEX I	Notification of an Appeal by China, WT/DS363/10	
ANNEX II	Notification of an Other Appeal by the United States, WT/DS363/11	
ANNEX III	Relevant Excerpts from China's Accession Protocol and Working Party Report, China's GATS Schedule, and the Chinese Measures at Issue in This Appeal	

CASES CITED IN THIS REPORT

Short title	Full case title and citation
<i>Brazil – Retreaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, 1527
<i>Canada – Aircraft</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377
<i>Canada – Autos</i>	Panel Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , 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
<i>Canada – FIRA</i>	GATT Panel Report, <i>Canada – Administration of the Foreign Investment Review Act</i> , L/5504, adopted 7 February 1984, BISD 30S/140
<i>Canada – Periodicals</i>	Appellate Body Report, <i>Canada – Certain Measures Concerning Periodicals</i> , WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, 449
<i>Canada – Periodicals</i>	Panel Report, <i>Canada – Certain Measures Concerning Periodicals</i> , WT/DS31/R and Corr.1, adopted 30 July 1997, as modified by Appellate Body Report WT/DS31/AB/R, DSR 1997:I, 481
<i>Canada – Provincial Liquor Boards (EEC)</i>	GATT Panel Report, <i>Canada – Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies</i> , L/6304, adopted 22 March 1988, BISD 35S/37
<i>Chile – Price Band System (Article 21.5 – Argentina)</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina</i> , WT/DS207/AB/RW, adopted 22 May 2007, DSR 2007:II, 513
<i>China – Auto Parts</i>	Appellate Body Reports, <i>China – Measures Affecting Imports of Automobile Parts</i> , WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R, adopted 12 January 2009
<i>China – Publications and Audiovisual Products</i>	Panel Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/R and Corr.1, circulated to WTO Members 12 August 2009
<i>Colombia – Ports of Entry</i>	Panel Report, <i>Colombia – Indicative Prices and Restrictions on Ports of Entry</i> , WT/DS366/R and Corr.1, adopted 20 May 2009
<i>Dominican Republic – Import and Sale of Cigarettes</i>	Appellate Body Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, 7367
<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243
<i>EC – Bananas III</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
<i>EC – Chicken Cuts</i>	Appellate Body Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> , WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, 9157
<i>EC – Computer Equipment</i>	Appellate Body Report, <i>European Communities – Customs Classification of Certain Computer Equipment</i> , WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, 1851

Short title	Full case title and citation
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
<i>EC – Poultry</i>	Appellate Body Report, <i>European Communities – Measures Affecting the Importation of Certain Poultry Products</i> , WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, 2031
<i>India – Autos</i>	Panel Report, <i>India – Measures Affecting the Automotive Sector</i> , WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002, DSR 2002:V, 1827
<i>India – Patents (US)</i>	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97
<i>Korea – Various Measures on Beef</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, 5
<i>Turkey – Rice</i>	Panel Report, <i>Turkey – Measures Affecting the Importation of Rice</i> , WT/DS334/R, adopted 22 October 2007, DSR 2007:VI, 2151
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779
<i>US – Continued Zeroing</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R, adopted 19 February 2009
<i>US – Corrosion-Resistant Steel Sunset Review</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3
<i>US – FSC (Article 21.5 – EC)</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, 55
<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, 5663 (Corr.1, DSR 2006:XII, 5475)
<i>US – Gambling</i>	Panel Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/R, adopted 20 April 2005, as modified by Appellate Body Report, WT/DS285/AB/R, DSR 2005:XII, 5797
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
<i>US – Malt Beverages</i>	GATT Panel Report, <i>United States – Measures Affecting Alcoholic and Malt Beverages</i> , DS23/R, adopted 19 June 1992, BISD 39S/206
<i>US – Offset Act (Byrd Amendment)</i>	Appellate Body Report, <i>United States – Continued Dumping and Subsidy Offset Act of 2000</i> , WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, DSR 2003:I, 375
<i>US – Section 211 Appropriations Act</i>	Appellate Body Report, <i>United States – Section 211 Omnibus Appropriations Act of 1998</i> , WT/DS176/AB/R, adopted 1 February 2002, DSR 2002:II, 589
<i>US – Section 301 Trade Act</i>	Panel Report, <i>United States – Sections 301-310 of the Trade Act of 1974</i> , WT/DS152/R, adopted 27 January 2000, DSR 2000:II, 815

Short title	Full case title and citation
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
<i>US – Shrimp (Thailand) / US – Customs Bond Directive</i>	Appellate Body Report, <i>United States – Measures Relating to Shrimp from Thailand / United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties</i> , WT/DS343/AB/R, WT/DS345/AB/R, adopted 1 August 2008
<i>US – Softwood Lumber IV</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, 571
<i>US – Steel Safeguards</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , 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
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , 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
<i>1997 Electronic Publications Regulation</i>	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)
<i>2001 Audiovisual Products Regulation</i>	People's Republic of China State Council, Order No. 341 (2001) – Regulations on the Management of Audiovisual Products (Panel Exhibit US-16)	Order of the State Council of the People's Republic of China (No. 341) (2001) – Regulations on the Administration of Audiovisual Products (Panel Exhibit CN-2)
<i>Audiovisual (Sub-)Distribution Rule</i>	Order of the People's Republic of China Ministry of Culture, Ministry of Commerce, No. 28 (2004) – Rules for the Management of Chinese-Foreign Contractual Joint Ventures for the Sub-Distribution of Audiovisual Products (Panel Exhibit US-18)	Ministry of Culture and Ministry of Commerce, Order No. 28 (2004) – Measures for Administration of Sino-Foreign Distribution Contractual Joint Ventures of Audiovisual Products (Panel Exhibit CN-54)
<i>Audiovisual Products Importation Rule</i>	Order of The People's Republic of China Ministry of Culture and The People's Republic of China General Administration of Customs, No. 23 (2002) – Rules for the Management of the Import of Audiovisual Products (Panel Exhibit US-17)	Order of the Ministry of Culture and the General Administration of Customs (No.23) (2002) – Measures on the Administration of Importation of Audiovisual Products (Panel Exhibit CN-15)
<i>Catalogue</i> (includes the List of Restricted Foreign Investment Industries and the List of Prohibited Foreign Investment Industries)	Order of the National Development and Reform Commission and the Ministry of Commerce of the People's Republic of China, No. 57 (2007) – Catalogue of Industries for Guiding Foreign Investment (Panel Exhibit US-5) (includes the Catalogue of Industries With Restricted Foreign Investment and the Catalogue of Prohibited Foreign Investment Industries)	Order of National Development and Reform Commission and the Ministry of Commerce (No. 57) (2007) – Catalogue of Industries for Guiding Foreign Investment (Panel Exhibit CN-41) (includes the Catalog of Restricted Foreign Investment Industries and the Catalog of Prohibited Foreign Investment Industries)
<i>Circular on Internet Culture</i>	Notice of the Ministry of Culture on Some Issues Relating to Implementation of the "Interim Rules on the Management of Internet Culture" (2003); and Order of the Ministry of Culture of the People's Republic of China, No. 27 (2003) Interim Rules on the Management of Internet Culture (Panel Exhibit US-33)	Circular of the Ministry of Culture (No.27) (2003) – Relevant Issues of Implementation of the "Interim Provisions on the Administration of Internet Culture" (Panel Exhibit CN-67)
<i>Film Distribution and Exhibition Rule</i>	State Administration of Radio, Film and Television and the Ministry of Culture, No. 1519 (2001) – Implementing Rules for the Reform of the Film Distribution And Projection Mechanisms (Trial Implementation) (Panel Exhibit US-21)	State Administration of Radio, Film and Television and Ministry of Culture (No. 1519) (2001) – Interim Implementing Rules for Reforming Film Distribution and Exhibition (Panel Exhibit CN-12)

Short Title	Full Title in United States Exhibit	Full Title in Chinese Exhibit
<i>Film Enterprise Rule</i>	Order of the State Administration of Radio, Film and Television and the Ministry of Commerce, No. 43 (2004) – Provisional Rules on Entry Criteria For Operating Film Enterprises (Panel Exhibit US-22)	State Administration of Radio, Film and Television and the Ministry of Commerce, Order No. 43 (2004) – Interim Provisions on the Qualification Access for Operating Film Enterprises (Panel Exhibit CN-13)
<i>Film Regulation</i>	State Council of the People's Republic of China, Order No. 342 (2001) – Regulations on the Management of Films (Panel Exhibit US-20)	Order of the State Council of the People's Republic of China (No. 342) (2001) – Regulations on the Administration of Film (Panel Exhibit CN-11)
<i>Foreign Investment Regulation</i>	Order of the State Council of The People's Republic of China, No. 346 (2002) – Regulations Guiding the Orientation of Foreign Investment (Exhibit US-9)	No exhibit
<i>Imported Publications Subscription Rule</i>	General Administration of Press and Publication, Order 27 (2004) – Rules for the Management of Subscribers Placing Subscriptions for Imported Publications (Panel Exhibit US-30)	Order of the General Administration of Press and Publication (No. 27) (2004) – Measures for Administration of Subscription of Imported Publications by Subscribers (Panel Exhibit CN-99)
<i>Internet Culture Rule</i>	Ministry of Culture, Order No. 32 (2003) – Interim Rules on the Management of Internet Culture (Panel Exhibit US-32)	Ministry of Culture, Order No. 27 (2003) (revised by Order No. 32 (2004)) – Interim Provisions on the Administration of Internet Culture (Panel Exhibit CN-55)
<i>Network Music Opinions</i>	Several Opinions of the Ministry of Culture on the Development and Management of Network Music (2006) (Panel Exhibit US-34)	Several Opinions of the Ministry of Culture on Development and Administration of Network Music (No.32) (2006) (Panel Exhibit CN-68)
<i>Publications (Sub-)Distribution Rule</i>	General Administration for Press and Publication and the Ministry of Foreign Trade and Economic Cooperation, Order No. 18 (2003) – Rules for the Management of Foreign Invested Enterprises Sub-Distributing Books, Newspapers and Periodicals (Panel Exhibit US-28)	Order of the General Administration of Press and Publication and the Ministry of Foreign Trade and Economic Cooperation (No.18) (2003) – Measures for Administration of Foreign-Invested Book, Periodical and Newspaper Distribution Enterprises (Panel Exhibit CN-47)
<i>Publications Market Rule</i>	General Administration of Press and Publication (2004) – Administrative Rules for the Publications Market (Panel Exhibit US-27)	General Administration of Press and Publication (2004) – Provisions on the Administration of the Publications Market (Panel Exhibit CN-38)
<i>Publications Regulation</i>	State Council of The People's Republic of China, Order No. 343 (2001) – Regulations on the Management of Publications (Panel Exhibit US-7)	Order of the State Council of the People's Republic of China (No. 343) (2001) – Regulations on the Administration of Publishing (Panel Exhibit CN-14)
<i>Several Opinions</i>	Notice Issued by the Ministry of Culture, State Administration of Radio, Film, and Television, General Administration of Press and Publication, National Development and Reform Commission, and Ministry of Commerce and Printing and Issuing, No. 19 (2005) – "Several Opinions on the Introduction of Foreign Capital into the Cultural Sector" (Panel Exhibit US-6)	No exhibit

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
<i>Anti-Dumping Agreement</i>	<i>Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994</i>
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	<i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i>
DVDs	digital video discs
GAPP	China's General Administration of Press and Publication
GATS	<i>General Agreement on Trade in Services</i>
GATT 1994	<i>General Agreement on Tariffs and Trade 1994</i>
Harmonized System	Harmonized Commodity Description and Coding System of the World Customs Organization
<i>Importation Procedure</i>	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 <i>China – Publications and Audiovisual Products</i>
Panel Report	Panel Report, <i>China – Publications and Audiovisual Products</i> , WT/DS363/R and Corr.1
SARFT	China's State Administration on Radio, Film and Television
Services Sectoral Classification List	Services Sectoral Classification List, Note by the Secretariat, MTN.GNS/W/120, 10 July 1991
SPS	sanitary and phytosanitary
<i>SPS Agreement</i>	<i>Agreement on the Application of Sanitary and Phytosanitary Measures</i>

Abbreviation	Description
State plan requirement	requirement in Article 42 of the <i>Publications Regulation</i> 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 <i>Publications Regulation</i> that publication import entities be wholly State-owned enterprises
<i>Sub-Distribution Procedure</i>	China's Examination and Approval for Establishing Chinese-Foreign Equity Joint Ventures, Contractual Joint Ventures and Wholly Foreign-Owned Enterprises for the Sub-Distribution of Publications (State Council Order No. 412) (2005) (Panel Exhibit US-29)
suitable organization and qualified personnel requirement	requirement in Article 42(4) of the <i>Publications Regulation</i> that publication import entities have an organizational structure adapted to the needs of its business of importing publications and professionals who meet the qualification requirements prescribed by the State
TBT	technical barriers to trade
<i>TBT Agreement</i>	<i>Agreement on Technical Barriers to Trade</i>
<i>TRIMs Agreement</i>	<i>Agreement on Trade-Related Investment Measures</i>
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNON	United Nations Office at Nairobi
<i>Vienna Convention</i>	<i>Vienna Convention on the Law of Treaties</i> , done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
<i>Working Procedures</i>	<i>Working Procedures for Appellate Review</i> , WT/AB/WP/5, 4 January 2005
WTO	World Trade Organization
<i>WTO Agreement</i>	<i>Marrakesh Agreement Establishing the World Trade Organization</i>

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 Communities¹, *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, books, newspapers, periodicals, electronic publications); audiovisual home entertainment ("AVHE") products (for example, videocassettes, video compact discs, digital video discs ("DVDs")); sound recordings (for example, recorded audio tapes); and films for theatrical release.³ Further details regarding the content and the operation of the measures examined by the Panel are set out in section IV of this Report.

2. Before the Panel, the United States claimed that certain of the challenged Chinese measures violate trading rights commitments undertaken by China in the Protocol on the Accession of the People's Republic of China to the World Trade Organization (the "WTO") ("China's Accession Protocol")⁴ and the Report of the Working Party on the Accession of China to the WTO ("China's

¹We note that, on 1 December 2009, the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* (done at Lisbon, 13 December 2007) entered into force. On 29 November 2009, the World Trade Organization received a Verbal Note (WT/L/779) from the Council of the European Union and the Commission of the European Communities stating that, by virtue of the *Treaty of Lisbon*, as of 1 December 2009, the European Union replaces and succeeds the European Community.

²WT/DS363/R, 12 August 2009, and WT/DS363/R/Corr.1, 19 August 2009.

³Panel Report, paras. 2.1 and 2.2.

⁴WT/L/432.

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

⁵WT/ACC/CHN/49 and WT/ACC/CHN/49/Corr.1.

⁶Panel Report, para. 2.3(a).

⁷Panel Report, para. 3.1(a).

⁸Panel 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

⁹Panel Report, paras. 2.3(c) and 3.1(d). The United States also requested the Panel to find that, regarding China's national treatment obligations in respect of goods, certain of China's measures are also inconsistent with paragraphs 1.2 and 5.1 of China's Accession Protocol. (*Ibid.*, para. 3.1(e))

¹⁰The United States challenged, in particular: the *Foreign Investment Regulation*; the *Catalogue*; the *Several Opinions*; the *Publications Regulation*; the *Importation Procedure*; the *Imported Publications Subscription Rule*; the *Publications (Sub-)Distribution Rule*; the *Publications Market Rule*; the *Sub-Distribution Procedure*; the *1997 Electronic Publications Regulation*; the *2001 Audiovisual Products Regulation*; the *Audiovisual Products Importation Rule*; the *Audiovisual (Sub-)Distribution Rule*; the *Internet Culture Rule*; the *Circular on Internet Culture*; the *Network Music Opinions*; the *Film Regulation*; the *Film Enterprise Rule*; and the *Film Distribution and Exhibition Rule*. (Panel Report, para. 3.1) The full titles of these legal instruments are set out in the lists of abbreviations at pages vii and ix of this Report.

The parties submitted translations of the measures, or of certain provisions of the measures, as part of the exhibits attached to their first written submissions. The Panel identified several provisions for which the parties had provided different translations or disputed the meaning of particular terms, and requested that the parties attempt to agree on a single translation. On 9 and 20 October 2008, the parties communicated that they had reduced some of their translation differences but that they were unable to agree on others, and requested that the Panel seek translation of the relevant terms or provisions from an independent source. On 19 December 2008, the Panel requested the United Nations Office at Nairobi (the "UNON") to provide the relevant translations. The Panel and the parties received the translations from the UNON on 10 February 2009. Annex A-1 to the Panel Report summarizes the translation issues that arose during the Panel proceedings. (See Panel Report, paras. 2.4-2.9)

¹¹The Panel found that the following were not within its terms of reference: claims relating to China's trading rights commitments in respect of the *Film Distribution and Exhibition Rule*; claims under Article III:4 of the GATT 1994 in respect of the *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule*; and claims concerning certain requirements (pre-establishment legal compliance, approval process requirements, decision making criteria) contained in certain measures. (Panel Report, para. 8.1.1(a) and (b); see also paras. 7.60, 7.82, and 7.104) The Panel separately found that the lack of consultations on a specific claim under Article III:4 of the GATT 1994 regarding certain reading materials did not mean that the claim was outside the Panel's terms of reference; however, it excluded from consideration claims under Article III:4 of the GATT 1994 in respect of electronic publications and certain provisions of the *Imported Publications Subscription Rule*. (*Ibid.*, para. 8.1.1(c); see also paras. 7.131, 7.147, 7.156, and 7.161)

¹²The Panel found that the *Importation Procedure* and the *Sub-Distribution Procedure* did not qualify as "measures" because they did not themselves establish rules or norms of general and prospective application. (Panel Report, para. 8.1.1(d)(ii); see also paras. 7.214 and 7.225) The Panel separately found that the *Several Opinions* was a measure properly subject to dispute settlement proceedings. (*Ibid.*, para. 8.1.1(d)(i); see also para. 7.198)

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 rights commitments include an obligation to grant "all enterprises in China ... the right to trade", which means "the right to import and export goods". This obligation is subject to certain conditions, including that it is "[w]ithout prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement".¹³ The Panel found that provisions in China's measures that either limit importation rights to wholly State-owned enterprises regarding, or prohibit foreign-invested enterprises in China from importing, reading materials, AVHE products, sound recordings, and films, are inconsistent with China's obligation to grant the right to trade.¹⁴ The Panel also concluded that several provisions of the Chinese measures at issue breach China's obligation to grant in a non-discretionary manner the right to trade.¹⁵

7. The Panel turned next to China's defence that certain provisions found to be inconsistent with its trading rights commitments are nevertheless justified under Article XX(a) of the GATT 1994 because they form part of measures governing China's regime to review the content of the relevant products, thereby protecting public morals in China. The Panel refrained from making a finding as to "whether Article XX can be directly invoked as a defence to a breach of China's trading rights

¹³See China's Accession Protocol, para. 5.1; and China's Accession Working Party Report, paras. 83(d) and 84(a). In addition, China assumed obligations to ensure that foreign enterprises and individuals would be granted treatment no less favourable than that accorded to enterprises in China with respect to the right to trade (see China's Accession Protocol, para. 5.2) and to ensure that trading rights for foreign enterprises and individuals are granted in a non-discriminatory and non-discretionary manner (see China's Accession Working Party Report, para. 84(b)). The texts of these provisions are included as part of Annex III to this Report, and the Panel's analysis of them is summarized at *infra*, section IV.B.

¹⁴These findings relate to 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 42, in conjunction with Article 41, of the *Publications Regulation*; Article 21 of the *Audiovisual (Sub-)Distribution Rule*; Article 30 of the *Film Regulation*; and Article 16 of the *Film Enterprise Rule*. (Panel Report, paras. 8.1.2(a)(i), (ii), and (v), 8.1.2(b)(ii), 8.1.2(c)(iii) and (vii), and 8.1.2(d)(x); see also paras. 7.351, 7.352, 7.374, 7.401, 7.411, 7.576, 7.598, 7.599, and 7.703) The Panel's findings of violation in respect of Article 30 of the *Film Regulation* and Article 16 of the *Film Enterprise Rule* also extend to the exclusion of foreign enterprises not registered in China and foreign individuals from engaging in the business of importing films. (*Ibid.*, paras. 7.576, 7.598, and 7.599)

¹⁵These findings relate to Article 41 of the *Publications Regulation*; Articles 5 and 27 of the 2001 *Audiovisual Products Regulation*; Articles 7 and 8 of the *Audiovisual Products Importation Rule*; Article 30 of the *Film Regulation*; and Article 16 of the *Film Enterprise Rule*. (Panel Report, paras. 8.1.2(b)(viii), 8.1.2(c)(ii) and (vi), and 8.1.2(d)(i), (ii), (v), and (vi); see also paras. 7.437, 7.571, 7.594, 7.633, 7.657, 7.680, and 7.690) The Panel exercised judicial economy with respect to the claims that 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 42 of the *Publications Regulation*, do not grant in a non-discriminatory manner the right to trade. (*Ibid.*, paras. 8.1.2(a)(iii) and (vi) and 8.1.2(b)(v); see also paras. 7.357, 7.378, and 7.417) The Panel also made findings that, in respect of certain claims, the United States had not established a violation of China's trading rights commitments. (*Ibid.*, paras. 8.1.2(a)(iv) and (vii), 8.1.2(b)(i), (iii), (iv), (vi), (vii), and (x)-(xvii), 8.1.2(c)(i), (iv), (v), and (viii), and 8.1.2(d)(iii), (iv), (vii)-(ix), and (xi))

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. The Panel also considered claims of the United States concerning China's market access and national treatment obligations in Articles XVI and XVII, respectively, of the GATS, as they relate to reading materials, AVHE products, and the electronic distribution of sound recordings. With respect to the distribution of reading materials, the Panel found that provisions prohibiting foreign-invested enterprises in China from engaging in: the "master distribution"¹⁹ of books, newspapers, and periodicals; the "master wholesale"²⁰ or wholesale of electronic publications; and the wholesale of imported reading materials, are each inconsistent with Article XVII of the GATS.²¹ The Panel also concluded that provisions imposing different registered capital and operating term requirements on foreign-invested wholesalers than on wholly Chinese-invested wholesalers are inconsistent with Article XVII of the GATS.²²

¹⁶Panel Report, para. 7.743.

¹⁷Panel Report, para. 7.745.

¹⁸These findings relate to 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*; Articles 41 and 42 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*. (Panel Report, para. 7.726) Because the Panel found that China had not established that the measures at issue satisfy the requirements of Article XX(a) of the GATT 1994, the Panel did not determine whether Article XX(a) is available as a defence for breaches of China's trading rights commitments. (*Ibid.*, para. 8.2; see also paras. 7.726 and 7.911-7.914)

¹⁹The Panel concluded that "master distribution" involves the sale of publications by an exclusive seller to other wholesalers or retailers, or to certain professional end-users. (Panel Report, paras. 7.1025-7.1027)

²⁰The Panel took note of China's statement that "master wholesale" is a term synonymous with "master distribution", but is used exclusively in the context of electronic publications. (Panel Report, para. 7.1068)

²¹These findings relate to Article X:2 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 42 of the *Publications Regulation*, in conjunction with Article 4 of the *Imported Publications Subscription Rule*; Article 62 of the *1997 Electronic Publications Regulation*; and Article 2 of the *Publications (Sub-)Distribution Rule*, in conjunction with Article 16 of the *Publications Market Rule*. (Panel Report, para. 8.2.3(a)(i)-(v); see also paras. 7.998, 7.999, 7.1048, 7.1058, 7.1074, and 7.1094)

²²These findings relate to paragraphs 4 and 5 of Article 7 of the *Publications (Sub-)Distribution Rule*. (Panel Report, para. 8.2.3(a)(vii); see also para. 7.1142)

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 provisions for which a violation of Article XVI of the GATS had not been found, the Panel concluded that these provisions nevertheless result in discrimination against foreign service providers in violation of Article XVII of the GATS.²⁴ Concerning the electronic distribution of sound recordings, the Panel concluded that provisions of China's measures prohibiting foreign-invested enterprises from supplying this service are also inconsistent with Article XVII of the GATS.²⁵

10. Finally, the Panel considered the claims of the United States that China's measures are in breach of China's national treatment obligations in Article III:4 of the GATT 1994. The Panel found that certain provisions of China's measures relating to reading materials result in discrimination against like imported products, in violation of Article III:4 of the GATT 1994, either by prohibiting foreign-invested enterprises from distributing imported books, newspapers, and periodicals²⁶, or by requiring that the distribution of imported newspapers and periodicals occur only through subscription.²⁷ Regarding films for theatrical release and the electronic distribution of sound recordings, the Panel concluded that the United States had not demonstrated a violation of China's national treatment obligations under Article III:4 of the GATT 1994.²⁸

²³These findings relate to Article VI:3 of the List of Restricted Foreign Investment Industries in the *Catalogue*, in conjunction with Article 8 of the *Foreign Investment Regulation*, and Article 8.4 of the *Audiovisual (Sub-)Distribution Rule*. (Panel Report, para. 8.2.3(c)(i); see also paras. 7.1395 and 7.1396) Because the Panel found inconsistencies with Article XVI of the GATS in respect of these provisions, it exercised judicial economy with respect to claims under Article XVII of the GATS. (*Ibid.*, para. 8.2.3(c)(iv); see also para. 7.1427)

²⁴These findings relate to Article 1 of the *Several Opinions* and Article 8.5 of the *Audiovisual (Sub-)Distribution Rule*. (Panel Report, para. 8.2.3(c)(iii); see also para. 7.1426)

²⁵These findings relate to 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*; Article 4 of the *Several Opinions*; Article II of the *Circular on Internet Culture*; and Article 8 of the *Network Music Opinions*. (Panel Report, para. 8.2.3(b); see also para. 7.1311) The Panel also made findings that, in respect of certain claims, the United States had not established a violation of China's GATS commitments. (*Ibid.*, paras. 8.2.3(a)(vi), 8.2.3(b)(ii), and 8.2.3(c)(ii))

²⁶These findings relate to Article 2 of the *Publications (Sub-)Distribution Rule*, in conjunction with Article 16 of the *Publications Market Rule*. (Panel Report, para. 8.2.4(a)(iii); see also para. 7.1545)

²⁷These findings relate to Articles 3 and 4 of the *Imported Publications Subscription Rule*. (Panel Report, para. 8.2.4(a)(i); see also para. 7.1539)

²⁸Panel Report, para. 8.2.4(b) and (c); see also paras. 7.1654 and 7.1693. The United States also claimed that any violation of Article III:4 of the GATT 1994 would also be inconsistent with China's obligations in paragraphs 1.2 and 5.1 of China's Accession Protocol to abide by the national treatment obligations in Article III:4 of the GATT 1994. The Panel exercised judicial economy in respect of the claims under the GATT 1994 relating to reading materials, and found that the prerequisite of a violation of Article III:4 of the GATT 1994 was not present in respect of the claims relating to films for theatrical release and the electronic distribution of sound recordings. (*Ibid.*, para. 8.2.5; see also paras. 7.1707 and 7.1708) The Panel also made findings that, in respect of certain claims, the United States had not established a violation of China's obligations under the GATT 1994. (*Ibid.*, paras. 8.2.4(a)(ii), 8.2.4(b)(i) and (ii), and 8.2.4(c)(i))

11. On 22 September 2009, China notified the Dispute Settlement Body (the "DSB") of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to Articles 16.4 and 17 of the DSU, and filed a Notice of Appeal²⁹ pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").³⁰ On 29 September 2009, China filed an appellant's submission.³¹ On 5 October 2009, the United States notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to Articles 16.4 and 17 of the DSU, and filed a Notice of Other Appeal³² pursuant to Rule 23(1) and (2) of the *Working Procedures*. On 7 October 2009, the United States filed an other appellant's submission.³³ On 19 October 2009, China and the United States each filed an appellee's submission.³⁴ On the same day, Australia, the European Communities, Japan, and Korea each filed a third participant's submission³⁵, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu notified its intention to appear at the oral hearing as a third participant.³⁶

12. The oral hearing in this appeal was held on 2 and 3 November 2009. The participants and three of the third participants (the European Communities, Japan, and Korea) made oral statements. The participants and the third participants responded to questions posed by the Members of the Division hearing the appeal.

13. Attached as Annex III to this Report are the provisions of the Chinese measures at issue in this appeal, together with relevant extracts from China's Accession Protocol, China's Accession Working Party Report, and China's Schedule of Specific Commitments for services ("China's GATS Schedule").³⁷

²⁹WT/DS363/10 (attached as Annex I to this Report).

³⁰WT/AB/WP/5, 4 January 2005.

³¹Pursuant to Rule 21 of the *Working Procedures*.

³²WT/DS363/11 (attached as Annex II to this Report).

³³Pursuant to Rule 23(3) of the *Working Procedures*.

³⁴Pursuant to Rules 22 and 23(4) of the *Working Procedures*.

³⁵Pursuant to Rule 24(1) of the *Working Procedures*.

³⁶Pursuant to Rule 24(2) of the *Working Procedures*.

³⁷The People's Republic of China, Schedule of Specific Commitments, GATS/SC/135.

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 products³⁸, which, according to China, regulate services and content. Because, in China's view, these measures are not subject to the trading rights commitments at all, China also seeks reversal of the Panel's finding that such measures are inconsistent with China's trading rights commitments. Secondly, China appeals various elements of the Panel's necessity analysis, as well as its ultimate finding that various measures at issue³⁹ are not "necessary", within the meaning of Article XX(a) of the GATT 1994, to protect public morals in China. Finally, China disputes the Panel's finding that the inscription "Sound recording distribution services" in China's GATS Schedule encompasses the distribution of sound recordings through electronic means and, on that basis, seeks reversal of the Panel's consequent finding that various measures⁴⁰ regulating such distribution are inconsistent with China's national treatment obligation under Article XVII of the GATS.

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

(a) Article 30 of the *Film Regulation* and Article 16 of the *Film Enterprise Rule*

15. China appeals the Panel's findings 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. Specifically, China contends that the Panel erred in determining that China's trading rights commitments, which apply only with respect to trade in goods, are applicable to the *Film Regulation* and the *Film Enterprise Rule* because, in China's view, these measures regulate the

³⁸Article 30 of the *Film Regulation*; Article 16 of the *Film Enterprise Rule*; Article 5 of the 2001 *Audiovisual Products Regulation*; and Article 7 of the *Audiovisual Products Importation Rule*.

³⁹Articles 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*; Articles 41 and 42 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*.

⁴⁰Article 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*.

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 its erroneous finding that China's trading rights commitments apply to these provisions, China contends that the findings of inconsistency "are equally flawed and in error, and should be reversed".⁴¹

16. China maintains that the United States shifted the subject of its claim from "films for theatrical release" to "hard-copy cinematographic films", and that the Panel erroneously accepted this shift as "a mere clarification of the [United States'] claim".⁴² In its request for the establishment of a panel and its first written submission to the Panel, the United States alleged that China had acted inconsistently with its trading rights commitments by failing to grant all foreign enterprises and individuals the right to import "films for theatrical release".⁴³ In its first oral statement before the Panel, however, the United States "suddenly" asserted that it was "challenging measures that prohibit foreign-invested enterprises from importing hard-copy cinematographic films, which are tangible items".⁴⁴ Yet, the Panel accepted this shift and found that the United States had merely clarified the meaning of the expression "films for theatrical release" by confirming that this expression describes goods. As a result, the Panel relieved the United States of its burden of proof. According to China, by not finding that the United States had deliberately shifted the subject of its claim, the Panel had to "supplement[] the United States' failure" to fill in "a logical gap" as to why China's measures, which regulate content and services, could be inconsistent with China's trading rights commitments that apply to trade in goods.⁴⁵

17. In China's view, the Panel committed a legal error in its assessment of the measures at issue when it found that Article 30 of the *Film Regulation*⁴⁶ regulates who may engage in the import of hard-copy cinematographic films. Having acknowledged that the term "film" could be properly understood as referring to content, the Panel erred in not ruling out "hard-copy cinematographic films" as a possible meaning of the term "film" in the *Film Regulation* and in deriving instead legal inferences based on such meaning. According to China, the language of other provisions of the *Film Regulation* demonstrates that they are about the regulation of content and the services related to such

⁴¹China's appellant's submission, para. 255.

⁴²China's appellant's submission, para. 203 (referring to Panel Report, para. 7.523).

⁴³China's appellant's submission, paras. 204 and 205 (quoting Request for the Establishment of a Panel by the United States, WT/DS363/5, p. 7 (underlining added by China); and referring to United States' first written submission to the Panel, paras. 268 and 269).

⁴⁴China's appellant's submission, para. 207 (quoting United States' oral statement at the first Panel meeting, para. 11). (underlining added by China)

⁴⁵China's appellant's submission, para. 213.

⁴⁶China's arguments on the *Film Regulation* apply *mutatis mutandis* to the *Film Enterprise Rule*. (China's appellant's submission, footnote 155 to para. 219)

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 highlights that it has, in any event, claimed that the Panel failed to conduct an objective assessment of the facts, in violation of Article 11 of the DSU, when it examined China's measures concerning films for theatrical release.

18. China adds that additional evidence before the Panel, in the form of an independent translator's opinion regarding the appropriate translation of Article 30 of the *Film Regulation*, confirms that the term "film" ("*Dian Ying*" in Chinese) refers exclusively to the content of a film, rather than to the material on which the film is printed or the film stock. Notwithstanding this evidence and its own acknowledgement that the term "film" could refer to content, the Panel wrongly decided not to make any clear finding as to the meaning of the term "film" ("*Dian Ying*") in Article 30 of the *Film Regulation*. Instead, the Panel erroneously found that Article 30 "would necessarily affect"⁴⁹ who may import goods even if the term "*Dian Ying*" refers exclusively to the content of films.

19. China takes issue with the Panel's finding that Article 30 "would necessarily affect" who may import goods also because, according to China, the Panel failed to establish how the measures at issue affect the importation of hard-copy cinematographic films. According to China, the import restrictions imposed by the measures at issue relate only to the intangible content—the motion picture, as distinct from the cinematographic film that is the physical carrier of such motion picture. Consequently, the measures do not have any direct legal effect of restricting the importation of hard-copy cinematographic films. The right to import granted under the measures refers exclusively to the right to import content in the form of licensing agreements for the distribution of such content within China. Thus, the fact that the measures "may have an incidental, practical effect on hard-copy cinematographic film"⁵⁰, which is the carrier of the content regulated by the measures, does not

⁴⁷China's appellant's submission, para. 224.

⁴⁸China's appellant's submission, para. 234 (referring to Appellate Body Report, *EC – Hormones*, para. 132; and Appellate Body Report, *US – Section 211 Appropriations Act*, para. 105). In response to questioning at the oral hearing, China also referred to Appellate Body Reports, *China – Auto Parts*, para. 255, in support of its argument.

⁴⁹Panel Report, para. 7.543.

⁵⁰China's appellant's submission, para. 240.

support the Panel's finding that Article 30 would necessarily affect who may engage in the importation of hard-copy cinematographic films. In the present dispute, cinematographic films are imported "simultaneously, physically in conjunction with the right to provide the service in question".⁵¹ Therefore, there is "no restriction on the carrier independently from that applicable to the service"⁵², and the demand for the service is with respect to the content, not with respect to any good carrying such content.

20. Finally, China alleges that the Panel's finding that the measures at issue necessarily affect the importation of goods undermines China's legitimate rights. China recalls that its legitimate right to conduct content review of imported cultural products, including films for theatrical release, was neither challenged by the United States nor questioned by the Panel. China provides the following example to illustrate that its right to conduct content review would be undermined as a result of the Panel's finding. If the content of a film fails to pass the content review and the film cannot be imported for release in China, the Panel's logic necessarily implies that China would be found to be in violation of its obligations concerning trade in goods, because the hard-copy cinematographic film, in which the content is embedded, also cannot be imported. In this way, China argues, its legitimate right to conduct content review would be "seriously undermined".⁵³ China adds that its right to conduct content review with respect to films is clearly retained by virtue of its GATS Schedule, in which China has expressly reserved its right to regulate the importation of motion pictures for theatrical release.⁵⁴ China reiterates that its measures on films for theatrical release regulate content and services, and any effects on goods are merely "incidental" and "practical".⁵⁵ Thus, China maintains that the Panel's error lies in its failure to recognize that applying WTO rules concerning goods to measures that regulate services, "on the basis of a mere practical [and] incidental effect" of the measures on goods, "would lead to absurd results".⁵⁶

21. For these reasons, China requests the Appellate Body to reverse the Panel's findings that Article 30 of the *Film Regulation* and Article 16 of the *Film Enterprise Rule* "are subject to China's trading rights commitments, in that they would either directly regulate who may engage in importing of 'hard-copy cinematographic films' or necessarily affect who may engage in importing of such goods."⁵⁷ China also requests the Appellate Body to reverse the Panel's consequent findings that these

⁵¹China's appellant's submission, para. 242. (footnote omitted)

⁵²China's appellant's submission, para. 242.

⁵³China's appellant's submission, para. 251.

⁵⁴China's response to questioning at the oral hearing.

⁵⁵China's appellant's submission, para. 252.

⁵⁶China's appellant's submission, para. 252.

⁵⁷Panel Report, para. 7.560; see also para. 7.584. China submits that its arguments concerning the Panel's reasoning with respect to Article 30 of the *Film Regulation* also apply, *mutatis mutandis*, to Article 16 of the *Film Enterprise Rule*.

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 products⁵⁸ 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-discretionary manner the right to trade applies to such measures.

23. China maintains that, like Article 30 of the *Film Regulation* and Article 16 of the *Film Enterprise Rule*, Article 5 of the *Audiovisual Products Regulation* and Article 7 of the *Audiovisual Products Importation Rule* do not regulate the importation of goods but, rather, regulate the service of copyright licensing for the publication of audiovisual content. China argues that, to the extent that the Panel's findings are based on the same reasoning as that on which the Panel based its findings concerning Article 30 of the *Film Regulation* and Article 16 of the *Film Enterprise Rule*, the Panel committed the same errors of law in its findings that Article 5 of the *2001 Audiovisual Products Regulation* and Article 7 of the *Audiovisual Products Importation Rule* are inconsistent with paragraph 1.2 of China's Accession Protocol and paragraph 84(b) of China's Accession Working Party Report.

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

24. China requests the Appellate Body to reverse the Panel's findings that several of the Chinese measures at issue in this dispute⁵⁹ are not "necessary", within the meaning of Article XX(a) of the GATT 1994, to protect public morals, and that they therefore cannot be justified under that provision.

⁵⁸The United States explained that unfinished audiovisual products refer to master copies to be used to publish and manufacture copies for sale in China. (See Panel Report, para. 7.608) The Panel referred to "unfinished audiovisual products" as master copies imported for publication. (See *ibid.*, paras. 7.625 and 7.642)

⁵⁹Articles 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*; Articles 41 and 42 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*.

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 requirement in Article 42(4) of the *Publications Regulation* that publication import entities have a suitable organization and qualified personnel. China alleges that the Panel erred in evaluating this argument exclusively through the prism of "cost". China claims

⁶⁰China's appellant's submission, para. 9.

⁶¹China's appellant's submission, para. 12.

⁶²China's appellant's submission, para. 18.

⁶³China's appellant's submission, paras. 17-20 (referring in footnotes to Panel Report, para. 7.853; China's responses to Panel Questions 46(a), 185, 188(b), and 195; China's first written submission to the Panel, paras. 153, 196, and 197; and China's second written submission to the Panel, para. 104).

that its argument was not only about cost, but also about the capacity to perform content review in a manner that preserves China's intended level of protection of public morals. China maintains that State-owned enterprises are the only entities currently considered to fulfil the technical and organizational requirements set out in the relevant Chinese laws and regulations.⁶⁴ China submits that, if the Panel had properly understood China's arguments, it would have found that the State-ownership requirement makes a material contribution and is therefore necessary to the protection of public morals in China.

(b) The Exclusion of Foreign-Invested Enterprises

29. China requests the Appellate Body to reverse the Panel's finding that the provisions excluding foreign-invested enterprises from importing the relevant products are not "necessary" to protect public morals in China within the meaning of Article XX(a) of the GATT 1994. China alleges that the Panel erred in finding that the provisions excluding foreign-invested enterprises from importing the relevant goods into China⁶⁵ make no material contribution to the protection of public morals in China. The Panel relied on its earlier 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. According to China, because the Panel's finding concerning the State-ownership requirement is erroneous, "[b]y necessary implication"⁶⁶ the Panel's finding with respect to the provisions excluding foreign-invested enterprises from importing is also in error. In addition, China submits that foreign-invested enterprises may not have the requisite understanding and knowledge of the applicable standards of Chinese public morals to ensure the level of protection sought by China. China maintains that the professionals performing content review must be familiar with Chinese values and public morals and capable of efficiently communicating with and understanding the administrative authorities. China submits that in its analysis the Panel made a finding that requiring qualified review personnel contributes materially to the protection of public morals in China, and that the Panel's finding on the exclusion of foreign-invested enterprises contradicts this finding.⁶⁷ China emphasizes that the Panel's failure to address these arguments constitutes a failure to make an objective assessment of the matter before it, as required by Article 11 of the DSU.

⁶⁴China's appellant's submission, para. 29 (referring to China's second written submission to the Panel, para. 104).

⁶⁵Articles 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*.

⁶⁶China's appellant's submission, para. 33.

⁶⁷China's appellant's submission, para. 36 (referring to Panel Report, para. 7.825).

(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 with paragraph 5.1 of China's Accession Protocol and its analysis under Article XX(a) of the GATT 1994, the Panel committed a mistake similar to that of the panel in *US – Gasoline*.⁶⁹ This approach leads to the "absurd situation"⁷⁰ that the challenged measures can never be justified because the reasons why they were found to be inconsistent are the same as the reasons given for why they are not "necessary". China adds that the Panel made no finding that China's measures have a significant restrictive impact on imports. To the contrary, in acknowledging that the statistical information submitted by China seemed to indicate that some of its measures were compatible with an increase in imports, the Panel found, in fact, that China's measures do not seem to have adversely affected imports.⁷¹

(d) Reasonably Available Alternative Measures

31. China requests the Appellate Body to reverse the Panel's finding that at least one of the alternative measures referred to by the United States was an alternative "reasonably available" to China. In particular, China submits that the proposed alternative that the Chinese Government be given sole responsibility for conducting content review is not "reasonably available" because it is merely theoretical in nature and would impose an undue and excessive burden on China. China alleges that the Panel erred in law and failed to properly address arguments presented by China demonstrating that the proposed alternative is not "reasonably available".

32. China asserts that the Panel failed to properly take into account the contribution of the import entities, as first-level reviewers, in the overall content review process. In the current system, import entities carry most of the burden of reviewing imported reading materials, while the Government's

⁶⁸China's appellant's submission, para. 39.

⁶⁹China's appellant's submission, para. 44 (referring to Appellate Body Report, *US – Gasoline*, p. 16, DSR 1996:I, 3, at 15).

⁷⁰China's appellant's submission, para. 43.

⁷¹China's appellant's submission, para. 45 (referring to Panel Report, paras. 7.846, 7.861, and 7.866).

involvement is much more limited. China takes issue with the Panel's statement that the cost of content review, if performed exclusively by the Chinese Government, would not be substantially higher than what it already is. To the contrary, the cost of the "tremendous restructuring" that would be required to implement the alternative proposed by the United States would result in an "undue financial burden" for China.⁷² At present, the Chinese Government does not have the capacity and the resources required to perform on its own the entire range of functions associated with content review. It would have to create a completely new structure reflecting the contribution of the different levels of review. In addition, the proposed alternative would involve significant cost and impose a significant administrative burden because it would require the training and assignment of a large number of qualified content reviewers in numerous locations. Furthermore, the Panel's judgement rests on the assumption that time-sensitive publications could be submitted electronically to the Government for content review. However, this would require the establishment of an electronic sampling system and upgrading of the current electronic transmission system, which would pose "substantial technical difficulties".⁷³ In addition, China stresses that, where elements of content are found to be contrary to public morals, these elements must be removed from the products before they are imported. It is unclear to what extent this could be achieved and by whom if content review were operated by means of electronic communication between private import entities and the Chinese Government. Finally, China adds that the proposed alternative would make it impossible to "double check"⁷⁴ content at the customs level because it implies that content review would be carried out in one single location.

33. China submits that, in any event, the alternative proposed by the United States does not qualify as "reasonably available" because it is not clear that it would be less trade restrictive than the measures at issue. China refers to its argument that, in assessing the trade-restrictive impact of the measure, the Panel erred in examining not only the restrictive impact on imports but also the restrictive impact on potential importers. For China, therefore, the Panel's finding that the alternative proposed by the United States was less trade restrictive was erroneous for the additional reason that the Panel's assessment of the restrictiveness was based on a flawed examination of the restrictive impact of the measure. It follows, according to China, that, in the absence of a proper finding as to the extent of the restrictive impact on imports resulting from China's measures, the Panel could not have established that an alternative measure would have a less restrictive impact on trade.

⁷²China's appellant's submission, para. 62.

⁷³China's appellant's submission, para. 67. (footnote omitted)

⁷⁴China's appellant's submission, para. 69.

(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 made before the Panel demonstrating that: the other "alternatives" proposed by the United States are not "genuine" and not "reasonably available"; China's measures comply with the requirements of the chapeau and are thus justified under Article XX(a) of the GATT 1994; and Article XX(a) is available as a defence to the claim that China has acted inconsistently with its trading rights commitments under its Accession Protocol.

35. In response to questioning at the oral hearing in this appeal, China clarified that, if the Appellate Body were to uphold the Panel's findings that the measures at issue are not "necessary" within the meaning of Article XX(a) of the GATT 1994, then China does not seek a ruling by the Appellate Body on the issue of whether Article XX(a) is available as a defence to a violation of China's trading rights commitments under its Accession Protocol.

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

36. China requests the Appellate Body to reverse the Panel's findings that a number of provisions of China's measures are inconsistent with Article XVII of the GATS.⁷⁵ China appeals these findings particularly on the grounds that the Panel erred in interpreting the commitment on "Sound recording distribution services" inscribed in China's GATS Schedule as encompassing the distribution of sound recordings through electronic means.

37. China claims that, in interpreting this entry in China's GATS Schedule, the Panel erred in its application of both Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*").⁷⁶ In China's view, "the only possible outcome which the Panel could have reasonably reached after applying the rules on treaty interpretation [was] that such analysis was largely inconclusive."⁷⁷ China considers that, as a consequence, the Panel also erred and acted contrary to

⁷⁵Article 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*.

⁷⁶Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679.

⁷⁷China's appellant's submission, para. 89.

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 distribution services", because it wrongly disregarded evidence submitted by China demonstrating that the ordinary meaning of the terms "sound recording" and "distribution" related only to tangible/physical goods, and reached premature conclusions on the ordinary meaning of these terms before examining them in their context and in the light of the object and purpose of the GATS.

39. China alleges that the Panel's conclusion that "sound recording" "cannot be limited to sound embedded or transferred on physical media"⁸⁰ was based exclusively on the Panel's analysis of the definition of the term "recording"—"recorded material; a recorded broadcast, performance".⁸¹ The Panel failed to consider an alternative definition submitted by China that defines "recording" as "something on which sound or visual images have been recorded".⁸² For China, this alternative definition unambiguously indicated that "recording" refers to the carrier that contains the result of a recording process. Rather than relying solely on one dictionary definition, the Panel "should have found that the existence of two possible meanings suggested that the use of dictionary definitions was

⁷⁸As a preliminary matter, China observes that it will, for purposes of this appeal, adopt the terminology used by the United States and the Panel and refer to the distribution of sound recordings by electronic means as "the services at issue". China stresses, however, that this is without prejudice to its view, as expressed throughout the Panel proceedings, that the services at issue constitute new and distinct services, "network music services", rather than, as the United States argued, merely a new technological means to deliver sound recording services. (China's appellant's submission, paras. 81 and 82)

⁷⁹China's appellant's submission, para. 97. In its argument, China draws on the approach of panels in *Canada – Autos* (at para. 10.12) and *US – Section 301 Trade Act* (at para. 7.22) and the Appellate Body in *EC – Chicken Cuts* (at para. 176).

⁸⁰China's appellant's submission, para. 105 (quoting Panel Report, para. 7.1176).

⁸¹*Shorter Oxford English Dictionary*, 5th edn., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 2, p. 2493. See China's appellant's submission, para. 101 (quoting Panel Report, para. 7.1173).

⁸²China's appellant's submission, para. 102 (quoting *The American Heritage Dictionary of the English Language*, 4th edn. (Houghton Mifflin Harcourt, 2000) (Panel Exhibit CN-71)).

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. China claims that the Panel committed a similar error in respect of the term "distribution". The Panel interpreted "distribution" to mean "the dispersal" of "things of value"⁸⁴, including *intangible* products, based on a dictionary definition supplied by the parties, and supplemented by additional dictionary definitions that the Panel itself sought out.⁸⁵ However, China had provided the Panel with another dictionary definition of "distribution" that defines this term as "the process of marketing and supplying goods, especially to retailers".⁸⁶ China had also cited the Appellate Body's statement in *US – Softwood Lumber IV* that "the ordinary meaning of the term 'goods' [...] includes items that are tangible and capable of being possessed"⁸⁷, which China views as supporting its position that the ordinary meaning of "distribution" encompasses the distribution of only physical goods. Although the Panel acknowledged that other dictionary definitions were relevant, it failed to carry out an analysis of these definitions. According to China, in the light of the various dictionary meanings, the Panel should have come to the conclusion that the meaning of "distribution" was also inconclusive.

41. China refers to the report of the Appellate Body in *US – Gambling* as support for its contention that the Panel failed to consider evidence submitted by China and failed to include the meanings claimed by China in the range of possible meanings of "sound recording" and "distribution". The Panel therefore erred in reaching "premature conclusions" on the ordinary meaning of these two terms "and ultimately on that of 'sound recording distribution services'".⁸⁸ For China, the Appellate Body report in *US – Gambling* suggests that, in cases where a panel commences its interpretation by consulting dictionary definitions, it must identify the range of possible meanings

⁸³China's appellant's submission, para. 106.

⁸⁴China's appellant's submission, para. 112 (referring to Panel Report, para. 7.1178).

⁸⁵The Panel observed that the term "commodity" is further defined as a "thing of use or value; *spec.* a thing that is an object of trade, *esp.* a raw material or agricultural crop'; or 'a thing one deals in or makes use of.'" (*Shorter Oxford English Dictionary*, 5th edn., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 1, p. 461. See Panel Report, para. 7.1179) The Panel also referred to dictionaries that define "distribution" as the "movement of goods *and services* from the source through the distribution channel" (*ibid.*, para. 7.1180 (quoting *Businessdictionary.com*, available at: <www.businessdictionary.com> (emphasis added by the Panel)), and define "distribution channel" as "the path or route taken by goods *and services* as they move from producer to final consumer" (*ibid.*, footnote 654 to para. 7.1180 (referring to *The Monash Marketing Dictionary*, available at: <www.buesco.monash.edu.au/mkt/dictionary/> (emphasis added by the Panel)).

⁸⁶China's appellant's submission, para. 113 (quoting *The American Heritage Dictionary of the English Language*, 4th edn. (Houghton Mifflin Harcourt, 2000) (Panel Exhibit CN-72) (underlining added by China); and referring in footnote to China's first written submission to the Panel, para. 458).

⁸⁷China's appellant's submission, para. 113 (referring in footnote to China's first written submission to the Panel, para. 460; and quoting Appellate Body Report, *US – Softwood Lumber IV*, para. 59 (underlining added by China)).

⁸⁸China's appellant's submission, para. 126 (referring to Panel Report, para. 7.1181).

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 sector 2.D of China's GATS Schedule, China claims that the Panel erred in failing to find that this element of context was also inconclusive as to the meaning of "Sound recording distribution services". China sees no "logical nexus"⁹² between, on the one hand, the Panel's statement that the

⁸⁹China's appellant's submission, para. 124 (referring to Appellate Body Report, *US – Gambling*, para. 167).

⁹⁰China's appellant's submission, para. 134.

⁹¹MTN.GNS/W/120, 10 July 1991, at sector 2.D.

⁹²China's appellant's submission, para. 144.

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 it recognized, with respect to the construction and renovation of cinema theatres, that China had scheduled service activities related to audiovisual services under the heading "Audiovisual Services", even if such activities are typically classified under other sectors in classification systems or in the GATS Schedules of other WTO Members. As regards the GATS Schedules of other Members, the Panel itself seems to have acknowledged that such examination did not offer any positive evidence, or support any particular inference, as to whether China's entry on "Sound recording distribution services" in its GATS Schedule extends to the supply of intangibles. The Panel "merely held that this element of context does not contradict such conclusion."⁹³

45. China "fails to see the logic behind"⁹⁴ the Panel's analysis of the context provided by Article XXVIII(b) of the GATS. In China's view, there is no link between the distribution of services, as referred to in Article XXVIII(b), and the definition of products in the context of a distribution activity, which was the issue concerning China's GATS commitment on "Sound recording distribution services". Even admitting that the term "distribution" could, in the abstract, relate to the distribution of both physical and intangible products, this does not indicate whether the specific entry in China's GATS Schedule refers only to physical products or extends also to intangible products. Thus, China contends that the Panel's examination of Article XXVIII(b), like its analysis of all the contextual elements discussed above, is inconclusive as to whether China's GATS commitment on "Sound recording distribution services" is limited to physical products, or extends also to intangible products.

⁹³China's appellant's submission, para. 156.

⁹⁴China's appellant's submission, para. 159.

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 progressive liberalization. According to China, these elements required the Panel to give careful consideration to: (i) the sovereignty of WTO Members to decide upon the pace and the extent of liberalization of their services markets; (ii) the fact that, absent a specific commitment explicitly inscribing it in a GATS Schedule, a particular service should not be considered as subject to any commitment; and (iii) the fact that the preamble of the GATS explicitly states that progressive liberalization should be achieved through "successive rounds of multilateral negotiations aimed at promoting the interests of all participants on a mutually advantageous basis ..., while giving due respect to national policy objectives". According to China, these elements should have led the Panel to exercise more deference in its interpretation of the terms in China's GATS Schedule "where there was no sufficiently conclusive evidence that China intended to schedule a commitment on this particular service."⁹⁵

47. China asserts that a proper examination of the object and purpose of the GATS suggests that the meaning to be ascribed to its entry on "Sound recording distribution services" should be based on definitions contemporaneous to the conclusion of the treaty. The Panel, however, followed an "evolutionary"⁹⁶ approach to treaty interpretation, insofar as it interpreted China's GATS commitments based on their contemporary meaning. In China's view, the principle of progressive liberalization does not allow the scope of the commitments of a WTO Member to be extended based on "temporal variations in language".⁹⁷

48. For all of the above reasons, China claims that the Panel failed to apply properly the customary rules of treaty interpretation codified in Article 31 of the *Vienna Convention*, acted inconsistently with the requirements of Article 3.2 of the DSU, and erred in failing to find that the results of its interpretation of the relevant entry in China's GATS Schedule under Article 31 of the *Vienna Convention* were "at the least inconclusive".⁹⁸

⁹⁵China's appellant's submission, para. 168.

⁹⁶China's appellant's submission, para. 170.

⁹⁷China's appellant's submission, para. 173.

⁹⁸China's appellant's submission, para. 178; see also para. 174.

(b) Article 32 of the *Vienna Convention*

49. China contends that the Panel's approach to Article 32 of the *Vienna Convention* was "fundamentally flawed from the outset".⁹⁹ Because the Panel should have found that its analysis pursuant to Article 31 was inconclusive, the Panel should have applied Article 32 to "determine"¹⁰⁰ the meaning of the terms in China's Schedule and not merely to confirm the erroneous preliminary conclusion it had reached under Article 31.

50. China claims that the Panel's analysis of the Services Sectoral Classification List and the 1993 Explanatory Note on Scheduling of Initial Commitments in Trade in Services (the "1993 Scheduling Guidelines")¹⁰¹, as preparatory work under Article 32 of the *Vienna Convention*, was largely based on the same premises as its analysis of the sector heading "Audiovisual Services" in China's GATS Schedule. Yet, the fact that audiovisual content is the fundamental characteristic of the products associated with the services scheduled under sector 2.D does not exclude that China may have intended to commit services relating to audiovisual products in physical form only under that heading. Thus, for the same reasons advanced by China in respect of the Panel's analysis of the sector heading "Audiovisual Services", the Panel's analysis of the preparatory work under Article 32 of the *Vienna Convention* is "equally inconclusive".¹⁰²

51. Regarding the circumstances of the conclusion of its Accession Protocol, China claims that, even assuming that the negotiators were aware of the technical feasibility and commercial viability of the electronic distribution of sound recordings in 2001, this alone does not demonstrate that the negotiators intended to agree on a commitment on such services. The Panel also failed to take proper account of the absence of a specific legal framework for the services at issue, both internationally and domestically, at that time. Referring to the reasoning of the Appellate Body in *EC – Chicken Cuts*¹⁰³, China submits that the facts that the supply of the services at issue was not allowed within China at the time of the negotiations on China's accession to the WTO and that Chinese measures regulating the services at issue were adopted only as from 2003, constitute relevant evidence of the circumstances of conclusion of the treaty. China emphasizes that this evidence, which reveals that China did not intend to make a commitment on such services, "should not have been ignored by the Panel".¹⁰⁴ In contrast, and contrary to the reasoning of the Panel, the fact that internal discussions on possible implementation of a legal framework concerning the services at issue were taking place

⁹⁹China's appellant's submission, para. 177.

¹⁰⁰China's appellant's submission, para. 179.

¹⁰¹MTN.GNS/W/164, 3 September 1993.

¹⁰²China's appellant's submission, para. 182.

¹⁰³China's appellant's submission, para. 189 (referring to Appellate Body Report, *EC – Chicken Cuts*, para. 283).

¹⁰⁴China's appellant's submission, para. 190.

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 the requirements of Article 3.2 of the DSU, and erred in failing to find that the results of its interpretation pursuant to Article 32 were "inconclusive".¹⁰⁵

(c) *In Dubio Mitius*

53. Finally, China claims that the Panel should have found that the application of both Articles 31 and 32 of the *Vienna Convention* left the issue of whether China's GATS commitment on "Sound recording distribution services" includes the distribution of sound recordings by electronic means "largely inconclusive".¹⁰⁶ When confronted with such a high level of ambiguity, the Panel should have applied the *in dubio mitius* principle and refrained from adopting the interpretation that was the least favourable to China. According to this principle, if the meaning of a term is ambiguous, the meaning to be preferred is the one that is less burdensome to the party assuming an obligation, or the one that interferes the least with a party's territorial supremacy, or involves less general restrictions upon the parties.¹⁰⁷ In China's view, this case presented a clear ground for the Panel to apply the *in dubio mitius* principle and, in failing to do so, the Panel failed to apply properly the customary rules of treaty interpretation and acted inconsistently with Article 3.2 of the DSU.

B. *Arguments of the United States – Appellee*

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

(a) Article 30 of the *Film Regulation* and Article 16 of the *Film Enterprise Rule*

54. The United States requests the Appellate Body to uphold the Panel's findings that Article 30 of the *Film Regulation* and Article 16 of the *Film Enterprise Rule* are subject to 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. According to the United States, the

¹⁰⁵China's appellant's submission, para. 192.

¹⁰⁶China's appellant's submission, para. 193.

¹⁰⁷China recalls that, in *EC – Hormones*, the Appellate Body found that the "principle of *in dubio mitius* applies in interpreting treaties, in deference to the sovereignty of States". (China's appellant's submission, para. 195 (quoting Appellate Body Report, *EC – Hormones*, footnote 154 to para. 165))

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 similarly not be subject to China's trading rights commitments, which cannot be the case. The United States adds that the expressive content of a good—such as the slogan of a T-shirt or the content of a film—is not separable from the rest of the good.

57. The United States characterizes as "misplaced"¹¹² China's reliance on the opinion of a translator at the United Nations Office at Nairobi (the "UNON") that the Chinese term "*Dian Ying*" in the *Film Regulation* could refer to the content of a film (that is, the artistic work), "and not to the

¹⁰⁸United States' appellee's submission, para. 124 (quoting Panel Report, para. 7.560).

¹⁰⁹United States' appellee's submission, para. 123 (referring to China's appellant's submission, paras. 221, 232, 238, 244, and 245).

¹¹⁰United States' appellee's submission, para. 125 (quoting China's response to Panel Question 179).

¹¹¹United States' appellee's submission, para. 125 (quoting China's response to Panel Question 179). (emphasis added by the United States omitted)

¹¹²United States' appellee's submission, para. 130.

material (*i.e.*, physical medium) on which the film is printed, or the film stock."¹¹³ The United States contends that "[t]he distinction drawn by the UNON translator between content in isolation on the one hand and the material in isolation on the other hand is not at issue in this dispute"¹¹⁴ because the United States has not asserted that Article 30 of the *Film Regulation* affects only the material on which the film is printed (such as film stock). Rather, the United States claims that Article 30 of the *Film Regulation* affects a good containing content.

58. In addition, the United States emphasizes that heading 3706 in both the Harmonized Commodity Description and Coding System of the World Customs Organization (the "Harmonized System")¹¹⁵ and China's Schedule of Concessions for goods¹¹⁶ reads "Cinematographic film, exposed and developed, whether or not incorporating sound track or consisting only of sound track". Moreover, the Explanatory Notes¹¹⁷ accompanying the Harmonized System heading provide that "this heading covers ... cinematographic film for the projection of motion pictures", which confirms that cinematographic films are considered goods even if they are used to provide a service. The United States also underlines that Article III:10 of the GATT 1994 provides an exception to the national treatment obligation for films for theatrical release, which is elaborated upon in Article IV of the GATT 1994. Noting that both provisions are unchanged from the GATT 1947, the United States contends that they "make clear that films for theatrical release have been considered goods since at least 1947."¹¹⁸

59. The United States recalls 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"¹¹⁹ does not preclude the application of China's trading rights commitments to the *Film Regulation*. 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. In any event, a measure restricting who may import a good would be subject to China's trading rights commitments in respect of goods. Furthermore, the United States highlights China's statement that "hard-copy cinematographic film is imported ... simultaneously, physically in conjunction with the right to

¹¹³United States' appellee's submission, para. 130 (quoting the UNON's translation, p. 25; and referring to China's appellant's submission, para. 231, in turn referring to Panel Report, para. 7.533).

¹¹⁴United States' appellee's submission, para. 130 (referring to the United States' comments during the Panel proceedings on the UNON's translation, paras. 26 and 27).

¹¹⁵Harmonized Commodity Description and Coding System, Explanatory Notes, 4th edn. (WCO, 2007), p. VI-3706-1 (Panel Exhibit US-53).

¹¹⁶WT/ACC/CHN/49/Add.1.

¹¹⁷Harmonized Commodity Description and Coding System, Explanatory Notes, 4th edn. (WCO, 2007), p. VI-3706-1 (Panel Exhibit US-53).

¹¹⁸United States' appellee's submission, para. 132.

¹¹⁹United States' appellee's submission, para. 134 (quoting Panel Report, para. 7.555).

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 does 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.

¹²⁰United 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 System¹²¹ 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 who may engage in importing of hard-copy master copies, because only licensed importers could engage in importing of audiovisual content on master copies."¹²³ The United States also supports the Panel's rejection of China's argument that measures restricting who may import unfinished audiovisual products should not be subject to goods disciplines simply because such products are, in China's view, accessories to services.

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

64. According to the United States, the Panel correctly found that none of the measures that it had determined 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. The United States observes that the Panel analyzed the necessity of the measures at issue by assuming, without deciding, that Article XX(a) of the GATT 1994 can be invoked as a defence to an inconsistency with China's obligation to grant the right to trade. At the oral hearing in this appeal, the United States urged the Appellate Body to review the Panel's findings under Article XX(a) using the same *arguendo* approach, and likewise to refrain from deciding whether Article XX(a) is available as a defence to a violation of China's obligation to grant the right to trade.

(a) The State-Ownership Requirement

65. The United States requests the Appellate Body to reject China's appeal of the Panel's finding that the State-ownership requirement does not make a material contribution to the protection of public morals in China. The United States maintains that the Panel properly considered China's arguments with respect to the State-ownership requirement and correctly concluded that this requirement does not make a material contribution to the protection of public morals in China.

66. Recalling that China bore the initial burden of proof with respect to any defence based on Article XX(a) of the GATT 1994, the United States observes that China's defence would fail if it could not prove that State ownership of the importing entity was necessary to achieve its content review objectives. In the United States' view, China did not meet this burden and the Panel did not

¹²¹Harmonized Commodity Description and Coding System, Explanatory Notes, 4th edn. (WCO, 2007), p. XVI-8523-1 (Panel Exhibit US-55).

¹²²WT/ACC/CHN/49/Add.1.

¹²³United States' appellee's submission, para. 150 (quoting Panel Report, para. 7.644).

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 function¹²⁴, 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 that China had offered very limited information on the cost of content review. The Panel also observed that non-State-owned enterprises are routinely required to bear the costs associated with complying with laws and regulations that serve a public policy function. For these reasons, the United States submits that the Panel properly found that "the arguments and evidence put forward by China do not support the view that the state-ownership requirement makes a material contribution to the protection of public morals in China."¹²⁵

67. The United States also asserts that the Panel did not misrepresent China's argument concerning the requirement for a suitable organization and qualified personnel. When asked by the Panel to explain why this requirement could not be met by non-State-owned enterprises, China's argumentation was "terse, at best"¹²⁶, because China merely repeated that it could not impose the cost of content review on non-State-owned enterprises. With regard to China's argument that State-owned enterprises are the only entities "currently considered"¹²⁷ to fulfil the organization and technical requirements set out in the relevant Chinese law, the United States contends that, as a logical matter, a description of what entities China currently considers to fulfil a requirement cannot establish that only those entities could fulfil that requirement. In any event, the Panel did not limit itself to considering the cost of compliance with the requirement of a suitable organization and qualified personnel. This is evidenced by the Panel's statement that it was not convinced that privately owned enterprises would be unable to attract qualified personnel, or that they would be unable to obtain the organizational know-how needed to conduct content review properly.¹²⁸ For these reasons, the United States contends that the Panel both understood and properly considered China's "very limited"¹²⁹ argument on the suitable organization and qualified personnel requirement, as it related to the State-ownership requirement, and rightly concluded that these requirements did not make a material contribution to China's objective.

¹²⁴United States' appellee's submission, para. 14 (referring to Panel Report, para. 7.854, in turn referring to China's second written submission to the Panel, para. 104).

¹²⁵United States' appellee's submission, para. 20 (quoting Panel Report, para. 7.860).

¹²⁶United States' appellee's submission, para. 22 (referring to China's response to Panel Question 46(b)).

¹²⁷United States' appellee's submission, para. 23 (referring to China's appellant's submission, para. 29, in turn quoting China's second written submission to the Panel, para. 104).

¹²⁸United States' appellee's submission, para. 24 (referring to Panel Report, para. 7.858).

¹²⁹United States' appellee's submission, para. 25.

(b) The Exclusion of Foreign-Invested Enterprises

68. The United States requests the Appellate Body to uphold the Panel's findings that the provisions¹³⁰ 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

(c) The Restrictive Effect of the Measures

70. The United States submits that the Panel was correct, in assessing the trade restrictiveness of the measures at issue under Article XX(a) of the GATT 1994, to consider not only the restrictive impact of the measures on imports, but also their restrictive impact on "those wishing to engage in

¹³⁰Articles 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*.

¹³¹China's appellant's submission, para. 33.

¹³²United States' appellee's submission, para. 32 (referring to Panel Report, para. 7.858).

importing".¹³³ In addition, according to the United States, the Panel's ultimate conclusion that the measures were not "necessary" within the meaning of Article XX(a) would stand irrespective of the Panel's assessment of the restrictive impact of the measures. This is so because the Panel found that China's measures do not make a contribution to the achievement of China's content review objectives, and this conclusion alone supports the Panel's ultimate conclusion. The United States refers to the various Panel findings concerning the contribution made by the measures at issue to the protection of public morals.¹³⁴ Each such finding suffices to sustain the Panel's ultimate conclusion that the relevant measure is not "necessary" to protect public morals within the meaning of Article XX(a). The United States contends that these findings also show that China's argument on appeal—that "the reasons for which these measures were found to be in violation of China's trading rights commitments in the first place were also exactly the same reasons for which such measures cannot be justified"¹³⁵—is incorrect.

71. In addition, the United States argues that, in its consideration of restrictive effects, the Panel was simply adapting 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. It was "logical" 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 applying Article XX(a) on an *arguendo* basis 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.

(d) Reasonably Available Alternative Measures

72. The United States requests the Appellate Body to uphold the Panel's finding that giving the Chinese Government sole responsibility for conducting content review is a WTO-consistent alternative that is reasonably available to China.¹³⁶ The United States contends that China has failed to submit evidence in support of its position that adopting the United States' proposal would impose

¹³³United States' appellee's submission, para. 38 (quoting Panel Report, para. 7.788). (emphasis added by the United States omitted)

¹³⁴United States' appellee's submission, paras. 36-39 (referring in footnotes to Panel Report, paras. 7.842, 7.844, 7.860, and 7.865).

¹³⁵United States' appellee's submission, para. 40 (quoting China's appellant's submission, para. 43).

¹³⁶As further alternative measures, in addition to the one examined by the Panel, the United States proposed: in-house review by content experts, trained or hired by the importer, who would do content review before importation, during the process of importation, or after importation but before release of the goods into China; review by the Chinese Government of products imported by foreign-invested and privately held importers; and review by Chinese domestic entities with the appropriate expertise, who importers would engage to conduct content review before, during, or after importation. (United States' appellee's submission, footnote 59 to para. 47 (referring to Panel Report, paras. 7.873-7.875; and United States' oral statement at the second Panel meeting, para. 25))

an undue burden on China. Instead, the evidence before the Panel established that the Chinese Government does have the capacity to carry out content review, because Chinese authorities already carry out content review of films imported for theatrical release and content review of electronic publications and audiovisual products. Moreover, with respect to reading materials, the General Administration of Press and Publication (the "GAPP") performs several content review functions even if, as China argues, its role may be limited. In the United States' view, this establishes that, in principle, the Chinese Government and the GAPP are capable of conducting content review.

73. The United States further argues that China has not provided any data or estimate that would suggest that the cost to the Chinese Government of performing content review would be unreasonably high. In addition, China has not responded to the Panel's observation that China could charge fees to defray any additional expense and that, in fact, Article 44 of the *Publications Regulation* as it stands already provides for that option.¹³⁷ The United States also submits that, because the Chinese Government owns 100 per cent of the equity in the import entities, the Government is in effect already financing content review of imported publications. Therefore, the United States considers that the Panel was correct in stating that it was "not apparent"¹³⁸ that the cost to the Chinese Government would be any higher if the United States' proposal were implemented.

74. In response to China's argument that the proposed alternative would impose an undue burden because it would require the creation of a new structure within the Chinese Government, the United States argues that the mere fact that a proposed alternative requires a change does not disqualify it as a reasonably available alternative. In *Korea – Various Measures on Beef*, the Appellate Body was not persuaded that Korea could not achieve its desired level of protection if it were to devote more resources to its enforcement efforts.¹³⁹ Furthermore, in response to China's argument that the proposed alternative would impose a significant burden because it would require the training and assignment of a large number of qualified content reviewers in numerous locations, the United States asserts that it is not apparent why the Chinese Government would have difficulty operating in multiple locations. In any event, according to the United States, current content review may be, and the annual inspections are, in the first instance, conducted by authorities at the provincial level. For the United States, this demonstrates that the capacity to conduct content review is already present across China and is not limited to a single location within the Chinese Government.¹⁴⁰

¹³⁷The text of Article 44 of the *Publications Regulation* is set out, *infra*, footnote 254.

¹³⁸United States' appellee's submission, para. 54 (quoting Panel Report, para. 7.904).

¹³⁹United States' appellee's submission, para. 55 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 180).

¹⁴⁰United States' appellee's submission, para. 56 (referring to GAPP, Notice on Approving and Issuing License for Importing Publications and Carrying Out Annual Inspection System (2006) No. 1238 (Panel Exhibit CN-22)).

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.

¹⁴¹United States' appellee's submission, para. 58 (referring to CNPIEC, Report on Operation of Imported Publications of China National Publication Import & Export (Group) Corporation in 2006 (26 February 2007) (Panel Exhibit CN-26), p. 5).

¹⁴²United States' appellee's submission, para. 59 (referring to China's response to Panel Question 191).

¹⁴³United States' appellee's submission, para. 62 (referring to China's appellant's submission, para. 77, in turn referring to China's second written submission to the Panel, paras. 107-132).

¹⁴⁴United States' appellee's submission, para. 64.

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 measures¹⁴⁵ 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."¹⁴⁶ According to the United States, China has presented little argumentation as to why the Panel's interpretation of China's GATS Schedule is inconsistent with the standard of treaty interpretation set forth in the *Vienna Convention*, or why China's preferred interpretation should be accepted. The United States disagrees with China that, at each step of the Panel's interpretative analysis, the Panel should have found the relevant element of interpretation to be "inconclusive". For the United States, China's criticism of the Panel's analysis "misses the mark"¹⁴⁷, insofar as it ignores that the Panel conducted a comprehensive examination of all relevant elements under Articles 31 and 32 of the *Vienna Convention*, rather than determining that any single element of its analysis in isolation was conclusive.

(a) Article 31 of the *Vienna Convention*

79. The United States argues that the Panel correctly found that the ordinary meaning of "recording" is "recorded material"¹⁴⁸, which refers to the content that is recorded, rather than the medium containing the recorded sound, as argued by China. This finding was consistent with a definition of "recording" that had been put forward by both the United States and China. Given that the Panel explicitly took note of all of the definitions offered by the parties and explained its reasons for concluding that "recording" is not limited to recorded content that is embedded on physical media, the United States maintains that China's claim that the Panel disregarded one of the two definitions for "recording" that China had provided does not withstand scrutiny.

80. The United States also contends that the Panel's analysis of the ordinary meaning of "sound recording" and "distribution" in China's GATS Schedule is consistent with the approach of the Appellate Body in *US – Gambling*. The Panel did not simply analyze the meaning of the relevant

¹⁴⁵ 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*.

¹⁴⁶ United States' appellee's submission, para. 71 (quoting Panel Report, para. 7.1311).

¹⁴⁷ United States' appellee's submission, para. 75.

¹⁴⁸ Panel Report, para. 7.1173.

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

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

¹⁵⁰The United States adds that, following China's logic, a commitment on "videos" undertaken in 2002 would not encompass DVDs, even though DVDs had already overtaken videotapes as the primary medium for distributing films by then. This example demonstrates that dictionaries are not the sole or even always the best source of the ordinary meaning of a term, particularly where the editing of a dictionary lags behind the evolution of the ordinary meaning of a term. (United States' appellee's submission, para. 91 (referring in footnote to Appellate Body Report, *EC – Chicken Cuts*, para. 175))

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. According to the United States, this conclusion by the Panel is consistent with the logic in China's Schedule, which groups audiovisual products under sector 2.D because these products are of a different kind than the other products whose distribution is covered in sector 4. This uniqueness is due both to their audiovisual content and to the fact that they can be distributed in non-physical form. The United States also observes that China has developed no alternative analysis of the context provided by sector 4 and that, in any event, the Panel did not rely solely on its analysis of sector 4 as conclusive of the scope of China's commitment on "Sound recording distribution services". Rather, the Panel examined sector 4 of China's Schedule together with other elements of the context, to determine whether, taken as a whole, they supported the Panel's analysis regarding the meaning of the terms in China's GATS Schedule.

85. In the view of the United States, Article XXVIII(b) of the GATS, which defines the "supply of a service" as including its "distribution", disproves China's assertion that the term "distribution" is limited to the distribution of physical goods. To the contrary, Article XXVIII(b) demonstrates that "distribution" can and does refer to distribution of non-physical items. For the United States, this rebuts China's assertions that the meaning of "distribution" effectively limits the term "sound recording" to physical objects.

¹⁵¹United States' appellee's submission, para. 92 (referring to Panel Report, *US – Gambling*, para. 6.285).

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 preamble of the GATS indicates that the Agreement is aimed at, *inter alia*, establishing "a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization", and that commitments negotiated under the Agreement should aim at "securing an overall balance" of rights and obligations between the Members. These statements mean that, while WTO Members may decide on the pace and extent of liberalization of their services markets, they must also comply with the services commitments that they have undertaken. The United States disagrees with China's conception of "progressive liberalization" because, while each Member exercises its prerogatives by entering into specific commitments, compliance with current commitments is essential to the credibility and success of progressive liberalization in the future. As for the argument that the principle of progressive liberalization would have required the Panel to base its analysis of the relevant terms in China's GATS Schedule on their meaning at the time of China's accession to the WTO, the United States observes that such an interpretative approach would place a limitation on a Member's commitment that does not exist in its Schedule, and would not conform to the requirements of the *Vienna Convention*. The United States adds that resorting to a dictionary published in December 2001—when China's GATS Schedule was finalized—would not have led to a different interpretation. Even in 2001, the term "distribution" referred to intangible products. For the United States, the Panel's finding that "product" refers to goods and services does not depend on technological developments since 2001.

87. For all of the above reasons, the United States submits that the Panel's analysis of the ordinary meaning of the relevant terms in China's GATS Schedule in their context and in the light of the object and purpose of the GATS was sound, and should be upheld.

(b) Article 32 of the *Vienna Convention*

88. The United States claims that the Panel did not err in resorting to supplementary means of interpretation under Article 32 of the *Vienna Convention* only for the purpose of confirming the conclusions it reached when applying Article 31 of the *Vienna Convention*. The United States cautions that China may not seek to have the Appellate Body reopen the facts related to the circumstances of the conclusion of China's GATS Schedule, in particular given that China's Notice of Appeal does not include a claim under Article 11 of the DSU on this issue.

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 by the Panel. Rather, the United States argues, they were considered and rejected by the Panel. The United States agrees with the Panel that a "Member's service commitments need not reflect its existing legal framework"¹⁵⁴, particularly given that Members often undertake GATS specific commitments that guarantee a level of market access higher than that available under the regulatory regimes in force at the time the commitments are made. The United States points to evidence that was before the Panel demonstrating that China and other WTO Members were aware of the commercial reality of the electronic distribution of sound recordings before 2001, and that the services at issue were being supplied in China at the time of the conclusion of the negotiations of China's GATS Schedule. In the view of the United States, the Panel could not have interpreted the common intentions of the parties based solely on China's adoption of a law in 2003. The United States adds that China's reference to *EC – Chicken Cuts* is unavailing because the Panel's approach to the circumstances of the conclusion of the treaty in this case was consistent with the guidance provided by the Appellate Body in that case.¹⁵⁵ The United States, therefore, concludes that the Panel's analysis of the supplementary means of interpretation was correct, and that the circumstances of the conclusion of China's accession to the WTO support the finding that China undertook a GATS specific commitment with respect to the electronic distribution of sound recordings.

(c) *In Dubio Mitius*

90. The United States characterizes China's claim that the Panel should have applied the principle of *in dubio mitius* as "without merit".¹⁵⁶ The Panel correctly interpreted the meaning of the entry "Sound recording distribution services" in China's GATS Schedule as encompassing the electronic distribution of sound recordings on the basis of Article 31 of the *Vienna Convention*, and then confirmed this interpretation by resorting to supplementary means of interpretation under Article 32

¹⁵²United States' appellee's submission, para. 110 (quoting China's appellant's submission, para. 184).

¹⁵³United States' appellee's submission, para. 111 (referring to China's appellant's submission, para. 190).

¹⁵⁴United States' appellee's submission, para. 111 (quoting Panel Report, para. 7.1245).

¹⁵⁵United States' appellee's submission, para. 114 (referring to China's appellant's submission, para. 189, in turn referring to Appellate Body Report, *EC – Chicken Cuts*, para. 283).

¹⁵⁶United States' appellee's submission, para. 115.

of the *Vienna Convention*. For these reasons, the United States considers that there was no basis for applying the *in dubio mitius* principle in this dispute.

C. *Claims of Error by the United States – Other Appellant*

1. The Necessity of the State Plan Requirement within the Meaning of Article XX(a) of the GATT 1994

91. The United States requests the Appellate Body to reverse the Panel's intermediate finding that the 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 (the "State plan requirement") can be characterized as "necessary", in the absence of reasonably available alternatives, to protect public morals in China within the meaning of Article XX(a) of the GATT 1994. Alternatively, if the Appellate Body upholds the Panel's findings on the proposed alternative measure that the Panel found to be reasonably available to China, then, rather than reversing the Panel, the United States suggests that the Appellate Body could simply declare the Panel's intermediate finding moot and of no legal effect.

92. The United States expresses "some concerns"¹⁵⁷ about the analytical approach taken by the Panel in its analysis of the "necessity" of the State plan requirement. The United States considers that the Panel took a "two-step"¹⁵⁸ approach in its analysis under Article XX(a) of the GATT 1994, examining, first, whether China had made a *prima facie* case that the measures at issue were "necessary" within the meaning of Article XX(a), and examining only subsequently whether reasonably available and WTO-consistent alternatives had been identified. In taking this approach, the Panel drew on a statement made by the Appellate Body in *Brazil – Retreaded Tyres*.¹⁵⁹ However, the United States submits that other Appellate Body reports, in particular *US – Gambling* and *Korea – Various Measures on Beef*, described a single process consisting of a number of "possible lines of inquiry"¹⁶⁰ that are to be weighed and balanced. According to the United States, the "single, integrated, yet multifaceted inquiry"¹⁶¹ set out by the Appellate Body is moreover in line with the text of Article XX(a), which sets out a single criterion: "necessary". The United States contends that intermediate findings of a multi-step analysis, such as the preliminary conclusion of the Panel in the present case that the State plan requirement is "necessary" to protect public morals "in the absence of

¹⁵⁷United States' other appellant's submission, para. 26.

¹⁵⁸United States' other appellant's submission, para. 26.

¹⁵⁹United States' other appellant's submission, para. 26 (referring to Panel Report, para. 7.786, in turn quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 178).

¹⁶⁰United States' other appellant's submission, para. 26 (referring to Appellate Body Report, *US – Gambling*, paras. 306 and 307; and referring in footnote to Appellate Body Report, *Korea – Various Measures on Beef*, para. 166).

¹⁶¹United States' other appellant's submission, para. 27.

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 Given that these domestic publishers perform in-house

¹⁶²United States' other appellant's submission, para. 27 (referring to Panel Report, para. 7.836).

¹⁶³United States' other appellant's submission, paras. 28 and 29 (referring to Panel Report, para. 7.785; Appellate Body Report, *US – Gambling*, para. 310; and Appellate Body Report, *Korea – Various Measures on Beef*, para. 161).

¹⁶⁴United States' other appellant's submission, para. 31 (quoting China's response to Panel Question 44).

¹⁶⁵United States' other appellant's submission, para. 34.

¹⁶⁶United States' other appellant's submission, para. 34 (referring to Panel Report, para. 7.812; United States' oral statement at the second Panel meeting, para. 30; and GAPP, "Bulletin of Statistics", Excerpt (Panel Exhibit US-98)).

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. For these reasons, the United States considers that there are "significant flaws"¹⁶⁷ in the Panel's analysis of the State plan requirement, and that the Panel misinterpreted and misapplied Article XX(a) of the GATT 1994 in reaching its findings regarding the "necessity" of this requirement. The United States claims, in the alternative, that, if the Appellate Body were to find that the Panel's analysis concerning the State plan requirement does not constitute a misinterpretation and misapplication of Article XX(a) of the GATT 1994, then the Panel's disregard of significant facts relating to this requirement, including the fact that it did not know the content of the State plan, constitutes an error in the appreciation of the evidence because the Panel made a finding that has no evidentiary basis in the record, and is therefore inconsistent with Article 11 of the DSU.

D. *Arguments of China – Appellee*

1. The Necessity of the State Plan Requirement within the Meaning of Article XX(a) of the GATT 1994

100. China contends that the Appellate Body should dismiss the United States' "concerns" about the analytical approach taken by the Panel in its Article XX(a) analysis. China also requests the Appellate Body to dismiss the United States' other appeal and to uphold the Panel's finding that the State plan requirement makes a material contribution to the protection of public morals in China.

101. With respect to the "two-step" analytical approach allegedly adopted by the Panel in its "necessity" analysis under Article XX(a) of the GATT 1994, China submits that the United States' contention appears to be based on an inaccurate representation of previous Appellate Body findings. China points out that the United States' reference to a statement in the Appellate Body report in *US – Gambling*¹⁶⁸ was incomplete. When read in its entirety, it is clear that in *US – Gambling* the Appellate Body set out an approach of logical sequencing between the various tests to be performed as part of the "necessity" test. This sequencing is also reflected in the Appellate Body report in *Brazil – Retreaded Tyres*.¹⁶⁹ China adds that the United States has not identified any specific legal error affecting the Panel's reasoning. Instead, the United States expresses "some concerns" and suggests that the Panel's approach generated confusion with respect to the term "necessary". According to China, this does not constitute an allegation of an error of law that would fall within the scope of appellate review. In any event, China submits that the Panel has followed precisely the multifaceted approach to weighing and balancing that the United States argues the Panel should have adopted.

¹⁶⁷United States' other appellant's submission, para. 38.

¹⁶⁸China's appellee's submission, para. 6 (referring to United States' other appellant's submission, para. 26).

¹⁶⁹China's appellee's submission, para. 7 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 178).

102. On substance, China submits that the Panel was correct 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. According to China, the United States' argument that China failed to put forward evidence about the State plan requirement is "misplaced and incorrect".¹⁷⁰ China did respond to the pertinent Panel question explaining that the State plan was not available in written form, and that the State plan is concerned with the quantity, geographical and product coverage of publication import entities. The Panel was entitled to consider that this response, together with other evidence on the record, provided a sufficient basis for the Panel's analysis.¹⁷¹ China points to, in particular, certain exhibits that, in its view, constituted "circumstantial evidence"¹⁷² confirming that the selection of publication import entities is concerned with their quantity, and their geographical and product coverage. China argues that the Panel's evaluation of this evidence fell within its discretion as the trier of facts and that the United States has failed to establish that the Panel erred in the inferences that it drew from the facts before it.¹⁷³

103. China characterizes as "irrelevant"¹⁷⁴ and "wrong"¹⁷⁵ the United States' comparison of the respective numbers of domestic publication entities and approved publication import entities, and its related efforts to explain that content review for imported publications could be performed in a manner similar to that for domestic publications. The United States fails to take into account significant differences between the content review of domestic publications and that of imported publications. In particular, China maintains that the market demand for domestic publications is much higher, and content review of imported publications requires greater resources and sophistication, including specific language skills and an appreciation of the differences between Chinese culture and that of the countries of origin of foreign publications. China asserts that the fact that there is a lower number of entities in charge of content review for imported publications is only a reflection of the different requirements for the two types of work and that, therefore, no meaningful comparison can be drawn from the number of entities involved in the content review of the two different categories of publications.

¹⁷⁰China's appellee's submission, para. 14 (referring to United States' other appellant's submission, para. 33).

¹⁷¹China's appellee's submission, paras. 13 (referring to China's response to Panel Question 44) and 14.

¹⁷²China's appellee's submission, footnote 12 to para. 15 (referring to W. Yumei, "Fourteen (Foreign Publications) Retailers Enter Chinese Mainland Market and Increasing Number of Book, Newspaper and Magazine Retailers", *China News Publishing Newspaper*, 22 January 2008 (Panel Exhibit US-13); Panel Exhibit CN-26, *supra*, footnote 141; and "China Statistical Data Collection of Press and Publication", in *China Labor and Social Security Publication* (2006, 2005, 2004, 2003, 2002) (Panel Exhibits CN-33 through CN-37, respectively)).

¹⁷³China's appellee's submission, para. 17 (referring to Appellate Body Report, *US – Wheat Gluten*, paras. 175 and 176).

¹⁷⁴China's appellee's submission, subheading 3.2, p. 4.

¹⁷⁵China's appellee's submission, para. 23.

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 inspections. China points to the evidence it submitted demonstrating that these GAPP annual inspections focus on the functioning and mode of operation of the import entities, in particular, with respect to their implementation of the content review system.¹⁷⁷ Thus, according to China, limiting the number of such entities does make a contribution to the protection of public morals in China.

106. Finally, as to the United States' allegation that the Panel erred in its consideration of the restrictive effect of the State plan requirement, China recalls that it has appealed the Panel's inclusion of the impact of the measures at issue on potential importers in its assessment of the restrictive impact. In any event, China contends that the State plan requirement does not set any form of quota on the number of import entities, but rather sets an additional condition in order for a publication import entity to be approved. Furthermore, China observes that, even if the State plan requirement could be viewed as setting a restriction on the number of import entities, this alone would not suffice to conclude that the State plan requirement does not make a material contribution to the protection of public morals in China.

¹⁷⁶China's appellee's submission, para. 25 (referring to Panel Exhibit CN-22, *supra*, footnote 140, para. VI(1)).

¹⁷⁷China's appellee's submission, paras. 29-31 (referring to Panel Exhibit CN-22, *supra*, footnote 140, para. IV(2)).

E. *Arguments of the Third Participants*

1. Australia

107. Australia submits that the Appellate Body should reverse or modify the Panel's finding that China's Accession Protocol commitments relating to trade in goods are applicable to the measures concerning films for theatrical release and unfinished audiovisual products. With regard to the "necessity" of China's measures, Australia submits that the Appellate Body should uphold the Panel's finding that China failed to demonstrate that the measures 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 1994.¹⁷⁸ Finally, Australia submits that the Appellate Body should uphold the Panel's findings that the entry "Sound recording distribution services" in China's GATS Schedule includes the distribution of sound recordings by electronic means.

108. Australia considers that the Panel erred in finding that China's trading rights commitments apply to the measures concerning films for theatrical release and unfinished audiovisual products.¹⁷⁹ Drawing an analogy with the Appellate Body's approach in *EC – Bananas III*, Australia maintains that the Panel should have examined whether those measures "affect" trading rights in goods in a manner inconsistent with the *Marrakesh Agreement Establishing the World Trade Organization* (the "WTO Agreement")¹⁸⁰, in particular by scrutinizing the structure and design of the measures in order to determine whether they regulate films for theatrical release and unfinished audiovisual products on the basis of their characteristics as goods, or on the basis of their content. In Australia's view, the content of audiovisual products is a service. Australia argues that China submitted sufficient evidence to "raise doubt"¹⁸¹ as to whether the measures regulate films for theatrical release based on their characteristics as goods. Given that the United States failed to counter this evidence, China's trading rights commitments should not have been found to apply to the measures at issue.

109. Referring to the Panel's analysis and intermediate finding of "necessity" of the State plan requirement, Australia emphasizes that China bore the burden of demonstrating that the measures at issue contribute to the achievement of China's objectives, "having regard in particular to the trade-

¹⁷⁸In this regard, Australia refers to the List of Prohibited Foreign Investment Industries in the *Catalogue*, the *Foreign Investment Regulation*, the *Several Opinions*, the *Publications Regulation*, the *2001 Audiovisual Products Regulation*, and the *Audiovisual Products Importation Rule*, insofar as the latter two concern finished audiovisual products, and the *Audiovisual (Sub-)Distribution Rule*.

¹⁷⁹These measures are, with regard to films for theatrical release, Articles 5 and 30 of the *Film Regulation* and Articles 3 and 16 of the *Film Enterprise Rule*, and with regard to unfinished audiovisual products, Article 5 of the *2001 Audiovisual Products Regulation* and Article 7 of the *Audiovisual Products Importation Rule*.

¹⁸⁰Australia's third participant's submission, para. 8 (referring to Appellate Body Report, *EC – Bananas III*, para. 221).

¹⁸¹Australia's third participant's submission, para. 12.

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 on the basis of public policy, Australia states that it "would welcome"¹⁸³ clarification from the Appellate Body regarding the Panel's interpretation of the relationship between the assessment of the "necessity" of a measure and the assessment of the existence of "reasonably available alternatives" under Article XX(a) of the GATT 1994.

2. European Communities¹⁸⁴

110. The European Communities submits that Article XX(a) of the GATT 1994 may be indirectly applicable to China's obligation under paragraph 5.1 of China's Accession Protocol to grant the right to trade, and contends that the Panel erred in law by examining China's Article XX(a) defence on an *arguendo* basis. With regard to the Panel's substantive analysis under Article XX(a), the European Communities disagrees with China's claims of error on appeal. Instead, the European Communities supports the Panel's finding that the State-ownership requirement is not "necessary" for the protection of public morals in China; submits that the Panel was correct to weigh the restrictive impact that the measures at issue may have on those wishing to engage in importing; and considers that the Panel did not err in its evaluation of whether the alternatives proposed by the United States were "reasonably available" to China. The European Communities does not, however, accept that the Panel had a sufficient basis on which to conclude that the State plan requirement was "necessary" and, therefore, agrees with the United States' appeal of this finding. The European Communities agrees with the Panel's legal interpretations and conclusions regarding the scope of China's GATS commitments.

111. The European Communities submits that Article XX(a) of the GATT 1994 does not directly apply to China's Accession Protocol because exceptions may be invoked only within the specific agreement in which they are contained, and accession protocol commitments are not part of the GATT 1994. However, Article XX(a) of the GATT 1994 is indirectly relevant for the interpretation of China's obligation under paragraph 5.1 of China's Accession Protocol due to the introductory clause to that paragraph, which reads: "Without prejudice to China's right to regulate trade". In the European Communities' view, the Panel correctly determined that China's right to regulate trade encompasses a "core"¹⁸⁵ right—to regulate imports and exports—and a consequent right to regulate

¹⁸² Australia's third participant's submission, para. 21.

¹⁸³ Australia's third participant's submission, paras. 3 and 22.

¹⁸⁴ We note that, on 1 December 2009, the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* (done at Lisbon, 13 December 2007) entered into force. On 29 November 2009, the WTO received a Verbal Note (WT/L/779) from the Council of the European Union and the Commission of the European Communities stating that, by virtue of the *Treaty of Lisbon*, as of 1 December 2009, the European Union replaces and succeeds the European Community.

¹⁸⁵ European Communities' third participant's submission, para. 6.

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

¹⁸⁶European Communities' third participant's submission, para. 8 (referring to Panel Report, para. 7.276).

¹⁸⁷European Communities' third participant's submission, para. 11.

¹⁸⁸European Communities' third participant's submission, para. 12.

¹⁸⁹European Communities' third participant's submission, para. 16.

Communities submits that the Panel was correct in its analysis and that there was no "circular reasoning"¹⁹⁰ as alleged by China. In analyzing whether the measures were "necessary" within the meaning of Article XX(a) of the GATT 1994, the Panel had to weigh and balance several factors, including the restrictive impact of the measures on international commerce. This element must be taken into account even when the restrictive impact is the reason why the measure was found to violate WTO obligations in the first place. A failure to take account of such restrictive impact would deprive the examination of "necessity" of its sense and impede a panel's assessment of whether a less restrictive alternative exists. The European Communities disagrees with China that the Panel's approach was analogous to that erroneously adopted by the panel in *US – Gasoline*¹⁹¹, and points out that, in any event, the panel in that dispute was interpreting paragraph (g) of Article XX, which does not contain a "necessity" requirement. The European Communities emphasizes that the effect of the measures at issue "is tantamount to a total ban on those entities who will never qualify to enter the Chinese market".¹⁹²

114. The European Communities considers that the Panel did not err in finding that at least one of the alternatives proposed by the United States was "reasonably available" to China even though the United States did not provide any details on how that alternative could be implemented. The task of WTO panels is to determine, on the basis of the arguments of the parties, whether there are other less trade-restrictive alternatives that could be implemented, not to provide a solution as to how any proposed alternatives would be implemented; it is up to China to deal with the details of how implementation could take place. The European Communities also recalls that, before the Panel, it argued that China could implement a content review system without such severe restrictions on trading rights because it is the content of the material itself that is subject to review, not the entity or individual who is actually importing it into China. This is further supported by reference to content review for domestic products, which can be efficiently performed without similar curtailments.

115. The European Communities "largely agree[s]"¹⁹³ with the United States' appeal regarding the Panel's analysis of the "necessity" of the State plan requirement. The European Communities does not fully understand on what specific grounds the Panel could have made its intermediate finding that the State plan requirement is "necessary" to protect public morals, especially as it had never been given the opportunity to examine the actual measure. The European Communities adds that it is important that parties to WTO disputes abide by the DSU, including the requirement in Article 13.1

¹⁹⁰European Communities' third participant's submission, para. 25 (quoting China's appellant's submission, para. 43).

¹⁹¹European Communities' third participant's submission, para. 26 (referring to and quoting Appellate Body Report, *US – Gasoline*, p. 16, DSR 1996:I, 3, at 15).

¹⁹²European Communities' third participant's submission, para. 34.

¹⁹³European Communities' third participant's submission, para. 40.

that "[a] Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate."

116. With respect to the appeal of the Panel's interpretation of the entry "Sound recording distribution services" in China's GATS Schedule, the European Communities disagrees with China's view that changes in digital technologies and communication networks have resulted in the emergence of an entirely new type of services sector—"network music services".¹⁹⁴ The European Communities further submits that the Panel decided not to invoke the principle of "technological neutrality" because there was no need for it to do so given that it had found that China's commitment includes the distribution of audio content by non-physical means and not because, as China suggests, this principle was irrelevant because network music services is a new and distinct service.

3. Japan

117. With regard to China's trading rights commitments, Japan submits that the Appellate Body should uphold the Panel's findings with regard to the measures relating to films for theatrical release and unfinished audiovisual products. Japan urges the Appellate Body to reverse the Panel's finding that, in the absence of reasonably available alternatives, the State plan requirement is "necessary" to protect public morals in China, but to otherwise uphold the Panel's conclusions in respect of Article XX(a) of the GATT 1994. Finally, Japan urges the Appellate Body to uphold the Panel's interpretation of China's GATS Schedule entry "Sound recording distribution services" as including the distribution of sound recordings in electronic form.

118. Japan asserts that, in appealing the Panel's finding that the measures regulating films for theatrical release are subject to its trading rights commitments, China simply repeats the arguments that it made before the Panel, changing the focus from the regulation of services to the regulation of content. In Japan's view, the content and use of tangible media are not relevant to the issue of whether China's trading rights commitments apply to hard-copy cinematographic films. For Japan, the Panel's findings in this regard are both correct and consistent with the Appellate Body's finding in *Canada – Periodicals* that content does not preclude a conclusion that the object in which such content is contained is a good.¹⁹⁵

119. Regarding the Panel's findings under Article XX(a) of the GATT 1994, Japan views the Panel's approach as "proper and legally correct", except that the Panel's intermediate finding regarding the "necessity" of the State plan requirement is, in Japan's view, "mere conjecture, made without any

¹⁹⁴European Communities' third participant's submission, para. 44.

¹⁹⁵Japan's third participant's submission, para. 37 (referring to Appellate Body Report, *Canada – Periodicals*, p. 17, DSR 1997:I, 449, at 463).

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 Instead, the content of a Member's Schedule should be interpreted on the basis of the maxim *pacta sunt servanda*.

4. Korea

121. Korea submits that the Panel's analysis of China's defence of the State plan requirement under Article XX(a) of the GATT 1994 may constitute legal error, but that the Panel's interpretation of China's GATS Schedule entry "Sound recording distribution services" should be upheld by the Appellate Body. Korea also notes that some of the issues raised in this appeal appear to be a re-

¹⁹⁶Japan's third participant's submission, para. 17.

¹⁹⁷Japan's third participant's submission, para. 27.

¹⁹⁸Japan's third participant's submission, para. 33.

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.

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

²⁰⁰Korea's third participant's submission, para. 22 (referring to China's appellant's submission, paras. 105, 106, 114, and 117).

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 provisions²⁰¹ that China sought to justify under Article XX(a) of the GATT 1994 are "necessary" to protect public morals:

²⁰¹Articles 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 contribution to the protection of public morals in China made by:
 - the requirement in Article 42 of the *Publications Regulation* that publication import entities be wholly State-owned enterprises;
 - the provisions excluding foreign-invested enterprises from engaging in the importation of the relevant products²⁰²; and
 - the State plan requirement in Article 42 of the *Publications Regulation*;
 - (ii) the Panel erred in taking into account the restrictive effect that the relevant provisions and requirements have on those wishing to engage in importing; and
 - (iii) the Panel erred in finding that there is a less-restrictive alternative measure "reasonably available" to China, and whether, in making this finding, the Panel failed to make an objective assessment of the matter before it, in violation of Article 11 of the DSU;
- (c) Whether the Appellate Body can complete the analysis under Article XX(a) and the chapeau of Article XX should it find that the Panel erred in its analysis of the "necessity" of China's measures to protect public morals, within the meaning of Article XX(a) of the GATT 1994; and
- (d) Whether the Panel erred 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 in finding, as a consequence, that the provisions²⁰³ prohibiting foreign-invested entities from engaging in the distribution of sound recordings in electronic form are inconsistent with Article XVII of the GATS.

²⁰²Such 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*.

²⁰³Article 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*.

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 trade²⁰⁴ to enterprises in China and foreign enterprises and individuals²⁰⁵, 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

²⁰⁴The 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.

²⁰⁵The 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.

²⁰⁶WT/L/432.

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

²⁰⁸China 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.

128. This dispute is characterized by a large number of claims made, and measures challenged, by the United States. In consequence, the Panel made many findings relating to the various measures and claims, including findings that a number of provisions of China's measures are inconsistent with China's WTO obligations. The Panel's findings that are challenged in this appeal are limited to those identified in section III above. Because the measures at issue in this appeal form part of a larger regulatory scheme, and in order to provide some context for our findings, we consider it useful to set out an overview of the Panel's findings of inconsistency before turning to the substance of the specific issues raised on appeal by China and the United States. We note that the following overview places certain emphasis on those findings of the Panel that are relevant to this appeal. For a more complete account of the Panel's consideration of the operation of China's measures and the Panel's reasoning and findings, direct reference should be had to the Panel Report.

129. The Panel reviewed 17 measures²⁰⁹ issued at different levels of the Chinese Government. Six of the challenged measures are administrative regulations or documents that were enacted or approved by the State Council, China's highest executive body.²¹⁰ The remaining Chinese measures challenged by the United States are departmental rules or administrative circulars or opinions enacted by one or more ministries or agencies under the State Council.²¹¹

²⁰⁹The United States challenged 19 legal instruments of China. (See *supra*, footnote 10) The Panel ruled that two of these instruments did not constitute "measures" within the meaning of Article 3.3 of the DSU, and that certain measures challenged by the United States fell outside the Panel's terms of reference. (See *supra*, footnotes 11 and 12) The Panel also found that the United States had not established a number of the claims raised, and exercised judicial economy in respect of certain other claims. (See *supra*, footnotes 15, 23, 25, and 28)

²¹⁰There are four such administrative regulations at issue in this dispute: (i) the *Foreign Investment Regulation*; (ii) the *Publications Regulation*; (iii) the *2001 Audiovisual Products Regulation*; and (iv) the *Film Regulation*. The *Catalogue* and the *Several Opinions* are administrative documents that were issued by one or more Chinese ministries or agencies after obtaining the approval of the State Council.

China explained to the Panel that the hierarchy of Chinese laws and regulations issued by the central Government is composed of three levels: (i) laws enacted by the National People's Congress or its Standing Committee; (ii) administrative regulations enacted by the State Council; and (iii) departmental rules enacted by ministries or agencies under the State Council. (Panel Report, para. 7.182 (referring to China's response to Panel Question 37(a)); see also Law of the People's Republic of China on Legislation (Panel Exhibit US-72)) None of the measures at issue in this dispute are laws enacted by the National People's Congress or its Standing Committee.

²¹¹There are 11 such departmental rules or administrative circulars or opinions at issue in this dispute: (i) the *Imported Publications Subscription Rule*; (ii) the *Publications (Sub-)Distribution Rule*; (iii) the *Publications Market Rule*; (iv) the *1997 Electronic Publications Regulation* (although entitled a "regulation", this measure was enacted by China's General Administration of Press and Publication (the "GAPP")); (v) the *Audiovisual Products Importation Rule*; (vi) the *Audiovisual (Sub-)Distribution Rule*; (vii) the *Internet Culture Rule*; (viii) the *Circular on Internet Culture*; (ix) the *Network Music Opinions*; (x) the *Film Enterprise Rule*; and (xi) the *Film Distribution and Exhibition Rule*.

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

²¹²The Panel found that the *Film Distribution and Exhibition Rule* 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)

²¹³For 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
<i>Foreign Investment Regulation</i>				
<i>Catalogue</i>				
<i>Several Opinions</i>				
<i>Publications Regulation</i> ²¹⁷				
<i>Imported Publications Subscription Rule</i>				
<i>Publications (Sub-)Distribution Rule</i>				
<i>Publications Market Rule</i>				
<i>1997 Electronic Publications Regulation</i>				
<i>2001 Audiovisual Products Regulation</i>				
<i>Audiovisual Products Importation Rule</i>				
<i>Audiovisual (Sub-)Distribution Rule</i>				
<i>Circular on Internet Culture</i>				
<i>Network Music Opinions</i>				
<i>Film Regulation</i>				
<i>Film Enterprise Rule</i>				

Panel Findings of Violation Concerning:

	Trading rights and GATS
	Trading rights only
	GATS only
	GATS and GATT 1994

²¹⁴The Panel determined the specific scope of "audiovisual products" for each of the challenged measures. For purposes of its findings in respect of specific provisions of the *Foreign Investment Regulation* and the *Catalogue*, for example, the Panel determined that the term "audiovisual products" covers products such as video discs, as well as physical sound recordings and films for theatrical release. (Panel Report, paras. 7.340-7.352 (concerning Article 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*))

²¹⁵As noted *supra*, footnote 214, the Panel determined that the term "audiovisual products" for purposes of a provision of the List of Prohibited Foreign Investment Industries in the *Catalogue*, in conjunction with provisions of the *Foreign Investment Regulation*, includes films for theatrical release.

²¹⁶The Panel determined that, for purposes of China's foreign investment regulations (the *Foreign Investment Regulation*, the *Catalogue*, and the *Several Opinions*), the electronic distribution of sound recordings was covered by provisions governing "Internet cultural activities". (Panel Report, paras. 7.1308-7.1310)

²¹⁷The *Publications Regulation* also applies to audiovisual products, but the Panel concluded that relevant provisions in the *2001 Audiovisual Products Regulation* take precedence over the corresponding provisions in the *Publications Regulation* concerning the regulation of audiovisual products. (Panel Report, para. 7.390)

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 outline certain elements of China's regulatory regime applicable to the products at issue.

B. *China's Trading Rights Commitments*

133. China acceded to the WTO on 11 December 2001. China's Accession Protocol provides that it shall, together with certain commitments referred to in China's Accession Working Party Report, "be an integral part of the WTO Agreement".²¹⁸ For purposes of this Report, we use the term "trading rights commitments" to refer to the obligations of China in respect of the right to trade that are contained in paragraphs 5.1 and 5.2 of China's Accession Protocol, and paragraphs 83(d) and 84(a) and (b) of China's Accession Working Party Report.²¹⁹ The Panel observed that paragraphs 83(d) and 84(a) and (b) of China's Accession Working Party Report are incorporated into China's Accession Protocol and, hence, the *WTO Agreement*.²²⁰

134. Before turning to the specific claims of the United States, the Panel set out its interpretation of these commitments. The Panel explained at the outset of its legal findings that it would apply the "principles" contained in Articles 31 and 32 of the *Vienna Convention* "in interpreting the relevant provisions of the covered agreements".²²¹

²¹⁸Paragraph 1.2 of China's Accession Protocol provides:

The WTO Agreement to which China accedes shall be the WTO Agreement as rectified, amended or otherwise modified by such legal instruments as may have entered into force before the date of accession. This Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement.

Paragraph 342 of China's Accession Working Party Report, provides:

The Working Party took note of the explanations and statements of China concerning its foreign trade regime, as reflected in this Report. The Working Party took note of the commitments given by China in relation to certain specific matters which are reproduced in paragraphs ... 83 [and] 84 ... of this Report and noted that these commitments are incorporated in paragraph 1.2 of the Draft Protocol.

²¹⁹We note that the Panel made findings of violation in respect of China's trading rights commitments as they relate to the obligation to grant the right to trade pursuant to paragraph 5.1 of China's Accession Protocol and paragraphs 83(d) and 84(a) of China's Accession Working Party Report, and the obligation to grant *in a non-discretionary manner* the right to trade pursuant to paragraph 84(b) of China's Accession Working Party Report. The Panel considered that paragraph 1.2 of China's Accession Protocol incorporates the relevant paragraphs of China's Accession Working Party Report such that any inconsistency with paragraph 83(d), 84(a), or 84(b) "leads to a consequential inconsistency" with paragraph 1.2 of China's Accession Protocol. (Panel Report, para. 7.332) The Panel did not find any violations in respect of China's obligation to grant *in a non-discriminatory manner* the right to trade under paragraph 5.2 of China's Accession Protocol and paragraph 84(b) of China's Accession Working Party Report.

²²⁰Panel Report, para. 7.232.

²²¹Panel Report, paras. 7.8 and 7.9.

135. First, the Panel considered that China's trading rights commitments encompass the obligation to grant the right to trade as set out in paragraph 5.1 of China's Accession Protocol and paragraphs 83(d) and 84(a) of China's Accession Working Party Report. 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 an annex (and which are not at issue in this dispute), "all enterprises in China shall have the right to trade in all goods throughout the customs territory of China."²²² According to paragraph 5.1, the right to trade means the right to import and export goods. The Panel determined that all of the products at issue in this dispute are goods covered by this obligation.²²³ The Panel also considered that the phrase "all enterprises in China" covers wholly Chinese-invested enterprises, regardless of whether they are privately or State-owned, and foreign-invested enterprises, which include wholly foreign-owned enterprises, as well as Chinese-foreign joint ventures, whether in equity or contractual form.²²⁴

136. The introductory clause of paragraph 5.1 stipulates that China's obligation to grant the right to trade is "[w]ithout prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement". The Panel determined that China could maintain a measure which does not ensure that all enterprises in China have the right to trade, provided that the measure also regulates trade in a WTO-consistent manner, because in such cases China's right to regulate trade takes precedence over China's obligation to ensure that all enterprises in China have the right to trade.²²⁵ The Panel also considered that the introductory clause of paragraph 5.1 permits China to regulate not only the goods that are imported or exported, but also *who* can import or export these goods.²²⁶ Recalling that the right to regulate may mean the right to restrict, the Panel concluded that the right to regulate trade

²²² Paragraph 5.1 of China's Accession Protocol provides:

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. All such goods shall be accorded national treatment under Article III of the GATT 1994, especially paragraph 4 thereof, in respect of their internal sale, offering for sale, purchase, transportation, distribution or use, including their direct access to end-users. For those goods listed in Annex 2B, China shall phase out limitation on the grant of trading rights pursuant to the schedule in that Annex. China shall complete all necessary legislative procedures to implement these provisions during the transition period.

²²³ Panel Report, para. 7.248.

²²⁴ Panel Report, paras. 7.249, 7.251, and 7.252. The Panel noted that both parties agreed that the phrase "all enterprises in China" does not include foreign enterprises that are not registered in China. (*Ibid.*, footnote 201 to para. 7.249)

²²⁵ Panel Report, paras. 7.254 and 7.255.

²²⁶ Panel Report, paras. 7.275 and 7.276.

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

²²⁷Panel Report, para. 7.277.

²²⁸Panel 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.

²²⁹Paragraph 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 nor would new business licence encompassing distribution be required to engage in importing and exporting.

Paragraph 84(a) of China's Accession Working Party Report provides: 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 China's Schedule of Specific Commitments under the GATS.

²³⁰Panel Report, paras. 7.310 and 7.315.

138. Secondly, the Panel considered that China's trading rights commitments encompass the obligation to grant *in a non-discriminatory manner* the right to trade to foreign enterprises and individuals. Paragraph 5.2 of China's Accession Protocol provides that, with respect to the right to trade, "all foreign individuals and enterprises, including those not invested or registered in China", shall be accorded treatment no less favourable than that given to enterprises in China.²³¹ The Panel considered that the term "foreign enterprises" includes enterprises registered outside China wishing to engage in importing or exporting, regardless of whether or not they have a commercial presence in China, as well as foreign-invested enterprises registered in China.²³² The Panel also concluded that this obligation should be understood, like that in paragraph 5.1 of China's Accession Protocol, as being without prejudice to China's right to regulate trade in a WTO-consistent manner.²³³ In addition, the Panel noted that paragraph 84(b) of China's Accession Working Party Report confirms the obligation to grant in a non-discriminatory manner the right to trade to foreign enterprises and individuals.²³⁴ The Panel considered that the obligation not to discriminate in granting trading rights would be breached if there were discrimination between foreign enterprises and individuals, on the one hand, and wholly Chinese-owned enterprises in China, on the other hand.²³⁵

139. Thirdly, the Panel noted that paragraph 84(b) of China's Accession Working Party Report encompasses the obligation to grant *in a non-discretionary manner* the right to trade to foreign enterprises and individuals. The Panel concluded that this obligation prohibits Chinese authorities responsible for granting trading rights from choosing on the basis of their own preference whether or not such rights should be granted, although the Panel acknowledged that the mere imposition of requirements or conditions for obtaining trading rights would not necessarily constitute a breach of this obligation.²³⁶

140. These interpretations by the Panel are not specifically appealed by the participants in their respective Notices of Appeal and Other Appeal.

²³¹Paragraph 5.2 of China's Accession Protocol provides:

Except as otherwise provided for in this Protocol, all foreign individuals and enterprises, including those not invested or registered in China, shall be accorded treatment no less favourable than that accorded to enterprises in China with respect to the right to trade.

²³²Panel Report, paras. 7.292 and 7.299. The Panel made the same finding in respect of the term "foreign enterprises" that appears in paragraph 84(a) and (b) of China's Accession Working Party Report. (*Ibid.*, para. 7.314 and 7.318)

²³³Panel Report, para. 7.305.

²³⁴Panel Report, para. 7.322.

²³⁵Panel Report, para. 7.320. The Panel did not consider it necessary to determine whether discrimination between foreign enterprises of different Members is also covered by paragraph 84(b). (*Ibid.*, para. 7.323)

²³⁶Panel Report, para. 7.324.

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 process²⁴¹, and because, in the case of imported products, it is critical that content review be carried out at the border²⁴², 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 importation vary depending upon the particular product involved. China further explained that its prohibition on the dissemination of certain types of content is enforced through dissuasive sanctions, including fines, the revocation of operating licences, and criminal sanctions²⁴³; and that domestic

²³⁷Panel Report, paras. 7.711 and 7.712.

²³⁸China referred, to Article 8 of the UNESCO *Universal Declaration on Cultural Diversity*, which states that cultural goods are "vectors of identity, values and meaning" and that they "must not be treated as mere commodities or consumer goods". (Panel Report, para. 7.751) China also referred to the UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*. (*Ibid.*, para. 4.207)

²³⁹China explained that content that is prohibited ranges "from the depiction or condoning of violence or pornography, to other important values, including the protection of Chinese culture and traditional values". (Panel Report, para. 7.714) The Panel set out the list of content that may not be included in publications and noted that the United States did not specifically contest that the dissemination of materials containing the types of content listed as prohibited by China could have a negative impact on public morals in China. (*Ibid.*, paras. 7.760-7.762)

²⁴⁰Panel Report, paras. 7.753-7.755.

²⁴¹Panel Report, para. 7.713. China further explained that, due to the limited resources of its administrative authorities and the risk of delay, import entities must be given a substantial role in the content review process in order to ensure effective and efficient content review. On this basis, China argued that "the importance of the input by the import entities in the content review process justifies the appropriate selection of those entities by the competent Chinese authorities, even if it may result in restrictions of the right to import." (*Ibid.*, para. 7.754)

²⁴²Panel Report, para. 7.754.

²⁴³Panel Report, para. 7.752.

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 Regulation* 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 the examination and approval of foreign-invested projects". Article 4 establishes that there are four categories of foreign-invested projects: "encouraged", "permitted", "restricted", and "prohibited". Under Article 4, the *Catalogue* is to list "encouraged, restricted and prohibited categories of foreign-invested projects", and foreign investment in any industry not listed in the *Catalogue* is permitted. The Panel determined that, read together, Articles 3 and 4 of the *Foreign Investment Regulation* mean that, if a foreign-invested project falls within the prohibited category in the *Catalogue*, that investment may not be approved.²⁴⁵

143. The *Catalogue* was most recently updated and approved by the State Council in 2007. In the List of Prohibited Foreign Investment Industries in the *Catalogue*²⁴⁶, there are three provisions of particular relevance in this dispute and on appeal: Article X:2 lists "master distribution, and import operations of books, newspapers and periodicals"; Article X:3 identifies "import operations of audiovisual products and electronic publications"; and Article X:7 references "[n]ews websites, network audiovisual program services, internet on-line service operation site, and internet culture operation". The Panel found that the effect of 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*, is to prohibit any foreign-invested enterprise in China from lawfully importing books, newspapers, periodicals, electronic publications, or audiovisual products (including sound

²⁴⁴Panel Report, paras. 7.716 and 7.752.

²⁴⁵Panel Report, para. 7.347. The Panel considered that Article 8 of the *Foreign Investment Regulation* provides guidance on the interpretation of provisions in the restricted category in the *Catalogue*. (*Ibid.*, paras. 7.1386-7.1388)

²⁴⁶In this Report, we refer to the List of Restricted Foreign Investment Industries and the List of Prohibited Foreign Investment Industries to distinguish between two parts of the *Catalogue* that separately list restricted and prohibited categories of foreign-invested projects, and to make clear that these Lists are parts of the *Catalogue* itself. The Panel referred to these two Lists as the *Catalogue* of Industries With Restricted Foreign Investment, and the *Catalogue* of Prohibited Foreign Investment Industries. (Panel Report, paras. 7.340 and 7.342)

recordings and films for theatrical release).²⁴⁷ Explaining that it understood "internet culture operation" as including the electronic distribution of sound recordings, the Panel found that the effect of Article X:7, in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*, is to prohibit foreign-invested enterprises from supplying such services.²⁴⁸

144. A third measure, the *Several Opinions*, was jointly issued in 2005 by several Chinese ministries and agencies with the approval of the State Council, and offers guidance to the issuing authorities in regulating foreign investment in their respective sectors.²⁴⁹ Article 4 of the *Several Opinions* directs Chinese Government agencies to prohibit foreign-invested enterprises in China from engaging in the business of importing and/or distributing certain products, including all of the goods and services at issue in this dispute.²⁵⁰

E. *Measures Pertaining to Reading Materials*

145. The importation and distribution of reading materials in China is regulated by the General Administration of Press and Publication (the "GAPP"). For books, newspapers, and periodicals, day-to-day content review is performed by the publication import entities approved by the GAPP.²⁵¹ Publication import entities conduct content review when they provide to the GAPP, prior to importation, a list of materials intended for importation.²⁵² The content is then double-checked at the time of customs clearance.²⁵³ With respect to these products, the GAPP mainly exercises a supervisory role by conducting annual inspections of the content review performed by importation entities. The GAPP may intervene in day-to-day content review, but only upon its review of the list of publications provided by publication import entities, or when it is requested to do so by such

²⁴⁷Panel Report, para. 7.348.

²⁴⁸Panel Report, paras. 7.1309 and 7.1310. As noted below, the Panel also made a finding regarding certain audiovisual distribution activities set out in the List of Restricted Foreign Investment Industries in the *Catalogue*. This finding is not appealed. (See *infra*, footnote 292)

²⁴⁹Panel Report, paras. 7.187 and 7.198.

²⁵⁰Panel Report, paras. 7.374, 7.1041, and 7.1308.

²⁵¹Panel Report, paras. 7.730 and 7.903. Article 44 of the *Publications Regulation* provides that publication import entities are "responsible for examining the content of the publications" that are imported. An exhibit in the Panel record indicates that, as of 2008, there were 42 wholly State-owned enterprises approved to import reading materials into China. (Panel Exhibit US-13)

²⁵²Panel Report, para. 7.730. Article 45 of the *Publications Regulation* provides, in part:

A publication import entity shall, before importing publications, submit a catalogue of the publications it plans to import to the publication administration under the people's government at the provincial level or above. If the publication administration under the people's government at the provincial level or above finds any publications that are prohibited or deferred from being imported, it shall immediately notify the publication import entity and inform Customs. A publication import entity shall not import any publication for which there has been a notice of prohibition or deferral, and Customs shall not release such a publication.

²⁵³Panel Report, para. 7.891 (referring to China's response to Panel Question 191).

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 Investment Regulation*, the *Catalogue*, and the *Several Opinions*)²⁵⁶ prohibit foreign-invested enterprises from engaging in the importation of reading materials, the Panel found the provisions inconsistent with China's obligation, in China's Accession Protocol and Working Party Report, to grant the right to trade to all enterprises in China.²⁵⁷

147. A separate administrative regulation enacted by the GAPP—the *Publications Regulation*—also regulates the importation of reading materials into China. Article 41 of the *Publications Regulation* prohibits the importation of reading materials by any individual or entity other than "approved" publication import entities.²⁵⁸ With respect to newspapers and periodicals, Article 41 imposes an additional requirement that approved publication import entities must be further "designated" by the GAPP in order to engage in the business of importing newspapers or

²⁵⁴Panel Report, paras. 7.730 and 7.901. Article 44 of the *Publications Regulation* provides, in part:

The publication administration under the people's government at the provincial level or above may directly examine the content of the publications imported by a publication import entity. When a publication import entity is unable to identify whether the imported publications include any content prohibited by Articles 26 and 27 of these Regulations, it may request the publication administration under the people's government at the provincial level or above [to] examine the contents. The publication administration under the people's government at the provincial level or above may, when examining the contents of imported publications upon the request of a publication import entity, charge fees in accordance with the standards approved by the State Council's department in charge of pricing.

²⁵⁵Panel Report, paras. 7.892 and 7.901 (referring to China's responses to Panel Questions 191 and 196).

²⁵⁶These findings relate to Articles X:2 and X:3 of the List of Prohibited Foreign Investment Industries contained in the *Catalogue*, in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*; and Article 4 of the *Several Opinions*.

²⁵⁷Panel Report, para. 8.1.2(a)(i), (ii), and (v); see also paras. 7.351, 7.352, and 7.374. Wherever the Panel found that a provision was inconsistent with China's obligation to grant the right to trade, it was referring to the obligation contained in paragraph 5.1 of China's Accession Protocol, and paragraphs 83(d) and 84(a) of China's Accession Working Party Report and, hence, paragraph 1.2 of China's Accession Protocol.

²⁵⁸Panel Report, para. 7.392.

periodicals.²⁵⁹ Article 42 of the *Publications Regulation* sets out that, in order to be approved as a publication import entity, the applicant is required to satisfy eight requirements, including that it must: (i) be a wholly State-owned enterprise (the "State-ownership requirement"); (ii) have an organization suited to the needs of its business of importing publications and specialized personnel who meet the qualification requirements determined by the State (the "suitable organization and qualified personnel requirement"); and (iii) conform to China's State plan for the total number, structure, and distribution of publications import entities (the "State plan requirement").²⁶⁰ The Panel found that each of these three requirements in Article 42, in conjunction with Article 41, of the *Publications Regulation* results in a violation of the obligation to grant the right to trade in China's Accession Protocol and Working Party Report.²⁶¹ The Panel moreover concluded that the requirement under Article 41 that publication import entities must be designated in order to engage in the importation of newspapers and periodicals violates China's obligation, under its Accession Protocol and Working Party Report, to grant in a non-discretionary manner the right to trade.²⁶² China does not appeal the above Panel findings of violation concerning China's regulations as they apply to the importation of reading materials.

148. China argued that, if the Panel were to find the above provisions inconsistent with China's trading rights commitments, then the Panel should also find that the provisions are "necessary to protect public morals" under Article XX(a) of the GATT 1994, consistent with the chapeau to Article XX, and therefore justified.²⁶³ The Panel did not determine whether Article XX(a) of the GATT 1994 is available to China as a defence to violations of China's trading rights commitments, but instead proceeded on the assumption that the defence was available, and analyzed the relevant provisions of the Chinese measures.²⁶⁴ In assessing whether they were "necessary to protect public morals" within the meaning of Article XX(a) of the GATT 1994, the Panel also proceeded on the

²⁵⁹Panel Report, para. 7.434.

²⁶⁰The Panel found that the United States had not demonstrated that the five other requirements in Article 42—(i) name and articles of association; (ii) well-defined scope of business; (iii) adequate funding; (iv) fixed business site; and (v) conditions set out in laws or other regulations—are inconsistent with China's trading rights commitments. (Panel Report, para. 7.409)

²⁶¹Panel Report, para. 8.1.2(b)(ii); see also paras. 7.401 and 7.411.

²⁶²Panel Report, para. 8.1.2(b)(viii); see also para. 7.437. Wherever the Panel found that a provision was inconsistent with China's obligation to grant in a non-discretionary manner the right to trade, it was referring to the obligation contained in paragraph 84(b) of China's Accession Working Party Report and, hence, paragraph 1.2 of China's Accession Protocol.

²⁶³China invoked its defence under Article XX(a) of the GATT 1994 in respect of the following provisions as they relate to the importation of reading materials: Article 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 41, and Article 42 in conjunction with Article 41, of the *Publications Regulation*. China also invoked Article XX(a) of the GATT 1994 in respect of provisions of China's measures as they relate to audiovisual products. (See *infra*, footnote 287)

²⁶⁴In its analysis of China's defence under Article XX(a) of the GATT 1994, the Panel considered that provisions contained in measures that did not, themselves, provide for content review should still be considered in the light of, and together with, other applicable rules and regulations that do establish or refer to content review mechanisms. (Panel Report, paras. 7.772-7.780)

assumption that the importation of a product containing the prohibited content listed in China's measures could have a negative impact on public morals in China. The Panel noted that the United States did not contest this point.²⁶⁵ The Panel therefore focused its assessment on the contribution of the provisions to the protection of public morals in China, and the restrictive effect of the provisions on imports and on those wishing to import.²⁶⁶ The Panel also sought to confirm its assessment by comparing China's measures with less trade restrictive, reasonably available alternatives.²⁶⁷

149. The Panel determined that the "suitable organization and qualified personnel requirement" and the "State plan requirement", in the absence of reasonably available alternatives, could be characterized as "necessary" to protect public morals in China²⁶⁸, but that China had not demonstrated that an alternative advanced by the United States was not reasonably available.²⁶⁹ The Panel also found that China had not demonstrated that provisions prohibiting foreign-invested enterprises from engaging in the importation of reading materials (either in the form of a "State-ownership requirement" or a requirement excluding foreign-invested enterprises from being approved as importers), or provisions relating to the designation of import entities, are "necessary" to protect public morals in China.²⁷⁰ The Panel thus concluded that none of the provisions of China's measures that it found to be inconsistent with China's trading rights commitments are justified under Article XX(a).²⁷¹

150. On appeal, China challenges various elements of the Panel's analysis under Article XX(a), as well as its ultimate finding that China had not demonstrated that the provisions of the measures set out above are "necessary" to protect public morals within the meaning of Article XX(a) of the GATT 1994. In its other appeal, the United States challenges the Panel's intermediate finding that the State plan requirement in Article 42 of the *Publications Regulation* could be characterized as "necessary", in the absence of reasonably available alternatives, to protect public morals in China within the meaning of Article XX(a) of the GATT 1994.²⁷²

²⁶⁵Panel Report, para. 7.763.

²⁶⁶Panel Report, paras. 7.787 and 7.788.

²⁶⁷Panel Report, para. 7.869.

²⁶⁸Panel Report, paras. 7.828 and 7.836.

²⁶⁹Panel Report, para. 7.911.

²⁷⁰Panel Report, paras. 7.848, 7.863, and 7.868.

²⁷¹Panel Report, para. 8.2; see also para. 7.913. In the light of these findings, the Panel did not proceed to decide whether Article XX is applicable to China's trading rights commitments under its Accession Protocol and Working Party Report. (*Ibid.*, para. 8.2(a)(ii); see also para. 7.914)

²⁷²Panel Report, para. 7.836.

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 *Publications (Sub)-Distribution Rule*, and the *Publications Market Rule*—violate Article XVII of the GATS because they either prohibit foreign-invested enterprises from engaging in the wholesale distribution of *imported* reading materials²⁷⁶, or impose registered capital and operating term requirements that discriminate against foreign-invested wholesale suppliers.²⁷⁷

152. The United States presented claims under Article III:4 of the GATT 1994 in respect of China's measures pertaining to all of the products at issue in this dispute.²⁷⁸ However, the Panel's only findings of violation under Article III:4 were made in respect of reading materials. The Panel concluded that provisions of the GAPP rules identified above discriminate against imported products because they either prohibit foreign-invested enterprises from distributing imported books, newspapers, and periodicals²⁷⁹, or require that the distribution of imported newspapers and periodicals occur only through subscription.²⁸⁰

²⁷³See *supra*, footnote 19.

²⁷⁴See *supra*, footnote 20.

²⁷⁵Panel Report, para. 8.2.3(a)(iii) and (iv); see also paras. 7.1048, 7.1058, and 7.1074.

²⁷⁶Panel Report, para. 8.2.3(a)(i), (ii), and (v); see also paras. 7.998, 7.999, and 7.1094.

²⁷⁷Panel Report, para. 8.2.3(a)(vii); see also para. 7.1142.

²⁷⁸The Panel made findings under Article III:4 of the GATT 1994 in respect of measures affecting reading materials, films for theatrical release, and the electronic distribution of sound recordings. (Panel Report, para. 8.2.4) The Panel separately found that claims under Article III:4 in respect of the *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule* were not within its terms of reference. (*Ibid.*, para. 8.1.1(a)(ii); see also para. 7.82)

²⁷⁹Panel Report, para. 8.2.4(a)(iii); see also para. 7.1545.

²⁸⁰Panel Report, para. 8.2.4(a)(i); see also para. 7.1539.

F. *Measures Pertaining to Audiovisual Products*

153. The importation and distribution of audiovisual products in China is regulated by the Ministry of Culture (the "MOC"). Similar to the content review conducted in respect of electronic publications, samples of audiovisual products are brought into China through temporary importation procedures, and an application that includes a report reviewing the content of the products to be imported is submitted to the MOC for final content review. Once a product passes content review, importation approval is granted and the import entity presents the approval documents to customs at the time of importation.²⁸¹

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

154. The Panel examined whether several measures challenged by the United States prohibit or otherwise affect the ability of foreign-invested enterprises to import audiovisual products into China. Having concluded that provisions of China's foreign investment regulations (the *Foreign Investment Regulation*, the *Catalogue*, and the *Several Opinions*)²⁸² prohibit foreign-invested enterprises from engaging in the importation of audiovisual products, 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.²⁸³ The Panel separately concluded that Article 21 of the *Audiovisual (Sub-)Distribution Rule*, a departmental rule issued by the MOC, denies qualifying Chinese-foreign contractual joint ventures, otherwise permitted to distribute audiovisual products, the right to import such products. As a result, the Panel found that this provision is also inconsistent with China's obligation to grant the right to trade.²⁸⁴

155. In addition, the Panel analyzed certain provisions contained in an administrative regulation (the *2001 Audiovisual Products Regulation*) and a departmental rule (the *Audiovisual Products Importation Rule*) that prohibit entities from engaging in the importation of audiovisual products unless they have been designated by the MOC. The Panel concluded that, in not establishing an

²⁸¹Panel Report, paras. 7.731, 7.732, 7.892, and 7.901 (referring to China's responses to Panel Questions 191 and 196). There is only one wholly State-owned enterprise—the China National Publications Import and Export (Group) Corporation—that has been approved to import finished audiovisual products. (*Ibid.*, para. 7.779) The Panel record does not indicate how many entities are approved to import unfinished audiovisual products.

²⁸²These findings relate to Article X:3 of the List of Prohibited Foreign Investment Industries contained in the *Catalogue*, in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*, and Article 4 of the *Several Opinions*.

²⁸³Panel Report, para. 8.1.2(a)(ii) and (v); see also paras. 7.351, 7.352, and 7.374.

²⁸⁴Panel Report, para. 8.1.2(d)(x); see also para. 7.703.

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 provisions found to be inconsistent with China's trading rights commitments on the assumption that Article XX(a) is available to China as a defence. As it did in respect of various measures concerning reading materials, the Panel likewise found that China had not demonstrated that provisions excluding foreign-invested enterprises from being approved as importers, or provisions relating to the designation of import entities, are "necessary" to protect public morals in China.²⁸⁸

157. The United States also challenged as inconsistent with China's trading rights commitments Article 5 of the *2001 Audiovisual Products Regulation* and Article 7 of the *Audiovisual Products Importation Rule* as they relate to the designation of entities allowed to import "unfinished" audiovisual products—that is, master copies to be used to publish and manufacture copies for sale in China.²⁸⁹ The Panel found that these provisions violate China's obligation to grant in a non-discretionary manner the right to trade.²⁹⁰ China appeals the Panel's finding that China's trading rights commitments apply to China's measures concerning "unfinished" audiovisual products. China considers that these measures relate to content and associated services, and not to physical goods, and thus are not subject to China's trading rights commitments. Accordingly, China seeks reversal of the

²⁸⁵The Panel took note of the United States' claims concerning finished and unfinished audiovisual products. (Panel Report, paras. 7.608 and 7.625; see also *infra*, footnote 289) The United States asserted that "finished" audiovisual products are produced and replicated outside of China and require no additional production or replication in China before being made available to consumers. (*Ibid.*, para. 7.608)

²⁸⁶Panel Report, para. 8.1.2(d)(ii) and (vi); see also paras. 7.633 and 7.690.

²⁸⁷China invoked Article XX(a) of the GATT 1994 in respect of the following provisions as they relate to the importation of audiovisual products: Article 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 27 of the *2001 Audiovisual Products Regulation*; Article 8 of the *Audiovisual Products Importation Rule*; and Article 21 of the *Audiovisual (Sub-)Distribution Rule*.

²⁸⁸Panel Report, paras. 7.849 and 7.868.

²⁸⁹Panel Report, paras. 7.625 and 7.642. See also *supra*, footnote 285. Article 5 of the *2001 Audiovisual Products Regulation* and Article 7 of the *Audiovisual Products Importation Rule* may apply to both finished and unfinished audiovisual products, but the Panel determined that the United States' claim concerned only unfinished audiovisual products. (Panel Report, paras. 7.637 and 7.669)

²⁹⁰Panel Report, para. 8.1.2(d)(i) and (v); see also paras. 7.657 and 7.680.

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 Regulation*, 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 participation of foreign capital in terms of a maximum percentage shareholding limit.²⁹² The Panel also found that provisions of the *Several Opinions* and the *Audiovisual (Sub-)Distribution Rule* violate Article XVII of the GATS because the former prohibits joint ventures where the foreign partner holds "the dominant position" from engaging in the distribution of audiovisual products (whereas like domestic service suppliers are permitted to supply such services), and the latter imposes operating term requirements that discriminate against Chinese-foreign contractual joint ventures.²⁹³

G. *Measures Pertaining to Films for Theatrical Release*

159. The importation and distribution of films for theatrical release is regulated by China's State Administration on Radio, Film and Television (the "SARFT"). Samples of films are brought into China through temporary importation procedures and submitted to the SARFT for final content review. Once a film passes content review, importation approval is granted and the import entity presents the approval documents to customs at the time of importation.²⁹⁴

160. The Panel considered China's measures prohibiting foreign-invested enterprises, foreign entities not registered in China, and foreign individuals from engaging in the importation into China of films for theatrical release. Having concluded that provisions in China's foreign investment

²⁹¹China did not invoke Article XX(a) as a defence to the inconsistency of Article 5 of the 2001 *Audiovisual Products Regulation* and Article 7 of the *Audiovisual Products Importation Rule* with China's trading rights commitments in respect of unfinished audiovisual products.

²⁹²Panel Report, para. 8.2.3(c)(i); see also paras. 7.1395 and 7.1396.

²⁹³Panel Report, para. 8.2.3(c)(iii); see also paras. 7.1421 and 7.1425.

²⁹⁴Panel Report, paras. 7.500, 7.892, and 7.901 (referring to China's responses to Panel Questions 191 and 196). There is only one wholly State-owned entity—the China Film Import and Export Corporation—that is approved to import films for theatrical release. (*Ibid.*, para. 7.575)

regulations (the *Foreign Investment Regulation*, 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 Rule*, 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, including foreign-invested enterprises, as well as foreign entities not registered in China and foreign individuals, from engaging in the importation of films into China. The Panel therefore found that Article 30 of the *Film Regulation* and Article 16 of the *Film Enterprise Rule* violate China's obligation to grant the right to trade under China's Accession Protocol and Working Party Report.²⁹⁸ Having considered that these provisions do not establish an application process or criteria for the SARFT to designate film import entities²⁹⁹, the Panel also found that these provisions violate China's obligation, under its Accession Protocol and Working Party Report, to grant in a non-discretionary manner the right to trade.³⁰⁰

162. China appeals the Panel's finding that China's trading rights commitments apply to Article 30 of the *Film Regulation* and Article 16 of the *Film Enterprise Rule*. China considers that these measures concerning films for theatrical release relate to the content of films, and associated services, and not to a physical good, and thus are not subject to China's trading rights commitments. Accordingly, China seeks reversal of the Panel's findings that Article 30 of the *Film Regulation* and Article 16 of the *Film Enterprise Rule* are inconsistent with China's trading rights commitments.³⁰¹

²⁹⁵These findings relate to Article X:3 of the List of Prohibited Foreign Investment Industries contained in the *Catalogue*, in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*, and Article 4 of the *Several Opinions*.

²⁹⁶Panel Report, para. 8.1.2(a)(ii) and (v); see also paras. 7.351, 7.352, and 7.374.

²⁹⁷Article 30 of the *Film Regulation* states that film import entities must be "designated", whereas Article 16 of the *Film Enterprise Rule* states that such entities must be "approved". China explained that the term "designated" should be followed because, under China's legal system, the *Film Regulation* prevails over the *Film Enterprise Rule*. The Panel stated that the evidence on the record did not demonstrate that the approval requirement in the *Film Enterprise Rule* was not applied by China when determining who may conduct the business of importing films. (Panel Report, paras. 7.587-7.590)

²⁹⁸Panel Report, para. 8.1.2(c)(iii) and (vii); see also paras. 7.576, 7.598, and 7.599.

²⁹⁹Panel Report, paras. 7.569 and 7.593.

³⁰⁰Panel Report, para. 8.1.2(c)(ii) and (vi); see also paras. 7.571 and 7.594.

³⁰¹China did not invoke Article XX(a) as a defence to the inconsistency of Article 30 of the *Film Regulation* and Article 16 of the *Film Enterprise Rule* with its trading rights commitments.

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 Regulation*, 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 China's Schedule of Specific Commitments for services ("China's GATS Schedule")³⁰³ covers the electronic distribution of sound recordings. Accordingly, China seeks reversal of the Panel's finding that the relevant measures are inconsistent with Article XVII of the GATS.

I. *Matters on Appeal*

165. The appeal of China and the other appeal of the United States thus concern three sets of findings in the Panel Report. First, China appeals the Panel's findings that China's trading rights commitments apply to its measures concerning films for theatrical release and unfinished audiovisual products, and, as a consequence, seeks reversal of the Panel's findings that certain provisions of those measures are inconsistent with China's trading rights commitments. According to China, the measures at issue regulate services and content, and are therefore not covered by China's trading rights commitments, which relate only to goods. Secondly, China challenges several elements of the Panel's analysis under Article XX(a) of the GATT 1994, as well as the Panel's ultimate finding that various provisions of China's measures are not "necessary to protect public morals" in China within the meaning of Article XX(a). In respect of the Panel's necessity analysis, the United States appeals, and requests reversal of, the Panel's intermediate finding that the "State plan requirement" in Article 42 of the *Publications Regulation* can be characterized as "necessary", in the absence of reasonably available alternatives, to protect public morals in China within the meaning of

³⁰²Panel Report, para. 8.2.3(b); see also para. 7.1311.

³⁰³The People's Republic of China, Schedule of Specific Commitments, GATS/SC/135.

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 Working Party Report contains an obligation to grant *in a non-discretionary manner* the right to trade to foreign enterprises and individuals.³⁰⁸

³⁰⁴The texts of these provisions are set out in Annex III to this Report.

³⁰⁵Panel Report, para. 8.1.2(c)(ii), (iii), (vi), and (vii); see also paras. 7.571, 7.576, 7.594, 7.598, and 7.599.

³⁰⁶See *supra*, para. 136 and Annex III to this Report. China's obligation to grant the right to trade does not apply to the goods listed in Annex 2A to China's Accession Protocol, which are reserved for importation and exportation by State trading enterprises. In addition, for those goods listed in Annex 2B to China's Accession Protocol, any limitations on the grant of trading rights were to be phased out pursuant to the schedule in that Annex within three years after accession, that is, by 11 December 2004. None of the products at issue in this dispute falls within the scope of the products listed in Annex 2A or 2B.

³⁰⁷See *supra*, para. 137.

³⁰⁸See *supra*, para. 139.

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 enterprises in China (including foreign-invested enterprises), foreign individuals, and foreign enterprises not registered in China have the right to import cinematographic films.³¹¹ Furthermore, the Panel found that, because the SARFT enjoys discretion under these measures when designating or approving enterprises for purposes of film importation, China also acted inconsistently with paragraph 1.2 of its Accession Protocol and paragraph 84(b) of China's Accession Working Party Report by failing to grant trading rights to foreign-invested enterprises in China in a non-discretionary manner.³¹²

169. China appeals the above findings of inconsistency on the grounds that the Panel erred in finding that China's trading rights commitments apply to these provisions at all. According to China, its measures pertaining to films for theatrical release do not regulate the importation of goods but, rather, regulate the content of films and the services associated with the importation of such content. Yet, China's trading rights commitments in its Accession Protocol and Working Party Report apply solely in respect of trade in goods. In other words, in claiming that the trading rights commitments do not apply to the measures, China does not contest that these measures restrict *who* may import films, but rather contends that *what* is imported by the enterprises designated/approved by the SARFT under these measures is *not a good*. It follows, according to China, that the Panel's findings that Article 30 of the *Film Regulation* and Article 16 of the *Film Enterprise Rule* are subject to China's trading rights commitments, along with its findings that these provisions are inconsistent with such commitments, must be reversed.

³⁰⁹Unlike Article 30 of the *Film Regulation*, which imposes a "designation" requirement, Article 16 of the *Film Enterprise Rule* refers to the need to be "approved" by the SARFT. (See *supra*, footnote 209; see also Panel Report, paras. 7.590-7.599)

³¹⁰Panel Report, para. 7.560; see also para. 7.584.

³¹¹See Panel Report, paras. 7.576, 7.598, and 7.599. With respect to Chinese branches of foreign enterprises not registered in China, the Panel made no finding of inconsistency because it noted that the United States' claims and arguments did not include any assertions with respect to such branches. (See *ibid.*, paras. 7.574 and 7.600)

³¹²See Panel Report, paras. 7.571 and 7.594. According to the Panel, however, the United States had neither asserted nor established that the discretion enjoyed by the Chinese Government authority under these provisions would affect foreign individuals, foreign enterprises not registered in China, or Chinese branches of foreign enterprises not registered in China. Thus, the Panel did not make any finding of inconsistency under paragraph 84(b) of China's Accession Working Party Report with respect to such individuals and enterprises. (See *ibid.*, paras. 7.570, 7.572, 7.595, and 7.596)

170. In this section, we address the following allegations of error raised by China concerning the Panel's findings. First, we examine China's contention that the Panel erroneously accepted a shift in the subject matter of the United States' claim and, as a result, relieved the United States of the burden of proving that China's measures concerning films for theatrical release could be scrutinized under China's trading rights commitments. Secondly, we review China's allegations of error regarding the Panel's review of the measures pertaining to films for theatrical release.

1. The Panel's Acceptance of the Alleged "Shift" in the United States' Claim

171. Before addressing the substance of China's appeal, we consider China's contention that the Panel wrongly allowed the United States to shift the subject of its claim and "manipulate the ambiguity of the term 'film'"³¹³ in China's measures so as to lead the Panel to scrutinize those measures under China's trading rights commitments. More specifically, China maintains that the United States shifted the subject of its claim during the course of the Panel proceedings from "films for theatrical release" to "hard-copy cinematographic films", thus transforming the subject of its claim from intangible content to tangible goods.³¹⁴ China notes that, in its request for the establishment of a panel and first written submission to the Panel, the United States alleged that China acted inconsistently with its trading rights commitments by failing to grant to all foreign enterprises and individuals the right to import "films for theatrical release".³¹⁵ In its first oral statement before the Panel, however, the United States "suddenly"³¹⁶ asserted that it was "challenging measures that prohibit foreign-invested enterprises from importing hard-copy cinematographic films, which are tangible items".³¹⁷ China further alleges that, by not finding that the United States had deliberately shifted the subject of its claim, the Panel had to "supplement[]" the United States' failure to fill in "a logical gap" as to why China's measures, which regulate content and services, could be inconsistent with China's trading rights commitments, which apply only to trade in goods.³¹⁸ In response, 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 goods subject to the United States' claim have always been tangible goods—that is, hard-copy cinematographic films used for projecting motion pictures.

³¹³China's appellant's submission, para. 211.

³¹⁴China's appellant's submission, paras. 201-203.

³¹⁵China's appellant's submission, paras. 204 and 205 (referring to Request for the Establishment of a Panel by the United States, WT/DS363/5, p. 7; and United States' first written submission to the Panel, paras. 268 and 269).

³¹⁶China's appellant's submission, para. 207.

³¹⁷China's appellant's submission, para. 207 (quoting United States' oral statement at the first Panel meeting, para. 11).

³¹⁸China's appellant's submission, para. 213.

172. In order to assess whether, as argued by China, the United States "shifted" the subject matter of its claim and, thereby, persuaded the Panel to apply China's trading rights commitments to measures that—according to China—do not regulate goods, we examine how the United States formulated and developed its claim before the Panel. In the United States' panel request, both the *Film Regulation* and the *Film Enterprise Rule* are listed among the measures subject to the United States' claim that China acted inconsistently with its trading rights commitments. In its first written submission to the Panel, the United States described both Article 30 of the *Film Regulation* and Article 16 of the *Film Enterprise Rule* as "[s]pecific measures addressing the importation of films for theatrical release", and alleged that these provisions are inconsistent with China's trading rights commitments because they prohibit foreign-invested enterprises from engaging in the importation of films and because the SARFT exercises discretion to decide who may import films.³¹⁹ In response, China contended that the United States' claim was based on the false assumption that films for theatrical release are goods, and provided various reasons as to why films for theatrical release should not be regarded as goods.³²⁰ Subsequently, in both its first oral statement and second written submission, the United States countered each of the reasons provided by China, including China's assertion that films for theatrical release were "intangible" and therefore not "goods". In this context, the United States emphasized that the subject of its claim—films for theatrical release—encompassed not only the "intangible" content of films, but also the hard-copy cinematographic films carrying such content, which are tangible.³²¹ Thus, we understand that, in referring to hard-copy cinematographic films, the United States was not changing the subject of its claim but, rather, was responding to China's arguments that films for theatrical release are not "goods".

173. Moreover, the Panel record shows that the United States provided relevant arguments and evidence in support of its contention that films for theatrical release—which are regulated by China's measures—are goods. For example, the United States explained why, in its view, the reasons invoked by China as justifying the position that films are not goods were flawed.³²² China argued that films for theatrical release are not goods because they are exploited through a series of services; because the commercial value of films for theatrical release lies in the revenue generated by these services;

³¹⁹United States' first written submission to the Panel, paras. 61-68 and 268-270. See also Panel Report, paras. 4.13, 4.14, 4.48, 7.488, 7.492, and 7.578-7.580.

³²⁰China's first written submission to the Panel, paras. 38-107. See also Panel Report, paras. 4.95-4.104 and 7.493-7.502.

³²¹See United States' oral statement at the first Panel meeting, para. 11; and United States' second written submission to the Panel, para. 13. See also Panel Report, paras. 4.199, 4.200, 4.301-4.303, and 7.503. Furthermore, the United States confirmed before the Panel that its claims should be understood as concerning goods, stating that the subject of its claim is hard-copy cinematographic film, in any tangible form, that can be used to project motion pictures in a theatre. (*Ibid.*, paras. 7.518 and 7.521)

³²²See United States' oral statement at the first Panel meeting, paras. 10-22; and United States' second written submission to the Panel, paras. 13-29. See also Panel Report, paras. 4.200-4.202, 4.302-4.308, and 7.503-7.510.

and because the delivery materials containing the content of films are mere accessories of such services and have no commercial value of their own.³²³ In response, the United States contended that all of the relevant products subject to its claims concerning trading rights consist of a hard-copy carrier medium containing content, and that China had not argued that reading materials, finished audiovisual home entertainment ("AVHE") products, or finished sound recordings are not goods.³²⁴ The United States further argued that the vast majority of goods are commercially exploited through a series of associated services and that China's argument would transform virtually all goods into services.³²⁵ The United States added that Articles III:10 and IV of the GATT 1994, which deal with cinematographic films, confirm that films for theatrical release are goods.³²⁶ The United States also referred to the international classification of products under the Harmonized Commodity Description and Coding System of the World Customs Organization (the "Harmonized System")³²⁷ and China's WTO Schedule of Concession for goods, both of which contain a heading for "cinematographic film" with embedded content.³²⁸ Moreover, before the Panel, the United States reiterated that its claim related to an integrated product, that is, the content of motion pictures integrated in the hard-copy film reel, and that the existence of a good could not be negated by the fact that the film reel carried "intangible" content.³²⁹

174. The above review of the record before the Panel leads us to the view that, as the United States submits on appeal, "[i]n response to China's contention that a film for theatrical release is not a good because it is not tangible, the United States made clear that the good subject to the [United States'] claim is in fact a tangible good *i.e.*, hard-copy cinematographic film."³³⁰ We, therefore, see no error in the Panel's observation that the United States' reference to hard-copy cinematographic films "merely clarified the meaning of the expression 'films for theatrical release', by confirming that this expression is intended to describe goods ... that can be used for projecting motion pictures in

³²³See China's first written submission to the Panel, paras.49-82. See also Panel Report, paras. 4.96-4.101, 7.494-7.499, 7.515, and 7.516.

³²⁴See United States' oral statement at the first Panel meeting, para. 11; and United States' second written submission to the Panel, para. 14. See also Panel Report, para. 7.503.

³²⁵See United States' oral statement at the first Panel meeting, para. 13; and United States' second written submission to the Panel, paras. 15 and 16. See also Panel Report, paras. 4.304, 4.305, and 7.504.

³²⁶United States' second written submission to the Panel, paras. 26 and 27. See also Panel Report, paras. 4.307, 7.506, and 7.519.

³²⁷Harmonized Commodity Description and Coding System, Explanatory Notes, 4th edn. (WCO, 2007), p. VI-3706-1 (Panel Exhibit US-53).

³²⁸Heading 3706 of China's Schedule of Concessions for goods reads as follows: "cinematographic film, exposed and developed, whether or not incorporating sound track or consisting only of sound track". (United States' oral statement at the first Panel meeting, para. 12; United States' second written submission to the Panel, paras. 17 and 28) See also Panel Report, paras. 4.201, 4.308, and 7.507.

³²⁹See United States' oral statement at the first Panel meeting, para. 11; and United States' second written submission to the Panel, para. 14. See also Panel Report, para. 7.518.

³³⁰United States' appellee's submission, para. 133 (referring to United States' oral statement at the first Panel meeting, para. 11).

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/approved³³² 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*, the Appellate Body examined one provision of a Chinese Decree, focusing on the text and context of the relevant provision in the Decree and the overall "structure and logic" of the Decree, so as to determine whether the legal characterization by the panel was in error.³³⁷ At the same time,

³³¹Panel Report, para. 7.523.

³³²See *supra*, footnotes 297 and 309.

³³³Panel Report, para. 7.575.

³³⁴Panel Report, para. 7.584.

³³⁵See China's appellant's submission, footnote 155 to para. 219.

³³⁶The Appellate Body stated that the municipal law of WTO Members may serve not only as evidence of facts, but also as evidence of compliance or non-compliance with international obligations. (Appellate Body Report, *India – Patents (US)*, paras. 65, 66, and 68) See also Appellate Body Report, *US – Section 211 Appropriations Act*, para. 106; Appellate Body Report, *US – Carbon Steel*, paras. 156 and 157; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 168; and Appellate Body Reports, *China – Auto Parts*, para. 225.

³³⁷Appellate Body Reports, *China – Auto Parts*, paras. 225-245.

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 nature³³⁸, 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*") in Article 30 of the *Film Regulation*. The Panel found it "not implausible"³⁴⁶ that, as China contended, Article 30 regulates who may conduct the business of bringing into China the content that can be commercially exploited, and considered it "somewhat less plausible"³⁴⁷ that Article 30 regulates *only* who may import hard-copy cinematographic films, which, as both parties agreed, are goods.³⁴⁸ Nonetheless, the Panel found that resolving the difference between China and the United States with respect to the meaning of the term "*Dian Ying*" was not critical to its analysis in the light of China's explanation regarding the practice of importing films. China explained to the Panel the practice of importing films to China as follows. A designated film importing entity enters into a licensing/distribution agreement with a foreign film producer/licensor. After the content of the film is reviewed and approved by the SARFT, the designated entity "proceeds with the customs clearance of the delivery materials", and such delivery materials include hard-copy cinematographic films.³⁴⁹ The Panel took specific note of China's explanation 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.³⁵⁰

³⁴³Panel Report, para. 7.533.

³⁴⁴Panel Report, para. 7.533.

³⁴⁵Panel Report, para. 7.533.

³⁴⁶Panel Report, para. 7.535.

³⁴⁷Panel Report, para. 7.535. The Panel used the term "hard-copy cinematographic films" to refer to either "internegative" films or "interpositive" films, both of which are exposed and developed. Internegative and interpositive films are reproductions of the original copy produced by the producer/licensor. An internegative contains the visual part of the film without sound track, whereas an interpositive contains both the visual part and the sound track. (*Ibid.*, paras. 7.522 and 7.537)

³⁴⁸Panel Report, para. 7.524.

³⁴⁹Panel Report, para. 7.537.

³⁵⁰China's response to Panel Question 179 (referred to in Panel Report, footnote 415 to para. 7.538). See also United States' appellee's submission, para. 130.

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 Regulation* 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*") in the light of the evidence provided by the independent translator and the "plain language"³⁵⁵ of the *Film Regulation*. China highlights the translator's statement 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."³⁵⁶ Given this opinion, China argues, the Panel's failure to make a clear finding as to the meaning of the term "*Dian Ying*" "seems difficult to justify".³⁵⁷ In response, the United States maintains that the distinction drawn by the translator between the content of a film and the content-free material on which a film could be printed (such as film stock) did not assist the Panel in analyzing the United States' claim, because the United States did not assert that unexposed, content-free film stock was the good at issue. Rather, the United States claimed that the good at issue is an integrated product, namely, cinematographic film with content embedded on it. Thus, in the United States' view, China's reliance on the translator's opinion is "misplaced".³⁵⁸

³⁵¹Panel Report, para. 7.543; see also paras. 7.538 and 7.539. The Panel also found that, if the term "films" were understood as meaning "hard-copy cinematographic films", Article 30 would directly regulate who may engage in importing such goods. (*Ibid.*, para. 7.543)

³⁵²Panel Report, para. 7.538.

³⁵³Panel Report, para. 7.560.

³⁵⁴China's appellant's submission, para. 233.

³⁵⁵China's appellant's submission, para. 220.

³⁵⁶Panel Report, para. 7.533.

³⁵⁷China's appellant's submission, para. 232.

³⁵⁸United States' appellee's submission, para. 130.

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 Body has the authority to examine the plain language of the *Film Regulation*, in the light of the Appellate Body's findings in prior disputes that the assessment of a WTO Member's municipal law as to its consistency with WTO obligations is a process of legal characterization and thus an issue of law subject to appellate review.³⁶¹ China adds that, in any event, it has invoked Article 11 of the DSU and claimed that the Panel failed to conduct an objective assessment of the facts in examining the *Film Regulation*.

186. In response, the United States maintains that a panel's construction of a Member's municipal law is a factual determination and, therefore, may be reviewed by the Appellate Body only to the extent that the panel's assessment of the municipal law is inconsistent with Article 11 of the DSU.³⁶² The United States further argues that the Appellate Body is not in a position to examine China's laws by looking beyond the facts examined by the Panel.

³⁵⁹Panel Report, paras. 7.539 and 7.543.

³⁶⁰China's appellant's submission, para. 221.

³⁶¹China's appellant's submission, para. 234 (referring to Appellate Body Report, *EC – Hormones*, para. 132; and Appellate Body Report, *US – Section 211 Appropriations Act*, para. 105); China's response to questioning at the oral hearing (referring to Appellate Body Reports, *China – Auto Parts*, para. 225).

³⁶²United States' response to questioning at the oral hearing.

187. In addressing a claim that a panel mischaracterized a Member's municipal law, the Appellate Body is not limited to reviewing only those provisions of the law explicitly examined by the panel. The Appellate Body has, in prior disputes, examined specific provisions, in the light of other provisions and the overall structure of the relevant municipal law, so as to determine whether a panel properly construed that law.³⁶³ In this dispute, the provision examined by the Panel, and found to be inconsistent with China's obligations, is Article 30 of the *Film Regulation*. In addition, Articles 2, 5, and 31 of that Regulation were also discussed by the parties before the Panel or reviewed by the Panel.³⁶⁴ Article 2 defines the activities subject to the regulation, namely, the "production, importation, exportation, distribution and projection of films" in China, as well as the types of films concerned, "including feature films, documentary films, science and educational films, cartoon and puppet films, and special subject films".³⁶⁵ According to China, Article 2 describes films according to their content, and not in relation to the physical materials used. Article 5, in turn, establishes a licensing system for conducting the activities listed in Article 2. China emphasizes that, in the context of the licensing system under Article 5, the word "film" also relates to content. Finally, China argues that Articles 24 to 29, and 31 of the *Film Regulation* confirm that the term "film" in the *Film Regulation* relates to content, as only the content is subject to review and approval before importation into China. Pointing to these provisions³⁶⁶, China submits that the term "film" in Article 30 of the *Film Regulation* has the same meaning, that is, content alone and not hard-copy cinematographic film.

188. In our view, none of these provisions contradicts the view that, where the content of a film is carried by physical delivery materials, Article 30 of the *Film Regulation* will *inevitably* regulate who may import goods for the plain reason that the content of a film is expressed through, and embedded in, a physical good. Indeed, Article 31 of the *Film Regulation* reflects this reality. This provision requires that the designated importing entity "undertake temporary film import procedures at Customs" for a film submitted to the SARFT for content review and that, once the film passes content review, the designated entity finalize the import procedures at customs by submitting the approval documents issued by the SARFT. This seems to indicate that, even if the *Film Regulation* is, as China argues, "focused on" the content of films, Article 31 of the Regulation treats films as goods for purposes of importation procedures at customs.

³⁶³See, for example, Appellate Body Reports, *China – Auto Parts*, paras. 225-245.

³⁶⁴See Panel Report, paras. 7.488, 7.512, 7.531, footnote 409 to para. 7.535, and footnote 413 to para. 7.537.

³⁶⁵China's appellant's submission, para. 223.

³⁶⁶China also quoted Article 1 of the *Film Regulation*, which states:

These Regulations are formulated for the purposes of strengthening the administration of the film industry, developing and promoting the film undertakings, and satisfying the needs of people for cultural life, promoting the construction of socialist material and spiritual civilization.

(China's appellant's submission, para. 222)

189. Finally, China argues that, "considering the numerous elements on the record, and the Panel's own acceptance that 'film' was most evidently to be interpreted as 'content'", the Panel also failed to make an objective assessment of the facts, in violation of Article 11 of the DSU.³⁶⁷ As noted above, although the Panel acknowledged that Article 30 of the *Film Regulation* may be concerned with the content of films, it did not pronounce upon the meaning of the term "film" ("*Dian Ying*") or, in particular, on the issue of whether the term referred exclusively to content independent of its physical carrier. Thus, contrary to China's assertion, we do not consider that the Panel "accept[ed]" that the term "film" should be interpreted as relating only to "content". We have addressed above China's arguments regarding the Panel's alleged failure to rule out "hard-copy cinematographic film" as a possible meaning of the term "*Dian Ying*" in the *Film Regulation*. China's claim under Article 11 of the DSU is not supported by arguments additional to or different from those addressed above.³⁶⁸

190. In sum, we consider that the Panel did not err in refraining from making a finding on the precise meaning of the term "film" ("*Dian Ying*") in Article 30 of the *Film Regulation*. Nor did the Panel err in accepting "hard-copy cinematographic film" as a possible meaning of the term "film" ("*Dian Ying*").

(c) The Alleged "Incidental and Practical" Effects on Goods of Article 30 of the *Film Regulation* and Their Relevance to the Applicability of China's Trading Rights Commitments

191. China submits that the Panel failed to establish how the *Film Regulation*, which regulates the content of films and associated services, could affect the importation of hard-copy cinematographic films. More specifically, China maintains that hard-copy cinematographic film is imported "simultaneously, physically in conjunction with the right to provide" a service, namely, the commercial licensing, distribution and projection of the intangible content of the film.³⁶⁹ China further submits that, unlike the importation of numerous goods that "are traded to meet the demand of services suppliers who use these goods to provide a service"³⁷⁰, in the case of imported hard-copy cinematographic films, "the demand of services suppliers is with respect to the content ... not with respect to any good".³⁷¹ Thus, in China's view, "there can be no restriction on the [good] independently from that applicable to the service".³⁷² Any effects that Article 30 of the *Film*

³⁶⁷China's appellant's submission, para. 234.

³⁶⁸We recall that a claim that a panel has failed to comply with its duties under Article 11 of the DSU must stand by itself and should not be made merely as a subsidiary argument or claim in support of a claim that a panel failed to construe or apply correctly a particular provision of a covered agreement. (See Appellate Body Report, *US – Steel Safeguards*, para. 498; and Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 238)

³⁶⁹China's appellant's submission, para. 242.

³⁷⁰China's appellant's submission, para. 243 (quoting Panel Report, para. 7.549).

³⁷¹China's appellant's submission, para. 243.

³⁷²China's appellant's submission, para. 242.

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 could be simultaneously subject to obligations relating to trade in goods under the GATT 1994 and to obligations relating to trade in services under the GATS. As the Appellate Body noted in *Canada – Periodicals*, "[t]he entry into force of the GATS, as Annex 1B of the *WTO Agreement*, does not diminish the scope of application of the GATT 1994."³⁷⁵ In *EC – Bananas III*, the Appellate Body observed that, although the subject matter of the GATT 1994 and that of the GATS are different, particular measures "could be found to fall within the scope of both the GATT 1994 and the GATS", and that such measures include those "that involve a service relating to a particular good or a service supplied in conjunction with a particular good."³⁷⁶ These findings specifically concern the relationship between the GATS and the GATT 1994, and thus do not directly address the relationship between China's trading rights commitments and its commitments on trade in services. Yet, these findings provide assistance in analyzing the issue of whether a measure can be simultaneously subject to obligations relating to trade in goods and those relating to trade in services. Given that China's trading rights commitments apply to trade in goods, the Appellate Body findings in these earlier disputes are also relevant to resolving the issue of whether measures regulating services may be subject to China's trading rights commitments.

194. The Appellate Body's approach in the above two disputes implies that a measure can regulate both goods and services and that, as a result, the same measure can be subject to obligations affecting trade in goods and obligations affecting trade in services. This does not necessarily mean that the same measure would also be subject to China's trading rights commitments, because a measure regulating

³⁷³China's appellant's submission, para. 240; see also para. 252.

³⁷⁴United States' appellee's submission, para. 134 (quoting Panel Report, para. 7.555).

³⁷⁵Appellate Body Report, *Canada – Periodicals*, p. 19, DSR 1997:I, 449, at 465.

³⁷⁶Appellate Body Report, *EC – Bananas III*, para. 221.

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*. In other words, in this dispute, the applicability of China's trading rights commitments to Article 30 of the *Film Regulation* depends on the issue of whether that provision regulates goods. In this regard, China maintains that "the import restrictions imposed" by Article 30 of the *Film Regulation* relate only to the right to import "intangible content" of films through licensing services, and do not relate to "the physical carrier" of such content.³⁷⁷

195. We do not see the clear distinction drawn by China between "content" and "goods". Neither do we consider that content and goods, and the regulation thereof, are mutually exclusive. Content can be embodied in a physical carrier, and the content and carrier together can form a good. For example, in *Canada – Periodicals*, the Appellate Body found that "a periodical is a good comprised of two components: editorial content and advertising content. Both components can be viewed as having services attributes, but they combine to form a physical product—the periodical itself."³⁷⁸ Moreover, the United States points out that China's Schedule of Concessions on goods, which contains the Harmonized System heading 3706, defines as a good "cinematographic film, exposed and developed, whether or not incorporating sound track or consisting only of sound track". This confirms that a physical film reel containing content is treated as a good under China's own tariff regime.³⁷⁹ We therefore share the view that China's arguments "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)".³⁸⁰

196. Moreover, as the Panel properly found, China's trading rights commitments refer to the right to trade in "all goods".³⁸¹ The applicability of China's trading rights commitments to a measure is triggered when that measure concerns who may import a good. Thus, even if cinematographic films are imported "simultaneously, physically in conjunction with the right to provide the service in question"³⁸², this does not imply that the effects of the *Film Regulation* on goods, and on the importers

³⁷⁷China's appellant's submission, para. 238.

³⁷⁸Appellate Body Report, *Canada – Periodicals*, p. 17, DSR 1997:I, 449, at 463. (footnote omitted)
See also United States' appellee's submission, para. 136 and footnote 217 thereto.

³⁷⁹See United States' appellee's submission, para. 131.

³⁸⁰United States' appellee's submission, para. 123 (referring to China's appellant's submission, paras. 221, 232, 238, 244, and 245).

³⁸¹Panel Report, para. 7.551 (quoting China's Accession Protocol, para. 5.1; and China's Accession Working Party Report, para. 84(a)). We recall that China's obligation to grant the right to trade does not apply to the goods listed in Annex 2A and, prior to 11 December 2004, Annex 2B to China's Accession Protocol, and that none of the products at issue in this dispute falls within the scope of the products listed in Annex 2A or Annex 2B. (See *supra*, footnote 306)

³⁸²China's appellant's submission, para. 242.

of those goods, are somehow removed from the scope of applicability of China's trading rights commitments. Rather, the fact that cinematographic films are imported "simultaneously, physically in conjunction with the right to provide the service in question" shows that, where physical carriers are used for purposes of importing and licensing the content of films, Article 30 of the *Film Regulation* has an *inevitable*, rather than "*incidental*"³⁸³, effect on who may import goods. The inevitable effect of Article 30 on the importation of goods confirms the Panel's finding that Article 30 "would necessarily affect"³⁸⁴ who may engage in the importation of goods where relevant content is to be imported on hard-copy cinematographic films.³⁸⁵ In our view, therefore, the Panel correctly found that 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"³⁸⁶ does not preclude the application of China's trading rights commitments to the *Film Regulation*.³⁸⁷

197. Finally, China asserts that the Panel's finding that Article 30 of the *Film Regulation* necessarily affects who may import goods would undermine China's right to conduct content review with respect to imported films. For example, China argues, where a film fails to pass content review and cannot be imported for release in China, the Panel's logic necessarily implies that China acted inconsistently with its obligations regarding trade in goods, because the hard-copy cinematographic film, in which the content is embodied, cannot be imported.³⁸⁸ The United States maintains that, according to China's example, the "right" being undermined by the Panel's finding appears to be China's right to prevent importation of goods that violate China's standards of content. Yet, the United States points out that it has challenged neither China's right to conduct content review nor China's right to bar the importation of goods containing prohibited content.³⁸⁹ In our view, the Panel's finding, which concerns China's restriction on who may import goods, has no implications for China's ability to justify a prohibition on the imports of goods under the *WTO Agreement*. Thus, we are not

³⁸³China's appellant's submission, para. 240. (emphasis added)

³⁸⁴Panel Report, para. 7.543.

³⁸⁵China also maintains that the measures at issue "do not have any direct legal effect to restrict the importation of hard-copy cinematographic film." (China's appellant's submission, para. 238) In this respect, we note that, in *Canada – Periodicals*, Canada submitted that the measure at issue "is a measure regulating trade in services 'in their own right'" and therefore not subject to the GATT 1994, despite Canada's acknowledgement that the measure had "effects on the physical good—the magazine as it crossed the border". (Appellate Body Report, *Canada – Periodicals*, p. 17, DSR 1997:I, 449, at 463) Despite these arguments, both the panel and the Appellate Body found that the measure at issue was subject to Article III:2 of the GATT 1994. (Panel Report, *Canada – Periodicals*, para. 5.19; Appellate Body Report, *Canada – Periodicals*, p. 20, DSR 1997:I, 449, at 465)

³⁸⁶Panel Report, para. 7.555.

³⁸⁷We note that sector 4.B of China's GATS Schedule, which relates to wholesale trade services, contains a footnote stating that "[t]he restrictions on mode 1 shall not undermine the rights of WTO Members to the right to trade as stipulated in Chapter 5 of China's Protocol of accession to the WTO." (GATS/SC/135, footnote 6) In our view, this footnote also suggests that China's commitments on trade in services cannot diminish the scope of China's obligation to grant the right to trade.

³⁸⁸China's appellant's submission, para. 250.

³⁸⁹United States' appellee's submission, para. 139.

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 Regulation* is subject to China's trading rights commitments, in that it "necessarily affect[s] who may engage in importing of hard-copy cinematographic films" and, therefore, goods.³⁹¹

(d) Conclusion

199. On the basis of our analysis in this section, we find that the Panel did not commit the errors alleged by China in concluding that Article 30 of the *Film Regulation*, which allows "only ... designated film import entities ... to be engaged in the business or activity of importing relevant contents"³⁹², is subject to China's trading rights commitments because it necessarily affects who may engage in importing hard-copy cinematographic film carrying relevant content (a good). Because the reasons that led the Panel to conclude that Article 30 of the *Film Regulation* was subject to China's trading rights commitments also applied, *mutatis mutandis*, to Article 16 of the *Film Enterprise Rule*, we also find that the Panel did not commit any error in finding that Article 16 of the *Film Enterprise Rule* is subject to 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.³⁹³

200. Consequently, we *find* 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. We therefore *uphold* the Panel's conclusions, in paragraph 8.1.2(c)(ii), (iii), (vi), and (vii) of the Panel Report³⁹⁴, that these 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.

³⁹⁰China's appellant's submission, para. 252.

³⁹¹Panel Report, para. 7.543.

³⁹²Panel Report, para. 7.538.

³⁹³Panel Report, para. 7.584.

³⁹⁴See also Panel Report, paras. 7.571, 7.576, 7.594, 7.598, and 7.599.

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 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.³⁹⁶ The Panel noted that these provisions, which require that the importation of audiovisual products be conducted under a licensing system, apply to both finished audiovisual products and unfinished audiovisual products. Unfinished audiovisual products are master copies to be used to publish and manufacture copies for sale in China.³⁹⁷ The Panel further noted that the United States' claims in respect of these measures concerned only unfinished audiovisual products.³⁹⁸ Although China "[did] not appear to dispute"³⁹⁹ before the Panel that unfinished audiovisual products are goods, China maintained that its trading rights commitments do not apply to Article 5 of the *2001 Audiovisual Products Regulation* and Article 7 of the *Audiovisual Products Importation Rule* because these provisions regulate "the licensing of copyrights for the publication of copies of audiovisual content".⁴⁰⁰ The Panel noted that it had examined, and rejected, similar arguments by China with respect to Article 30 of the *Film Regulation*.⁴⁰¹ The Panel thus applied the same reasoning, *mutatis mutandis*, to Article 5 of the *2001 Audiovisual Products Regulation* and Article 7 of the *Audiovisual Products Importation Rule*, and found them to be subject to China's trading rights commitments.⁴⁰² The Panel also concluded that these provisions are inconsistent with paragraph 1.2 of China's Accession Protocol and paragraph 84(b) of China's Accession Working Party Report because, under these provisions, China does not grant trading rights to foreign-invested enterprises in a "non-discretionary" manner.⁴⁰³

³⁹⁵The text of these provisions is set out in Annex III to this Report.

³⁹⁶Panel Report, para. 8.1.2(d)(i) and (v).

³⁹⁷Panel Report, paras. 7.608, 7.625, and 7.642. See also *supra*, para. 157 and footnote 289 thereto.

³⁹⁸Panel Report, paras. 7.637, 7.639, and 7.672.

³⁹⁹Panel Report, para. 7.640.

⁴⁰⁰Panel Report, para. 7.646; see also para. 7.674.

⁴⁰¹Panel Report, para. 7.651.

⁴⁰²Panel Report, paras. 7.652 and 7.674.

⁴⁰³Panel Report, paras. 7.657 and 7.680.

202. China asserts that the Panel erred in reaching the above findings because, with respect to unfinished audiovisual products, Article 5 of the *2001 Audiovisual Products Regulation* and Article 7 of the *Audiovisual Products Importation Rule* do not regulate the importation of goods but, rather, regulate the service of the licensing of copyrights for the publication of copies of audiovisual content. In this regard, China's arguments rest entirely on the assertion that, to the extent that the Panel's findings were based on the same reasoning as the Panel employed in reaching its findings on Article 30 of the *Film Regulation* and Article 16 of the *Film Enterprise Rule*, the Panel committed the same errors of law in reaching its findings on Article 5 of the *2001 Audiovisual Products Regulation* and Article 7 of the *Audiovisual Products Importation Rule*.⁴⁰⁴

203. In subsection A above, we found that the Panel did not err in reaching its findings regarding Article 30 of the *Film Regulation* and Article 16 of the *Film Enterprise Rule*. Therefore, we also find that the Panel did not err 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, under paragraph 1.2 of its Accession Protocol and paragraph 84(b) of its Accession Working Party Report, to grant the right to trade to foreign-invested enterprises in a non-discretionary manner.

204. On this basis, we *find* 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. We therefore *uphold* the Panel's conclusions, in paragraph 8.1.2(d)(i) and (v) of the Panel Report⁴⁰⁵, that these provisions 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.

VI. China's Defence under Article XX(a) of the GATT 1994

A. The Availability of a Defence under Article XX(a) of the GATT 1994

205. We now turn to the Panel's analysis of China's defence under Article XX(a) of the GATT 1994. Relying upon the introductory clause of paragraph 5.1 of its Accession Protocol, which reads: "Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement", China invoked Article XX as a defence. More specifically, China invoked

⁴⁰⁴China's appellant's submission, paras. 260 and 261.

⁴⁰⁵See also Panel Report, paras. 7.657 and 7.680.

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 commitments⁴⁰⁶:

- (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 China's obligation in paragraph 5.1 concerns the right to import and export goods, China's right to regulate trade must be interpreted in conjunction with WTO

⁴⁰⁶China did not invoke Article XX(a) to the extent that these measures and provisions concern the import of films for theatrical release and unfinished audiovisual products. (Panel Report, para. 7.726) China also did not invoke Article XX(a) as a defence to the United States' claims with respect to the *Film Regulation* and the *Film Enterprise Rule*, or the claims regarding unfinished audiovisual products under Article 5 of the *2001 Audiovisual Products Regulation* and Article 7 of the *Audiovisual Products Importation Rule*. As discussed above, China argued that its trading rights commitments did not apply, at all, to these measures, because the measures regulate services and not goods. (See *supra*, section V of this Report; see also Panel Report, paras. 7.540, 7.584, 7.649, and 7.674) China also did not invoke Article XX(a) to justify the measures that the Panel found to be inconsistent with Article III:4 of the GATT 1994. Nor did China seek to justify, under Article XIV(a) of the GATS, the measures that the Panel had found to be inconsistent with Articles XVI and XVII of the GATS.

⁴⁰⁷The text of these provisions is set out in Annex III to this Report. The Panel found that these provisions, and certain specific requirements contained within them, restrict the right to import goods into China. The Panel found each of the relevant requirements to be inconsistent with either: (i) China's obligation to grant the right to trade (paragraph 5.1 of China's 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); or (ii) China's obligation to grant in a non-discretionary manner the right to trade (paragraph 84(b) of China's Accession Working Party Report and, hence, paragraph 1.2 of China's Accession Protocol).

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

⁴⁰⁸China's arguments are summarized in paragraphs 7.239-7.241, 7.244, and 7.245 of the Panel Report.

⁴⁰⁹The United States' arguments are summarized in paragraphs 7.242 and 7.243 of the Panel Report.

⁴¹⁰Panel 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 explained that it would:

... proceed on the assumption that Article XX(a) is available to China as a defence for the measures we have found to be inconsistent with its trading rights commitments under the Accession Protocol. Based on that assumption, we will examine whether the relevant measures satisfy the requirements of Article XX(a).⁴¹²

210. Ultimately, the Panel determined that China had not demonstrated the "necessity", within the meaning of Article XX(a), of its measures, and did not, therefore, return to the issue of whether Article XX(a) is a defence available to China in this case. The Panel included the following statement in the final section of its Report, setting out its conclusions and recommendations:

Because China has in any event not established that the measures at issue satisfy the requirements of Article XX(a), the Panel did not determine whether Article XX(a) is available as a direct defence for breaches of China's trading rights commitments as set out in the Accession Protocol.⁴¹³

211. China has appealed the substance of the Panel's findings under Article XX(a) of the GATT 1994. China requests us to: (i) reverse the Panel's finding that China has not demonstrated that the measures that China sought to justify under Article XX(a) of the GATT 1994 are "necessary" to protect public morals within the meaning of that provision; (ii) complete the analysis with regard to the chapeau of Article XX of the GATT 1994 and find that China's measures comply with the requirements of the chapeau; and (iii) find that Article XX(a) of the GATT 1994 is available to China to justify measures found to be inconsistent with the trading rights commitments in its Accession Protocol.

⁴¹¹The Panel noted that the United States had, referring to the *arguendo* approach adopted by the Appellate Body in *US – Shrimp (Thailand) / US – Customs Bond Directive*, invited the Panel to take the same approach in this dispute. In that case, the United States invoked Article XX(d) of the GATT 1994 to defend the measure at issue (a bond requirement) that had been found to be inconsistent with the *Ad Note* to Article VI:2 and 3 of the GATT 1994 and Article 18.1 of the *Anti-Dumping Agreement*. The Appellate Body found that the bond requirement was not "necessary" within the meaning of Article XX(d) and did not return to the issue of whether Article XX(d) was available to justify a measure that is inconsistent with the requirements of the *Ad Note* and the *Anti-Dumping Agreement*.

⁴¹²Panel Report, para. 7.745.

⁴¹³Panel Report, para. 8.2(a)(ii).

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 and obligations of WTO Members and clarifies existing provisions of the covered agreements in accordance with the customary rules of interpretation of public international law.⁴¹⁵ In doing so, panels and the Appellate Body are not bound to favour the most expedient approach or that suggested by one or more of the parties to the dispute. Rather, panels and the Appellate Body must adopt an analytical methodology or structure appropriate for resolution of the matters before them, and which enables them to make an objective assessment of the relevant matters and make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.⁴¹⁶

214. In this case, China asserted that the introductory clause of paragraph 5.1 of its Accession Protocol allowed it to justify the provisions of its measures found to be inconsistent with its trading rights commitments as necessary to protect public morals in China within the meaning of Article XX(a) of the GATT 1994. The Panel did not decide whether paragraph 5.1 gave China access to this defence. Instead, the Panel proceeded on the *assumption* that such a defence was available. Yet, if China cannot rely on Article XX(a) to defend its measures as ones that protect public morals in China, the findings of inconsistency with China's trading rights commitments would be the end of the matter, and any analysis of the measures under Article XX(a) would be unnecessary. Moreover, certain elements of the Panel's reasoning under Article XX(a), notably its analysis of the appropriate restrictive effect to be taken into account, depended, at least to some extent, on the availability of

⁴¹⁴United States' appellee's submission, footnote 14 to paragraph 10. At the oral hearing in this appeal, the United States requested us to adopt the same *arguendo* approach as the Panel, that is, to review the Panel's findings under Article XX(a) of the GATT 1994 based on the assumption that Article XX(a) is a defence available to China in this dispute.

⁴¹⁵Article 3.2 of the DSU.

⁴¹⁶Article 11 of the DSU.

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

⁴¹⁷In 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.

⁴¹⁸The 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 well as its relationship to the remainder of the sentence within which it is situated.

218. Looking first to the overall structure of the first sentence of paragraph 5.1, we note that the sentence contains a commitment, or obligation, undertaken by China, namely, to progressively liberalize the right to trade and ensure that, within three years of accession, all enterprises in China have the right to import and export all goods.⁴¹⁹ This obligation is, however, qualified by the introductory clause of the first sentence: "Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement".

219. An obligation that is "without prejudice to" a right may not detrimentally affect, encroach upon, or impair such right.⁴²⁰ In the introductory clause of paragraph 5.1, the "right" that may not be impaired is "China's right to regulate trade". This right is itself further qualified by the phrase "in a manner consistent with the WTO Agreement". We examine the content of each of these phrases in turn.

220. In the abstract, "rights" may encompass both entitlements or powers, and immunities or protected interests.⁴²¹ Within the first sentence of paragraph 5.1, the word "right" is used twice. In the introductory clause, China is identified as enjoying a "right" to regulate trade. Subsequently, China is identified as being subject to an obligation to grant the "right" to trade. The first time the word "right" is used, it seems to us to refer to an *authority*, or *power* that China enjoys, whereas the second time the word is used, it refers to a legal entitlement that China is under an obligation to *grant*

⁴¹⁹Paragraph 5.1 provides that China's obligation to grant the right to import and export all goods does not apply to the specific goods listed in Annex 2A to China's Accession Protocol, the import and export of which may be reserved to State trading enterprises in accordance with that Annex. Thus, Annex 2A carves out certain goods from the scope of China's obligation to grant the right to trade. For all goods not listed in Annex 2A, including all of the goods at issue in this dispute, China is subject to an obligation to grant all enterprises in China the right to import and export such goods, irrespective of the meaning and scope of "China's right to regulate trade in a manner consistent with the WTO Agreement". The question of the meaning and operation of the introductory clause to paragraph 5.1—"Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement"—is distinct from the question of whether China has acted inconsistently with the obligation set out in the first sentence of paragraph 5.1. Thus, we do not agree with the argument made by the United States to the Panel that accepting that China's "right to regulate trade" may justify certain restrictions on trading rights would, in effect, permit China to add new goods to the Annex 2A list.

⁴²⁰The Panel referred to the following dictionary definitions of "without prejudice to": "without detriment to any existing right or claim; *spec.* in LAW, without damage to one's own rights or claims" (*Shorter Oxford English Dictionary*, 5th edn., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 2, p. 2324); and "[w]ithout loss of any rights; in a way that does not harm or cancel the legal rights or privileges of a party" (*Black's Law Dictionary*, 7th edn., B.A. Garner (ed.) (West Group, 1999), p. 1596). (Panel Report, footnotes 207 and 208 to para. 7.253)

⁴²¹Among the definitions of "right" are: "[e]ntitlement or justifiable claim ... to act in a certain way", and "[a] legal, equitable, or moral title or claim to the possession of ... authority, the enjoyment of privileges or immunities, etc." (*Shorter Oxford English Dictionary*, 5th edn., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 2, p. 2583.); as well as "a recognized and protected interest the violation of which is a wrong" (*Black's Law Dictionary*, 7th edn., B.A. Garner (ed.) (West Group, 1999), p. 1322).

to all enterprises in China.⁴²² The next component of the phrase "China's right to regulate trade" is the verb "regulate". As noted by the Panel, to "regulate" means to "[c]ontrol, govern, or direct by rule or regulations; subject to guidance or restrictions".⁴²³ As for the word "trade", it is used as a noun in the phrase "China's right to regulate trade"⁴²⁴, and seems to refer, generally, to commerce between nations.⁴²⁵

221. Thus, our analysis so far suggests that the phrase "China's right to regulate trade" is a reference to China's power to subject international commerce to regulation. As explained above, this power may not be impaired by China's obligation to grant the right to trade, *provided that* China regulates trade "in a manner consistent with the WTO Agreement".

222. We read the phrase "in a manner consistent with the WTO Agreement" as referring to the *WTO Agreement* as a whole, including its Annexes. We note, in this respect, that we see the "right to regulate", in the abstract, as an inherent power enjoyed by a Member's government, rather than a right bestowed by international treaties such as the *WTO Agreement*. With respect to trade, the *WTO Agreement* and its Annexes instead operate to, among other things, discipline the exercise of each Member's inherent power to regulate by requiring WTO Members to comply with the obligations that they have assumed thereunder. When what is being regulated is trade, then the reference in the introductory clause to "consistent with the WTO Agreement" constrains the exercise of that regulatory power such that China's regulatory measures must be shown to conform to WTO disciplines.

223. We observe, in this regard, that WTO Members' regulatory requirements may be WTO-consistent in one of two ways. First, they may simply not contravene any WTO obligation. Secondly, even if they contravene a WTO obligation, they may be justified under an applicable exception. The reference to "a manner consistent with the WTO Agreement" seems to us to encompass both types of WTO-consistency. Thus, we read the phrase "right to regulate trade in a manner consistent with the WTO Agreement" as a reference to: (i) rights that the covered agreements affirmatively recognize as

⁴²²Thus, the direct beneficiaries of China's obligation to grant the "right to trade" in paragraph 5.1 are not other WTO Members, as such, but rather, enterprises in China.

⁴²³*Shorter Oxford English Dictionary*, 5th edn., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 2, p. 2516. See Panel Report, para. 7.256.

⁴²⁴As a noun, trade is defined as: "[b]uying and selling or exchange of commodities for profit, *spec.* between nations; commerce, trading ...". (*Shorter Oxford English Dictionary*, 5th edn., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 2, p. 3316)

⁴²⁵We note that the word "trade" is used three times in the first sentence of paragraph 5.1. The first time is as a noun in "China's right to regulate trade". The second and third times, it is used as a verb in the phrase "right to trade". Paragraph 5.1 expressly defines "the right to trade" as "the right to import and export goods", which in turn suggests that, in the phrase "the right to trade", the verb "trade" means "import and export". Such meaning is consistent with, but narrower in scope than, the dictionary definition of the verb trade: "[e]ngage in trade or commerce, pursue trade". (*Shorter Oxford English Dictionary*, 5th edn., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 2, p. 3316)

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 themselves⁴²⁸, nor to requirements that apply to the activity of importing or exporting.⁴²⁹ We also

⁴²⁶The 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)

⁴²⁷The 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 exercise of their right to regulate trade in goods, while at the same time ensuring that the use of such measures is carefully circumscribed so as to comport with specific objectives recognized as legitimate and so as to minimize the extent to which the exercise of such rights may constitute a barrier to trade in goods or discriminate against the goods of other Members. The *Agreement on the Application of Sanitary and Phytosanitary Measures* (the "*SPS Agreement*"), the *Agreement on Technical Barriers to Trade* (the "*TBT Agreement*"), the *Agreement on Import Licensing Procedures*, and the GATT 1994 all recognize and embody this balance.

⁴²⁸Import licensing requirements, for example, are requirements relating to the activity of importing goods. Typically, licensing requirements and their attendant procedures apply to and are satisfied by those who wish to import the goods, rather than by the goods themselves.

⁴²⁹SPS and TBT measures may be applied to goods that are imported, and may also be applied to domestic goods. They may be applied at the border, or internally. In essence, they are measures regulating goods.

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 consistent with the *WTO Agreement*. We see the obligations assumed by China in respect of trading rights, which relate to traders, and the obligations imposed on all WTO Members in respect of their regulation of trade in goods, as closely intertwined. This is particularly true of China's trading rights commitments, on the one hand, and the obligations imposed on all WTO Members under Articles III and XI of the GATT 1994, on the other hand, as certain WTO Members expressly recognized during the negotiations on China's accession to the WTO.⁴³⁰ Such interlinkage is also reflected in paragraph 5.1 itself. Read as a whole, this provision is clearly concerned with trade in *goods*. The first two sentences relate to the entitlements that China must give to potential importers and exporters of *goods*. The next, or third sentence of paragraph 5.1, provides that:

All such goods shall be accorded national treatment under Article III of the GATT 1994, especially paragraph 4 thereof, in respect of their internal sale, offering for sale, purchase, transportation, distribution or use, including their direct access to end-users.⁴³¹

227. The close relationship between restrictions on entities engaged in trade and GATT obligations relating to trade in goods has also been recognized in previous GATT panel and WTO panel and Appellate Body reports, where measures that did not directly regulate goods, or the importation of goods, have nonetheless been found to contravene GATT obligations. Thus, for example, restrictions imposed on investors, wholesalers, and manufacturers, as well as on points of sale and ports of entry,

⁴³⁰This is reflected in paragraph 80 of China's Accession Working Party Report. That paragraph describes the restrictions on the right to trade that China maintained at the time, and adds that some members of the Working Party "stated their view that such restrictions were inconsistent with WTO requirements, including Articles XI and III of GATT 1994".

⁴³¹We note that the wording of this commitment closely follows, but is not identical to, the language of Article III:4 of the GATT 1994. More specifically, the above commitment in paragraph 5.1 refers to "including their direct access to end-users", which is a phrase not used in Article III:4 itself. In addition, not all of the language of the first sentence, and none of the second sentence, of Article III:4 is reproduced in paragraph 5.1.

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* that are deemed to be inconsistent with either Article III:4 or Article XI:1 of the GATT 1994, and Article 3 of the *TRIMs Agreement* states that all exceptions under the GATT 1994 apply, as appropriate, to the provisions of the *TRIMs Agreement*. These considerations suggest that measures that restrict the rights of traders may violate GATT obligations with respect to trade in goods.

228. Returning to the introductory clause of paragraph 5.1, we recall our observation above that the reference to China's power to regulate trade "in a manner consistent with the WTO Agreement" seems to us to encompass both China's power to take regulatory action provided that its measures satisfy prescribed WTO disciplines and meet specified conditions (for example, an SPS measure that conforms to the *SPS Agreement*) and China's power to take regulatory action that derogates from WTO obligations that would otherwise constrain China's exercise of such power—that is, to relevant exceptions.

229. China's power to regulate trade in goods is disciplined by the obligations set out in Annex 1A of the *WTO Agreement*. In our view, the introductory clause of paragraph 5.1 cannot be interpreted in a way that would allow a complainant to deny China access to a defence merely by asserting a claim under paragraph 5.1 and by refraining from asserting a claim under other provisions of the covered agreements relating to trade in goods that apply to the same or closely linked measures, and which set

⁴³²With respect to Article III:4 of the GATT 1994, the panel in *India – Autos* found that "indigenization requirements" (requirements to use a minimum amount of domestically produced parts) and "trade balancing requirements" (requirements to export products of an equivalent value to the imported products) imposed on automobile manufacturers were inconsistent with Article III:4 of the GATT 1994. (Panel Report, *India – Autos*, paras. 7.195-7.198 and 7.307-7.309) Similarly, in *China – Auto Parts*, the Appellate Body found that measures that applied to automobile manufacturers created incentives for those manufacturers to *limit* their use of imported parts relative to domestic parts, or to avoid entirely the use of imported auto parts, and were, therefore, inconsistent with Article III:4 of the GATT 1994. (Appellate Body Reports, *China – Auto Parts*, paras. 195 and 196; see also Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 212) Requirements that imported products be sold or distributed only through specific points of sale or specific channels have also been found to violate Article III:4 (see the Panel and Appellate Body Reports in *Korea – Various Measures on Beef*; and GATT Panel Report, *US – Malt Beverages*, para. 5.38), as have purchase undertakings that conditioned investment approval upon the acceptance by investors of undertakings to purchase goods of domestic origin (GATT Panel Report, *Canada – FIRA*, para. 6.1). As for Article XI:1, the GATT panel in *Canada – Provincial Liquor Boards (EEC)* found that restrictions on points of sale were a restriction on importation (GATT Panel Report, *Canada – Provincial Liquor Boards (EEC)*, para. 4.25), and, in *Colombia – Ports of Entry*, the panel found that a restriction on the ports through which relevant goods could enter Colombia constituted a restriction on importation within the meaning of Article XI:1 (Panel Report, *Colombia – Ports of Entry*, para. 7.275).

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 regulating those who may engage in the import and export of goods falls within the scope of China's right to regulate trade may also depend on whether the measure has a clearly discernable, objective link to the regulation of trade in the goods at issue. In considering whether such a link is discernable, it may be relevant whether the measure regulating *who* may engage in trade is clearly and intrinsically related to the objective of regulating the *goods* that are traded. In addition, such a link may often be discerned from the fact that the measure in question regulates the right to import and export particular *goods*. This is because the regulation of *who* may import and export specific goods will normally be objectively related to, and will often form part of, the regulation of trade in those goods. Whether the necessary objective link exists in a specific case needs to be established through careful scrutiny of the nature, design, structure, and function of the measure, often in conjunction with an examination of the regulatory context within which it is situated. When such a link exists, then China may seek to show that, because its measure complies with the conditions of a GATT 1994 exception, the measure represents an exercise of China's power

⁴³³In this dispute, the United States challenged a variety of provisions within various Chinese measures as inconsistent with paragraph 5.1 of China's Accession Protocol. All of the provisions challenged by the United States regulate the right to import the products at issue into China. The United States did not raise claims under any other provisions of the covered agreements, notably under Article III:4 or Article XI:1 of the GATT 1994, with respect to these provisions. As explained, *supra*, in paragraphs 151 and 152, the United States did, however, raise a number of claims under Article III:4 in respect of the *distribution* of the relevant products. With respect to one provision—Article 16 of the *Film Enterprise Rule*—the United States raised claims that China had acted inconsistently with *both* Article III:4 of the GATT 1994 and its trading rights commitments. That provision relates to *both* the *importation* of films for theatrical release, in its first sentence, and the *distribution* of films for theatrical release, in its second sentence. Ultimately, the Panel found that the United States had not made out its claim under Article III:4 of the GATT 1994 regarding films for theatrical release. (Panel Report, para. 7.1699) The United States further claimed that the provisions relating to the *distribution* of the relevant products that it alleged to be inconsistent with Article III:4 were also inconsistent with China's obligations under the *third* sentence of paragraph 5.1 of China's Accession Protocol, which refers to China's obligation to accord to imported goods national treatment under Article III of the GATT 1994, especially paragraph 4 thereof. In respect of such claims, the Panel either exercised judicial economy or found that the United States had not made out its claim. (*Ibid.*, paras. 7.1709 and 7.1710)

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 goods⁴³⁶, 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 provisions that China seeks to justify have a clearly discernable, objective link to China's regulation of trade in the relevant products. In the light of this relationship between provisions of China's measures that are inconsistent with China's trading rights commitments, and China's regulation of trade in the relevant products, we find that China may rely

⁴³⁴Panel Report, para. 7.767.

⁴³⁵Panel Report, para. 7.779; see also paras. 7.773 and 7.774.

⁴³⁶See, in particular, Panel Report, section VII.C.2.

⁴³⁷As discussed further below, the United States did contend that the provisions restricting trading rights are not "necessary" to protect public morals.

⁴³⁸See *supra*, footnote 433.

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*

234. The Panel found that China had not demonstrated that any of the provisions⁴³⁹ that China sought to justify are "necessary to protect public morals" within the meaning of Article XX(a) of the GATT 1994.⁴⁴⁰ On appeal, China challenges this conclusion. More specifically, China contends that the Panel erred in finding: (i) that the State-ownership requirement in Article 42(2) of the *Publications Regulation* makes no material contribution to the protection of public morals in China; (ii) that the provisions excluding foreign-invested enterprises from engaging in the importation of the relevant products⁴⁴¹ make no material contribution to the protection of public morals in China; (iii) that the restrictive effect of the provisions on "those wishing to engage in importing" is relevant for assessing the necessity of such provisions under Article XX(a); and (iv) that at least one of the alternative measures proposed by the United States (that is, giving the Chinese Government sole responsibility for conducting content review) was an alternative "reasonably available" to China. In addition, China requests the Appellate Body to 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.

235. The United States requests the Appellate Body to uphold these four elements of the Panel's analysis appealed by China and the Panel's ultimate conclusion that China had not demonstrated that any of the relevant measures are "necessary to protect public morals" within the meaning of Article XX(a) of the GATT 1994. In its other appeal, the United States requests us to reverse or declare "moot and of no legal effect" an "intermediate finding" by the Panel that the requirement of

⁴³⁹Articles 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*.

⁴⁴⁰Panel Report, para. 8.2(a)(i). See also paras. 7.911 and 7.913.

⁴⁴¹This 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*.

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 raised by the United States about the analytical approach taken by the Panel in its analysis of "necessity" under Article XX(a) of the GATT 1994. Thereafter, we address, in turn, specific aspects of the Panel's analysis of: (i) the contribution of China's measures to the protection of public morals in China; (ii) the restrictive effect of China's measures; and (iii) whether an appropriate alternative measure is reasonably available to China. If necessary, we will thereafter address China's request to complete the analysis with respect to Article XX(a) and the chapeau of Article XX of the GATT 1994.

1. The Panel's Analytical Approach to the "Necessity" Test under Article XX(a)

237. The United States expresses "some concerns" regarding the Panel's approach to analyzing the "necessity" of China's measures.⁴⁴⁴ The United States' concerns relate to a "two step"⁴⁴⁵ approach, allegedly taken by the Panel in examining, first, whether China had made a *prima facie* case that the measures at issue were "necessary" within the meaning of Article XX(a), and examining only subsequently whether reasonably available WTO-consistent alternatives had been identified. The Panel drew on a statement made by the Appellate Body in *Brazil – Retreaded Tyres*.⁴⁴⁶ However, the United States submits, other Appellate Body reports, in particular *US – Gambling* and *Korea – Various Measures on Beef*, described a single process.⁴⁴⁷ Moreover, according to the United States, the text of Article XX(a) sets out a single criterion, "necessary", which also suggests a "single, integrated, yet multifaceted inquiry".⁴⁴⁸ The United States adds that the preliminary conclusion of the Panel that the State plan requirement is "necessary" to protect public morals "in the absence of

⁴⁴²See Panel Report, para. 7.836. We note that the Panel stated that the State plan requirement in Article 42 of the *Publications Regulation* could be characterized as "necessary" in the sense of Article XX(a) of the GATT 1994 "in the absence of reasonably available alternatives". Ultimately, however, the Panel found that this requirement could not be justified, because China had not demonstrated that a less trade-restrictive alternative proposed by the United States was not reasonably available to it. (*Ibid.*, paras. 7.906 and 7.907)

⁴⁴³United States' other appellant's submission, para. 26.

⁴⁴⁴The United States expresses these concerns in its other appellant's submission in the context of its claim relating to the State plan requirement.

⁴⁴⁵United States' other appellant's submission, para. 26.

⁴⁴⁶United States' other appellant's submission, para. 26 (referring to Panel Report, para. 7.786, in turn quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 178). The Appellate Body stated that a panel must consider the importance of the interests or values at stake, the extent of the contribution made by the measure to the achievement of the relevant objective, and the measure's trade restrictiveness, and that "[i]f this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective."

⁴⁴⁷United States' other appellant's submission, para. 26 (referring to Appellate Body Report, *US – Gambling*, para. 307; and Appellate Body Report, *Korea – Various Measures on Beef*, para. 166).

⁴⁴⁸United States' other appellant's submission, para. 27.

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* (in the context of Article XX(d) of the GATT 1994); *US – Gambling* (in the context of Article XIV(a) of the GATS⁴⁵²); and in *Brazil – Retreaded Tyres* (in the context of Article XX(b) of the GATT 1994). In each of these cases, the Appellate Body explained that an assessment of "necessity" involves "weighing and balancing" a number of distinct factors relating both to the measure sought to be justified as "necessary" and to possible alternative measures that may be reasonably available to the responding Member to achieve its desired objective.

240. In *US – Gambling*, for example, the Appellate Body addressed, in the context of Article XIV(a) of the GATS, the proper means of assessing "necessity" through a process of "weighing and balancing" a number of factors. The Appellate Body explained that the process begins with an assessment of the relative importance of the interests or values furthered by the challenged measure. A panel should then turn to the other factors that are to be weighed and balanced, which will in most cases include: (i) the contribution of the measure to the realization of the ends pursued by it; and (ii) the restrictive effect of the measure on international commerce. Additional factors may be relevant in specific cases. Once a panel has identified the factors to be weighed and balanced, a

⁴⁴⁹Panel Report, para. 7.836.

⁴⁵⁰United States' other appellant's submission, para. 27.

⁴⁵¹We note that the United States did not specifically identify this concern in its Notice of Other Appeal.

⁴⁵²In *US – Gambling*, the Appellate Body stated that, due to the similar language used in both provisions—in particular the term "necessary" and the requirements set out in their respective chapeaux—previous decisions under Article XX of the GATT 1994 were relevant to its analysis under Article XIV of the GATS. (Appellate Body Report, *US – Gambling*, para. 291) For the same reasons, the decision of the Appellate Body in *US – Gambling* dealing with the interpretation of Article XIV of the GATS is relevant to the analysis of Article XX called for in this dispute.

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* the Appellate Body described the process in the context of an analysis of "necessity" under Article XX(b) of the GATT 1994. The Appellate Body observed that a panel must consider the relevant factors, particularly the importance of the interests or values at stake, the extent of the contribution made by the measure to the achievement of the relevant objective, and the measure's trade restrictiveness. The Appellate Body stated that, if such an analysis "yields a preliminary conclusion" that a measure is necessary, then the necessity of the measure must be "confirmed" by comparing the measure with possible alternatives, in the light of the importance of the interests or values at stake.⁴⁵⁴

242. We do not see that the Appellate Body's approach to the "necessity" analysis in *Brazil – Retreaded Tyres* differs from that in *US – Gambling*, which in turn referred to *Korea – Various Measures on Beef*.⁴⁵⁵ In each case, a sequential process of weighing and balancing a series of factors was involved. *US – Gambling* sets out a sequence by using the phrases: "The process *begins with* an assessment of the 'relative importance' of the interests or values furthered by the challenged measure"⁴⁵⁶; "*Having ascertained* the importance of the particular interests at stake, a panel should *then* turn to the other factors that are to be 'weighed and balanced'"⁴⁵⁷; and "A comparison between the challenged measure and possible alternatives should *then* be undertaken".⁴⁵⁸ The description of this sequence in *Brazil – Retreaded Tyres* mentions, first, the relevant factors to be weighed and balanced for the measure sought to be justified, and continues that the result of this analysis "must be confirmed by comparing the measure with possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective".⁴⁵⁹ Although the language used is not identical, both reports articulate the same approach and, like the Appellate Body report in *Korea – Various Measures on Beef*, emphasize the need to identify relevant factors and undertake a weighing and balancing process including, where relevant, with respect to proposed

⁴⁵³Appellate Body Report, *US – Gambling*, paras. 306-308. In paragraph 305, the Appellate Body quoted from paragraph 166 of Appellate Body Report, *Korea – Various Measures on Beef*.

⁴⁵⁴Appellate Body Report, *Brazil – Retreaded Tyres*, para. 178; see also para. 156.

⁴⁵⁵In articulating the proper approach in *Brazil – Retreaded Tyres*, the Appellate Body referred to its report in *US – Gambling* without distinguishing that case or suggesting any intention to depart from the approach articulated in *US – Gambling* (or, for that matter, *Korea – Various Measures on Beef*). (Appellate Body Report, *Brazil – Retreaded Tyres*, footnote 319 to para. 178 (referring to Appellate Body Report, *US – Gambling*, para. 307))

⁴⁵⁶Appellate Body Report, *US – Gambling*, para. 306. (footnote omitted; emphasis added) See also Appellate Body Report, *Brazil – Retreaded Tyres*, para. 143; and Appellate Body Report, *EC – Asbestos*, para. 172.

⁴⁵⁷Appellate Body Report, *US – Gambling*, para. 306.

⁴⁵⁸Appellate Body Report, *US – Gambling*, para. 307. (emphasis added)

⁴⁵⁹Appellate Body Report, *Brazil – Retreaded Tyres*, para. 178; see also para. 156.

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 steps. First, the Panel considered the relationship between the provisions and China's stated objective (to protect public morals by avoiding the dissemination of goods containing prohibited content within China).⁴⁶⁰ The Panel assumed that each of the types of prohibited content in China's measures could, if it were brought into China, have a negative impact on "public morals" in China within the meaning of Article XX(a) of the GATT 1994.⁴⁶¹ Next, the Panel identified the importance of the objective pursued ("the protection of public morals ranks among the most important values or interests pursued by Members as a matter of public policy"⁴⁶²) and the level of protection sought by China ("a high level of protection of public morals").⁴⁶³ Up to this point in its analysis, the Panel's analysis dealt collectively with all of the provisions that China sought to justify.

244. In the next stage of its analysis, the Panel addressed separately each provision that it had found to be inconsistent with China's trading rights commitments.⁴⁶⁴ For each, the Panel: (i) identified the contribution made to the realization of the objective pursued; (ii) identified the restrictive impact on trade and on those wishing to import; and (iii) "weighed and balanced" three factors, namely, the extent of the contribution, the restrictive impact, and the "fact that the protection

⁴⁶⁰Panel Report, paras. 7.751-7.793.

⁴⁶¹The Panel set out the list of the types of content that may not be included in publications and noted that the United States did not specifically contest that the dissemination of materials containing the types of content listed as prohibited by China could have a negative impact on public morals in China. (Panel Report, paras. 7.760-7.763)

⁴⁶²Panel Report, para. 7.817.

⁴⁶³Panel Report, para. 7.819.

⁴⁶⁴For the purposes of its analysis, the Panel grouped certain similar provisions together. The "criteria provisions" comprise: (i) the requirement in Article 42 of the *Publications Regulation* that approval of a publications import entity must conform to the State plan, and (ii) the requirement in Article 42(4) of the *Publications Regulation* that publication import entities have a suitable organization and qualified personnel. The "discretion provisions" consist of: (i) Article 41 of the *Publications Regulation*; (ii) Article 27 of the 2001 *Audiovisual Products Regulation*; and (iii) Article 8 of the *Audiovisual Products Importation Rule*. The "exclusion provisions" consist of: (i) the requirement in Article 42(2) of the *Publications Regulation* that publication import entities be wholly State-owned; (ii) 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*; (iii) Article 4 of the *Several Opinions*; and (iv) Article 21 of the *Audiovisual (Sub-)Distribution Rule*. (Panel Report, para. 7.814) We do not use the same nomenclature in this Report.

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."⁴⁶⁵

245. Having weighed and balanced these factors for each provision, the Panel reached a "conclusion" for each such provision. The Panel characterized the suitable organization and qualified personnel requirement and the State plan requirement as "necessary", "in the absence of reasonably available alternatives", to protect public morals in China.⁴⁶⁶ For each of the other provisions, the Panel "concluded" that China had not demonstrated that the requirement in question is "necessary" to protect public morals within the meaning of Article XX(a).⁴⁶⁷

246. Once it had completed this exercise with respect to all of the provisions, the Panel turned to consider whether, in respect of the two requirements that it had characterized as "necessary", a less restrictive alternative measure was reasonably available. In analyzing the United States' proposal that the Chinese Government be given sole responsibility for conducting content review, the Panel examined the restrictive effect that such alternative would have ("significantly less restrictive"⁴⁶⁸), the contribution that the alternative would make to the objective of protecting public morals ("at least equivalent to"⁴⁶⁹), and weighed these factors together with the importance of the interest at stake and China's desired high level of protection.⁴⁷⁰ Finally, the Panel found that China had not demonstrated that the proposed alternative is not a genuine alternative or is not reasonably available.⁴⁷¹ Having done so, the Panel then reached its overall conclusion, namely, that "none of the provisions of China's measures which we have determined to be inconsistent with China's trading rights commitments under the Accession Protocol is 'necessary' within the meaning of Article XX(a)."⁴⁷²

247. As the above summary reveals, the Panel, confronted with the task of analyzing the "necessity" of multiple provisions and requirements, undertook an analysis that was, in part, aggregated and relevant to all such provisions and requirements and, in part, disaggregated and specific to each provision or requirement. The Panel's analysis also involved distinct steps

⁴⁶⁵Panel Report, para. 7.828.

⁴⁶⁶Panel Report, paras. 7.828 and 7.836.

⁴⁶⁷Panel Report, para. 7.848 (the designation requirement in Article 41 of the *Publications Regulation*); para. 7.849 (the designation requirements in Article 27 of the *2001 Audiovisual Products Regulation* and Article 8 of the *Audiovisual Products Importation Rule*); para. 7.863 (the State-ownership requirement in Article 42 of the *Publications Regulation*); and para. 7.868 (the provisions excluding foreign-invested enterprises from engaging in the importation of the relevant products in 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*).

⁴⁶⁸Panel Report, para. 7.897.

⁴⁶⁹Panel Report, para. 7.898.

⁴⁷⁰Panel Report, para. 7.899.

⁴⁷¹Panel Report, para. 7.908.

⁴⁷²Panel Report, para. 7.911.

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, including with respect to the alternative measures proposed by the United States. Read in this broader context, it is clear that the "conclusion" reached by the Panel after having completed one part of the overall weighing and balancing process did not constitute a "finding" that the State plan requirement is "necessary" in the sense of Article XX(a) of the GATT 1994. Rather, this conclusion was in the nature of a preliminary result, an indication that the Panel had completed certain steps of its analysis. Moreover, the Panel was careful to add the qualification that its "conclusion" was reached only "in the absence of reasonably available alternatives". Had there not been a less restrictive alternative measure reasonably available to China, the Panel's intermediate finding would have stood as part of an ultimate finding of necessity. Given the outcome of the Panel's analysis of the alternative measure proposed by the United States, however, it did not.

249. The challenge faced by the Panel in deciding how to tackle the series of factors to be weighed and balanced in its analysis of the "necessity" of the multiple provisions it had found to be inconsistent with China's trading rights commitments was heightened by the large number of measures challenged by the United States in this dispute. The Panel chose to group together all of the relevant provisions for purposes of certain steps of its analysis but to analyze these provisions individually for purposes of other steps in its analysis. While this was not necessarily the only way that the Panel could have approached its task, we do not see that, in the circumstances of this case, the Panel's approach amounted to error or contradicted the approach set out in previous Appellate Body reports.

⁴⁷³Panel Report, para. 7.836.

⁴⁷⁴Panel Report, para. 7.869. In the intervening seven pages the Panel weighed and balanced relevant factors for several other provisions and "concluded", for each, that it could not be characterized as "necessary" to protect public morals within the meaning of Article XX(a) of the GATT 1994. (*Ibid.*, paras. 7.837-7.868)

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 entities⁴⁷⁵ 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

⁴⁷⁵These 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*.

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

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

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

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

by] one specific measure from those attributable to the other measures that are part of the same comprehensive policy".⁴⁸⁰ Accordingly, the Appellate Body stated in *Brazil – Retreaded Tyres*, that:

... a panel might conclude that [a measure] is necessary on the basis of a demonstration that [it] is apt to produce a material contribution to the achievement of its objective. This demonstration could consist of quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence.⁴⁸¹

254. With these considerations in mind, we turn to our analysis of the participants' claims relating to the contribution of the State-ownership requirement, the provisions excluding foreign-invested enterprises from engaging in the importation of the relevant products, and the State plan requirement to the protection of public morals in China.

(a) The State-Ownership Requirement

255. China appeals the Panel's finding regarding the "necessity" of the State-ownership requirement. We recall that this requirement, set out in Article 42(2), in conjunction with Article 41, of the *Publications Regulation*, requires that an enterprise be wholly State-owned in order to be eligible for approval as a publications import entity. After having identified various factors relevant to its analysis of the necessity of this requirement, the Panel weighed and balanced them as follows:

[W]e note, first of all, 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. This said, ... we have not been persuaded that the requirement in question makes a material contribution to the protection of public morals. Also, while it is unclear from the evidence on record to what extent, if any, the requirement in question limits imports of relevant products, it is clear that it completely excludes particular types of enterprise in China from the right to engage in importing. Weighing these factors, we reach the conclusion that China has not demonstrated that the requirement in question is "necessary" to protect public morals in China.⁴⁸²

256. China requests the Appellate Body to reverse this finding. China alleges that in reaching this finding the Panel misrepresented two arguments made by China in relation to the State-ownership requirement and that this resulted in a failure to assess objectively the material contribution of this requirement to the protection of public morals. According to China, these misrepresentations resulted

⁴⁸⁰This is so, for instance, where a measure is part of a comprehensive policy comprising a multiplicity of interacting measures or where the results of a measure can only be evaluated with the benefit of time. (Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151)

⁴⁸¹Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

⁴⁸²Panel Report, para. 7.863; see also para. 7.860.

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.⁴⁸³

257. First, 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 policy function of content review, but could require only those enterprises in which the State owns all of the equity to bear the cost of carrying out content review.⁴⁸⁴ China alleges that the Panel mistakenly reduced this argument to a mere "cost analysis" and failed to recognize that China's argument in fact related to the balance between the performance of a public policy function (content review) and the cost associated with performing this public policy function.⁴⁸⁵ Secondly, China alleges that the Panel misrepresented China's argument that only wholly State-owned enterprises are capable of satisfying the requirement in Article 42(4) of the *Publications Regulation* that publication import entities must have a suitable organization and qualified personnel. China alleges that the Panel erred in evaluating this argument exclusively under the prism of "cost", when its argument was not only about cost but also about the capacity to perform content review in a manner that preserves China's desired level of protection.⁴⁸⁶

258. The United States contends that by stating that, "[i]n China's view, privately-owned enterprises cannot be expected to pay for performing a public interest function"⁴⁸⁷, the Panel fully captured China's argument. The United States further argues that the Panel was correct in pointing out that non-State-owned publication import entities could be expected to face incentives and respond to dissuasive sanctions just as State-owned enterprises do under the current Chinese measures. The United States adds that China had offered very limited information on the cost of content review. The United States also asserts that the Panel did not misrepresent China's argument concerning the requirement for a suitable organization and qualified personnel. The United States argues that the Panel's statement that it was not convinced that privately owned enterprises would be unable to attract qualified personnel, or that they would be unable to obtain the organizational know-how needed to

⁴⁸³China's appellant's submission, paras. 15-30 and 37. In response to questioning at the oral hearing in this appeal, China clarified that it was not making a claim with respect to the way the Panel applied the "necessity" test to the State-ownership requirement. Instead, China takes issue with the Panel's representation of China's arguments in the Panel Report and the Panel's assessment of those arguments. China stated that the alleged misrepresentations led to a failure to make an objective assessment of the matter.

⁴⁸⁴China's appellant's submission, paras. 17-20 (referring in footnotes to Panel Report, para. 7.853; China's responses to Panel Questions 46(a), 185, 188(b), and 195; China's first written submission to the Panel, paras. 153, 196, and 197; and China's second written submission to the Panel, para. 104).

⁴⁸⁵China's appellant's submission, paras. 18-20.

⁴⁸⁶China's appellant's submission, paras. 27-29.

⁴⁸⁷United States' appellee's submission, para. 14 (quoting Panel Report, para. 7.854, in turn referring to China's second written submission to the Panel, para. 104).

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 enterprises cannot be expected to pay for performing a public interest function.⁴⁹¹ (footnote omitted)

262. In our view, the Panel's statement that "China does not contend that publication import entities need to be wholly state-owned because they perform a public policy function"⁴⁹² is somewhat imprecise. While it is true that China did not argue that the public policy function was the sole reason for the State-ownership requirement, China did rely on the balance reached between the performance of a public policy function and the cost associated with performing this public policy function. Thus, the public policy function was one of two components of China's argument as to why publication import entities need to be wholly State-owned.

⁴⁸⁸United States' appellee's submission, para. 24 (referring to Panel Report, para. 7.858).

⁴⁸⁹China's second written submission to the Panel, para. 104.

⁴⁹⁰China's response to Panel Question 46(a). See also Panel Report, para. 7.853 and footnote 581 thereto.

⁴⁹¹Panel Report, para. 7.854.

⁴⁹²Panel Report, para. 7.854.

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 analysis⁴⁹³ 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 enterprises⁴⁹⁵, 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 element of China's argument in isolation, but rather in relation to the public policy function. Thus, while the Panel could have analyzed the public policy component of China's argument in more depth, we acknowledge that the Panel was constrained by the fact that only limited evidence had been submitted by China in relation to that argument.

264. China further alleges that the Panel misrepresented its argument that only wholly State-owned enterprises are capable of satisfying the requirement in Article 42(4) of the *Publications Regulation* that publication import entities must have a suitable organization and qualified personnel, by reducing China's submission to an argument relating only to cost.

265. We note that the Panel asked China to explain whether the requirement that publication import entities have a suitable organization and qualified personnel could be met by enterprises other than wholly State-owned enterprises. China responded that it could not, and stated that "a specific organizational structure is required which, *for the reasons stated above*, can only be met by wholly

⁴⁹³ See Panel Report, paras. 7.854-7.856.

⁴⁹⁴ China's response to Panel Question 185.

⁴⁹⁵ Panel Report, para. 7.856.

⁴⁹⁶ Panel Report, para. 7.857.

⁴⁹⁷ Panel Report, para. 7.854.

⁴⁹⁸ Panel Report, para. 7.854.

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 ownership condition—that only wholly state-owned enterprises are currently capable of satisfying the condition that publication import entities need to have a suitable organization and qualified personnel. China appears to suggest that this is because of the cost involved in satisfying the condition.⁵⁰¹ (footnote omitted)

267. It is not clear to us that this statement can be characterized as a "misrepresentation" of China's argument. China itself responded in a very brief manner to the Panel's question, referring simply to "the reasons stated above". China did not argue before the Panel that the public policy function of content review was the sole reason or the main reason why only State-owned enterprises could have a suitable organization and qualified personnel. Nor did China explain how, in its view, the policy function of content review leads to the consequence that only wholly State-owned enterprises would be capable of satisfying the requirement that publication import entities have a suitable organization and qualified personnel. In any event, the Panel stated that it was not convinced that enterprises with private investment would be unable to attract qualified personnel, or that they would be unable to obtain the organizational know-how needed to conduct content review properly.⁵⁰² This demonstrates that the Panel did not reduce China's argument solely to a cost component, but also considered the public policy function of content review.

268. China further alleges that, by misrepresenting China's arguments, the Panel failed to make an objective assessment of the matter before it as required by Article 11 of the DSU. We have found above that the Panel did not misrepresent China's arguments. However, even if we were to accept that the Panel did misrepresent China's arguments, we do not think that this led to a failure by the Panel in assessing whether the State-ownership requirement made a contribution to the protection of public morals in China or that it follows that China has demonstrated that the requirement is "necessary" to protect public morals in China within the meaning of Article XX(a) of the GATT 1994. China neither

⁴⁹⁹China's response to Panel Question 46(b). (footnote omitted; emphasis added)

⁵⁰⁰China's response to Panel Question 46(a). In response to questioning at the oral hearing, China did not point to other arguments or evidence on record.

⁵⁰¹Panel Report, para. 7.858.

⁵⁰²Panel Report, para. 7.858.

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 protection of public morals in China.

269. We therefore *find* that the Panel did not err, in paragraphs 7.860 and 7.863 of the Panel Report, 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* and we *reject* China's claim that the Panel failed to make an objective assessment of the matter before it, in violation of Article 11 of the DSU.

(b) The Exclusion of Foreign-Invested Enterprises

270. China appeals the Panel's finding that China has not demonstrated that the provisions⁵⁰³ prohibiting foreign-invested enterprises from engaging in the importation of the products at issue are "necessary" to protect public morals in China.⁵⁰⁴

271. The Panel found that the effect of 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*, is to prohibit any foreign-invested enterprise in China from engaging in the importation of books, newspapers, periodicals, electronic publications, or audiovisual products (including sound recordings and films for theatrical release).⁵⁰⁵ The Panel also found that Article 4 of the *Several Opinions* directs relevant agencies to ensure, through promulgation of appropriate rules, that no foreign-invested enterprise in China can lawfully import books, newspapers, periodicals, films for theatrical release, other audiovisual products (including sound recordings), or electronic publications.⁵⁰⁶ Furthermore, the Panel found that the legal effect of Article 21 of the *Audiovisual*

⁵⁰³ 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*; or Article 21 of the *Audiovisual (Sub-)Distribution Rule*.

⁵⁰⁴ Panel Report, para. 7.868.

⁵⁰⁵ Panel Report, para. 7.348.

⁵⁰⁶ Panel Report, para. 7.372. The Panel noted that the United States' claims in respect of these products related only to physical products. (*Ibid.*, para. 7.371)

(Sub-)Distribution Rule is 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 importing do not contribute to the protection of public morals in China. China argues that, because the Panel's finding concerning the State-ownership requirement is erroneous, "by necessary implication"⁵⁰⁹, the Panel's finding in respect of the provisions excluding foreign-invested enterprises from importing is also in error.

273. In addition, China submits that foreign-invested enterprises may not have the requisite understanding and knowledge of the applicable standards of Chinese public morals and would not be capable of efficiently communicating with the administrative authorities, and that the Panel's finding on the exclusion of foreign-invested enterprises contradicts the finding made elsewhere by the Panel that requiring qualified review personnel contributes materially to the protection of public morals in China.⁵¹⁰ According to China, the Panel's failure to address certain arguments relating to the contribution of the provisions excluding foreign-invested enterprises to the protection of public morals in China constitutes a failure to make an objective assessment of the matter before it as required by Article 11 of the DSU.

274. The United States asserts that it is not clear that China presented to the Panel its argument concerning the foreign-invested enterprises' alleged lack of understanding and knowledge of the applicable standards of public morals.⁵¹¹ In addition, the United States argues that China's concern that enterprises with private investment "may not have"⁵¹² 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

⁵⁰⁷Panel Report, para. 7.703. The Panel explained that according to Article 2 of the *Audiovisual (Sub-)Distribution Rule* the term "audiovisual products" applies to sound recordings and other audiovisual products, as it specifically states that the term refers to audio tapes, video tapes, records, and audio and video CDs with audiovisual recorded contents. (*Ibid.*, para. 7.701)

⁵⁰⁸Panel Report, paras. 7.773, 7.776, 7.779, and 7.865.

⁵⁰⁹China's appellant's submission, paras. 32 and 33 (referring to Panel Report, para. 7.865).

⁵¹⁰China's appellant's submission, para. 36 (referring to Panel Report, para. 7.825).

⁵¹¹United States' appellee's submission, para. 31.

⁵¹²United States' appellee's submission, para. 31.

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 import entities be wholly State-owned overlap to a large degree, in that both preclude foreign-invested enterprises from engaging in importing.⁵¹⁵ Because we have found above that the Panel committed no error in its finding regarding the contribution to the protection of public morals in China made by the State-ownership requirement, we also reject, for the same reasons, China's claim that the Panel erred in finding that China has not demonstrated that the provisions contribute to the protection of public morals in China.⁵¹⁶

⁵¹³Panel Report, para. 7.865. The finding that the Panel refers to is contained in paragraphs 7.860 and 7.863 of the Panel Report.

⁵¹⁴Panel Report, para. 7.865.

⁵¹⁵The State-ownership requirement also excludes Chinese-owned enterprises that are not wholly State-owned from engaging in importing.

⁵¹⁶Panel Report, paras. 7.865 and 7.868.

277. We now turn to China's allegation that the Panel failed to make an objective assessment of the matter before it as required by Article 11 of the DSU because it failed to address China's argument that professionals performing content review must be familiar with Chinese values and public morals, and capable of efficiently communicating with and understanding the authorities. We note that China's argument is reflected in the Panel's summary of China's arguments⁵¹⁷, as well as in the Panel's analysis of the "necessity" of the State-ownership requirement. As explained above⁵¹⁸, in analyzing China's defence of the State-ownership requirement, the Panel was not convinced that enterprises with private investment would be unable to attract qualified personnel or unable to obtain the expertise needed to conduct content review properly. In our view, such reasoning—with which we agree—applies equally to the arguments made by China in defence of its provisions excluding foreign-invested enterprises from engaging in importation. The mere fact that an entity involves some foreign investment does not necessarily imply that content review would be carried out by professionals who are not familiar with Chinese values and public morals, or incapable of efficiently communicating with and understanding the authorities. In fact, those carrying out these functions could be the same individuals, with the same qualifications and capabilities, irrespective of the ownership of the equity of the import entity. Thus, China did not establish that the exclusion of foreign-invested enterprises from engaging in the importation of the relevant products contributes to the protection of public morals in China. We see no indication that the Panel did not reasonably consider China's claim or otherwise failed to make an objective assessment of the matter.

278. We therefore *find* 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 products and we *reject* China's claim that the Panel failed to make an objective assessment of the matter before it in violation of Article 11 of the DSU.

(c) The State Plan Requirement

279. The United States requests the Appellate Body to reverse, or to "declare moot and of no legal effect"⁵¹⁹ the Panel's intermediate finding regarding the "necessity" within the meaning of Article XX(a) of the GATT 1994 of the requirement of conformity with China's State plan for the total number, structure, and distribution of publication import entities contained in Article 42 of the *Publications Regulation* (the "State plan requirement"). The Panel found that this requirement can

⁵¹⁷Panel Report, para. 7.801.

⁵¹⁸*Supra*, para. 267.

⁵¹⁹United States' other appellant's submission, para. 43.

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.⁵²¹

280. In a subsequent part of its analysis, the Panel found that the United States had proposed an alternative measure that would have a significantly less restrictive impact, would make an equivalent or better contribution to the objective of protecting public morals in China⁵²², and was reasonably available to China.⁵²³ We address China's appeal of this finding of the Panel in subsection B.3 below. Overall, the Panel found that China had not succeeded in justifying the State plan requirement under Article XX(a) of the GATT 1994.⁵²⁴

281. Article 42 of the *Publications Regulation* sets out eight requirements for the approval of publication import entities. The last of these is that publication import entities may only be approved if they are in conformity with the State plan for the number, structure, and geographical coverage of publication import entities.⁵²⁵

⁵²⁰The Panel found:

[S]ince in the case of the *Publications Regulation* the publication import entities are responsible for content review, we can see that limiting the number of import entities can make a material contribution. It would appear that with a limited number of publication import entities, it is easier for the GAPP to interact with these entities with a view to ensuring, and enhancing, the consistency of the review work of these entities. Similarly, a limited number of entities allows the GAPP to devote more time to conduct careful ex post controls of compliance with applicable content review requirements, e.g., through the annual inspections.

(Panel Report, para. 7.832)

⁵²¹Panel Report, para. 7.836.

⁵²²Panel Report, para. 7.899.

⁵²³Panel Report, para. 7.908.

⁵²⁴Panel Report, para. 7.911.

⁵²⁵Article 42 of the *Publications Regulation* is reproduced in Annex III to this Report.

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 "State's plans", China stated that "[t]he plans concern the quantity, geographical and product coverage of publication import entities. However, such plans are not available in written form."⁵²⁶ China did, however, refer to the "State's plans" as prescribing development consistent with the selection of a limited number of import entities with extensive geographic coverage.⁵²⁷ China explained to the Panel that the requirement to have a small number of companies with extensive geographic coverage ensures that import entities, through branches, have premises in a large number of customs areas, so that no entry gate into the Chinese market is overlooked. In the same section of its first written submission—although without referring explicitly to the State plan—China explained that, "for the content review to be efficient and smooth"⁵²⁸, it is necessary that only a limited number of entities be authorized to engage in the importation of the relevant products. China further asserted that limiting the number of importation entities "enables the administrative authorities to have efficient control over whether those entities comply with the rules and procedures on inappropriate content."⁵²⁹

283. The Panel understood China to contend that the State plan requirement is designed to ensure, first, that only a limited number of import entities are approved, and, secondly, that each approved import entity has an extensive geographical presence, through branches, in a large number of customs areas.⁵³⁰ The Panel found that limiting the number of import entities can make a material contribution to the protection of public morals in China. The Panel based this finding on two considerations: (i) a limitation on the number of publication import entities would make it easier for the GAPP to interact with these entities and to ensure the consistency of their content review; and (ii) a limitation on the number of import entities would allow the GAPP to devote more time to conduct annual inspections of compliance with the content review requirements.⁵³¹ Although the Panel was not persuaded that, in itself, a wide geographical distribution of the branches of import entities makes a significant contribution to the protection of public morals, the Panel noted that there appeared to be a close link between the desired wide geographical distribution of the branches and the desired limitation on the number of import entities, and viewed both elements as "forming a single whole".⁵³²

⁵²⁶China's response to Panel Question 44.

⁵²⁷China's first written submission to the Panel, para. 214.

⁵²⁸China's first written submission to the Panel, para. 216.

⁵²⁹China's first written submission to the Panel, para. 218.

⁵³⁰Panel Report, para. 7.831.

⁵³¹Panel Report, para. 7.832. See also *supra*, footnote 520.

⁵³²Panel Report, para. 7.833.

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 publication import entities have branches in a large number of customs areas undermines the alleged benefits that the Panel presumed to flow from any limit the State plan may place on the number of import entities. Furthermore, the United States takes issue with the Panel's assumption that a limitation on the number of publication import entities would allow the GAPP to devote more time to conduct its annual inspections of the entities' compliance with content review requirements, in particular because China's failure to provide information regarding the nature of the GAPP's annual inspections makes it impossible to assess what additional burden would be caused by an increase in the number of import entities.

286. The United States claims, in the alternative, that, if the Appellate Body were to find that the Panel's analysis concerning the State plan requirement does not constitute a "misinterpretation and misapplication" of Article XX(a) of the GATT 1994, then the Panel's disregard of significant facts relating to this requirement, including the fact that it did not know the content of the State plan, constitutes an error in the appreciation of the evidence. This, asserts the United States, is because the Panel made a finding that has no evidentiary basis in the record, and is therefore inconsistent with Article 11 of the DSU.

287. China requests the Appellate Body to dismiss the United States' other appeal and to uphold the Panel's intermediate finding that the State plan requirement is apt to make a material contribution to the protection of public morals in China. China disputes the United States' contention that China failed to put forward evidence about the operation of the State plan requirement. China contends that it explained to the Panel that the State plan is not available in written form, and that the plan is concerned with the quantity, geographical and product coverage of publication import entities. China

⁵³³United States' other appellant's submission, paras. 28 and 29 (referring to Panel Report, para 7.785; Appellate Body Report, *US – Gambling*, para. 310; and Appellate Body Report, *Korea – Various Measures on Beef*, para. 161).

⁵³⁴United States' other appellant's submission, para. 34.

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 State plan requirement] *makes a contribution* to the realization of ... the protection of public morals in China".⁵³⁹ This language suggests that the Panel intended to assess the *actual* contribution of the State plan requirement to the protection of public morals in China. The Panel then stated that it could "see that limiting the number of import entities *can make a material contribution*".⁵⁴⁰ Finally, in its conclusion, the Panel stated that "the requirement of conformity with the State plan is *apt to make a material contribution* to the protection of public morals".⁵⁴¹ This statement does not appear to relate to the *actual* contribution of the State plan requirement to the protection of public morals in China. In fact, the language used at the outset of, and during, its analysis does not match the language in the Panel's conclusion that the State plan is "apt to make a material contribution to the protection of

⁵³⁵China's appellee's submission, footnote 12 to para. 15 (referring to Panel Exhibit US-13, *supra*, footnote 172; Panel Exhibit CN-26, *supra*, footnote 141; and Panel Exhibits CN-33 through CN-37, *supra*, footnote 172).

⁵³⁶China's appellee's submission, para. 30 (referring to Panel Exhibit CN-22, *supra*, footnote 140).

⁵³⁷Appellate Body Report, *US – Gambling*, para. 304.

⁵³⁸Appellate Body Report, *US – Gambling*, para. 310.

⁵³⁹Panel Report, para. 7.830. (emphasis added)

⁵⁴⁰Panel Report, para. 7.832. (emphasis added)

⁵⁴¹Panel Report, para. 7.836. (emphasis added)

public morals in China". It is, therefore, unclear to us whether the Panel was assessing the actual contribution of the State plan requirement to the protection of public morals in China, or the extent to which the requirement was apt to make such a contribution.

291. We understand the Panel to have reached its finding regarding the contribution to the protection of public morals made by the State plan requirement on the basis of an assumption that the State plan requirement imposed a limitation on the number of import entities and on the basis of two inferences it drew from this assumption, namely: (i) that a limitation on the number of publication import entities would make it easier for the GAPP to interact with these entities and to ensure consistency of the review work; and (ii) that a limitation on the number of import entities would allow the GAPP to devote more time to conduct annual inspections of compliance with the content review requirements.⁵⁴²

292. We note that the Panel did not cite any evidence in support of its assumption that the State plan requirement imposed a limitation on the number of import entities. We also note that the Panel did not explain why the contribution made by the presumed limitation in the State plan requirement would be a "material" one. We further note that, while China asserted before the Panel that the State plan requirement constitutes a limitation on the number of import entities, China did not point the Panel to evidence supporting that assertion or evidence providing information about the operation of the State plan, or the nature of the limitation contained in the State plan.

293. In its appellee's submission, China maintains that the State plan requirement "does [not] set any quantitative threshold to the number of ... enterprises which can be approved."⁵⁴³ Yet elsewhere in its appellee's submission, China contends that the State plan contributes to limiting the number of approved import entities.⁵⁴⁴ China points to certain exhibits contained in the Panel record that, according to China, support the Panel's finding that the State plan requirement is apt to make a material contribution to the protection of public morals in China. China points to an exhibit that was submitted by the United States to the Panel containing a newspaper article. China submits that this article makes reference to the number of entities authorized to engage in the importation of publications.⁵⁴⁵ This newspaper article states that, in January 2008, there were 42 approved publications import entities in China. However, the newspaper article does not explicitly refer to the

⁵⁴²Panel Report, para. 7.832.

⁵⁴³China's appellee's submission, para. 34.

⁵⁴⁴China's appellee's submission, footnote 12 to para. 15. In response to questioning at the oral hearing in this appeal, China explained that the State plan does not contain a fixed number for publication import entities, but rather a statement dealing with the number of publication import entities in a flexible manner.

⁵⁴⁵China's appellee's submission, footnote 12 to para. 15 (referring to Exhibit US-13, *supra*, footnote 172). The United States refers to the same number of approved publication import entities in paragraph 10 of its other appellant's submission.

State plan. It does not establish the existence of the State plan, nor does it provide information about any restrictions or limitations provided for in such a plan. Moreover, this article does not indicate whether the number of entities approved corresponds to the number of entities foreseen in the State plan. China also points to a number of exhibits consisting of statistical reports published by the GAPP showing the general categories of publications and audiovisual products that are imported each year.⁵⁴⁶ While these exhibits provide some information about past trade flows, they do not provide information about the content of the State plan or any limitation on the number of import entities contained therein. Furthermore, China makes reference to the 2006 annual report of the CNPIEC.⁵⁴⁷ According to China, this report demonstrates that the State plan, although contributing to limiting the number of approved import entities, does not result in limiting growth in the number of imported publications. Again, however, this report contains no information on the limitation of the number of import entities set out in the State plan. Furthermore, we do not see that the evidence referred to by China contains any information about the geographical or product coverage of the State plan.

294. In reaching its finding regarding the contribution made by the State plan requirement to the protection of public morals in China, the Panel simply stated that limiting the number of import entities "can make a material contribution"⁵⁴⁸ to the protection of public morals in China. Yet, the Panel neither addressed quantitative projections nor provided qualitative reasoning based on evidence before it to support that finding. The Panel Report contains no discussion of how or to what extent the State plan requirement can or does make a contribution. For these reasons, we disagree with the Panel's finding that China had met its burden of proof regarding the contribution of the State plan requirement to the protection of public morals in China.

295. We nonetheless address China's additional argument that the Panel correctly inferred that the assumed limitation on the number of publication import entities would allow the GAPP to devote more time to conduct its annual inspections of the entities' compliance with the content review requirements. China asserts that, contrary to what the United States alleges, it did provide evidence in support of this argument.⁵⁴⁹

296. In our view, the evidence in the Panel record does not establish that any State plan contains a limitation on the number of publication import entities, or that any such limitation would allow the GAPP to devote more time to conduct its annual inspections of the entities' compliance with content

⁵⁴⁶China's appellee's submission, footnote 12 to para. 15 (referring to Panel Exhibits CN-33 through CN-37, *supra*, footnote 172).

⁵⁴⁷China's appellee's submission, footnote 12 to para. 15 (referring to Panel Exhibit CN-26, *supra*, footnote 141).

⁵⁴⁸Panel Report, para. 7.832.

⁵⁴⁹China's appellee's submission, para. 30 (referring to Panel Exhibit CN-22, *supra*, footnote 140).

review requirements. The Panel exhibit that China relies upon as supporting the latter argument⁵⁵⁰ 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 an import entity must submit to the authorities in the context of the annual inspection of compliance with the content review requirements.⁵⁵¹ In any event, because we have found that the Panel wrongly assumed that the State plan requirement imposes a limitation on the number of import entities, the inferences that the Panel drew from this assumption have no basis.

297. For all these reasons, we *find* 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.

298. The United States claims in the alternative that, if the Appellate Body finds that the Panel's analysis concerning the State plan requirement does not constitute a misinterpretation and misapplication of Article XX(a) of the GATT 1994, then the Panel's disregard of significant facts relating to this requirement, including the fact that it did not know the content of the State plan, constitutes an error in the appreciation of the evidence because the Panel made a finding that has no evidentiary basis in the record, and is therefore inconsistent with Article 11 of the DSU.

299. We have found that the Panel erred in finding that the State plan requirement is apt to make a material contribution to the protection of public morals in China and can be characterized as "necessary", in the absence of reasonably available alternatives, to protect public morals in China. Consequently, the condition upon which the United States' alternative claim under Article 11 of the DSU rests is not fulfilled and we do not address this claim.

3. The Restrictive Effect of the Measures

300. As part of the "weighing and balancing" test for assessing whether the measures at issue are "necessary" to the protection of public morals in China, the Panel analyzed the restrictive effect of the measures on international trade. The Panel found it "appropriate", in this case, "to consider two different types of restrictive impact".⁵⁵² More specifically, the Panel explained that:

⁵⁵⁰Paragraph IV of the Notice on Approving and Issuing License for Importing Publications and Carrying Out Annual Inspection System (Panel Exhibit CN-22, *supra*, footnote 140).

⁵⁵¹We note that paragraph V.2 of this Notice stipulates that the GAPP will undertake an "examination and verification" on the basis of the material described in paragraph IV. The Notice, however, does not set out any criteria for that examination and verification.

⁵⁵²Panel Report, para. 7.788.

... 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 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.⁵⁵³

In its subsequent analysis, the Panel assessed for each of the relevant provisions both the restrictive effect of the provisions on imports and the restrictive effect of the provisions on "those wishing to engage in importing".⁵⁵⁴ The Panel noted that evidence submitted by China showed that the number of titles of newspapers and publications imported into China had increased from 2002 to 2006. However, the Panel found that this increase did not necessarily indicate that China's measures had not had any trade-restrictive effects, because the statistics did not indicate what import levels might have been if the measures had not been imposed.⁵⁵⁵

301. On appeal, China alleges that the Panel erred in including an assessment of the effect on those wishing to engage in importing in its assessment of the restrictive effect of the measures at issue. China contends that, in so doing, the Panel placed an "unsustainable burden of proof"⁵⁵⁶ on China. Moreover, China alleges that 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 under paragraph 5.1 of China's Accession Protocol and in finding that the measures are not "necessary" within the meaning of Article XX(a) of the GATT 1994. China contends that the Panel mistakenly adopted an approach similar to that of the panel in *US – Gasoline*.⁵⁵⁷ This approach, according to China, leads to the "absurd situation"⁵⁵⁸ that the challenged measures can never be justified, because the reasons why the measures were found to be inconsistent with paragraph 5.1 of China's Accession Protocol are the same as the reasons given for why they are not "necessary" in the context of Article XX(a) of the GATT 1994.

⁵⁵³Panel Report, para. 7.788.

⁵⁵⁴See Panel Report, paras. 7.826 and 7.827, for the suitable organization and qualified personnel requirement; paras. 7.834 and 7.835, for the State plan requirement; paras. 7.845-7.847, for Article 41 of the *Publications Regulation*, Article 27 of the *2001 Audiovisual Products Regulation*, and Article 8 of the *Audiovisual Products Importation Rule*; paras. 7.861 and 7.862, for the State-ownership requirement; and paras. 7.866 and 7.867, for the provisions excluding foreign-invested enterprises from engaging in the importation of the relevant products.

⁵⁵⁵See Panel Report, paras. 7.826, 7.834, 7.846, 7.861, and 7.866.

⁵⁵⁶China's appellant's submission, para. 39.

⁵⁵⁷China's appellant's submission, para. 44 (referring to Appellate Body Report, *US – Gasoline*, p. 16, DSR 1996:I, 3, at 15).

⁵⁵⁸China's appellant's submission, para. 43.

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 measures have on imports of relevant products, or whether a panel may also consider the restrictive effect of the measures on importers or potential importers. The text of Article XX(a) does not specifically refer to "imports" or "importers" or, in different terms, "products" or "traders". However, the chapeau of Article XX of the GATT 1994 refers in a somewhat different context to "restrictions on international trade".

304. In *Korea – Various Measures on Beef*, the Appellate Body referred to the preamble of the GATT 1994 and stated that the extent to which a measure produces restrictive effects "on international commerce" should be taken into account in assessing "necessity".⁵⁶² In the same way as the preamble of the GATT 1994 includes the objectives of reducing barriers to trade and eliminating discriminatory treatment in international commerce⁵⁶³, paragraph 84(b) of China's Accession Working Party Report, concerning the grant of trading rights to "foreign enterprises and individuals", includes a commitment that "any requirements for obtaining trading rights ... would not constitute a barrier to trade".

⁵⁵⁹United States' appellee's submission, para. 41.

⁵⁶⁰United States' appellee's submission, para. 42.

⁵⁶¹See *supra*, subsection VI.B.

⁵⁶²Appellate Body Report, *Korea – Various Measures on Beef*, para. 163 and footnote 105 thereto.

⁵⁶³Preamble to the GATT 1994, third recital.

305. The Appellate Body's "necessity" analysis in *Korea – Various Measures on Beef* was undertaken in respect of a measure inconsistent with Article III:4 of the GATT 1994. This provision requires that no less favourable treatment be accorded not only in respect of laws, regulations and requirements directly regulating like products, but also in relation to measures affecting their internal sale, offering for sale, purchase, transportation, distribution or use. This suggests that effects on those who sell, purchase, transport, distribute, or use the products are not beyond scrutiny under Article III:4.⁵⁶⁴ This is also consistent with the purpose of Article III:4, which seeks to preserve equality of competitive opportunities for imported products as compared to like domestic products.⁵⁶⁵ Such competitive opportunities can be affected in a variety of ways, not only by measures directly regulating products and restricting imports.

306. In our view, therefore, while in principle a panel must assess the restrictive effect of a measure on international commerce, this test must be applied in the light of the specific obligation of the covered agreements that the respective measure infringes. The assessment of the restrictive effect to be taken into account in a particular dispute may, in appropriate cases, extend beyond an assessment of the restrictive effect on imported products, as this assessment must be undertaken in the light of the measure at issue, the specific obligation of the covered agreements that the measure infringes, and the defence being invoked.

307. In the present case, the Panel found China's measures to be inconsistent with, *inter alia*, China's obligation in paragraph 5.1 of its Accession Protocol to grant the right to trade to all enterprises with respect to goods. This obligation is not only concerned with the question of *what* can be traded, but more directly with the question of *who* is entitled to engage in trading. In view of, on the one hand, China's measures, which impose a restriction on *who* can engage in importing the relevant products, and, on the other hand, the nature of the specific obligation in paragraph 5.1, which stipulates *who* China must permit to engage in importing, we see no error in the Panel's tailoring its assessment of the restrictive effect of the provisions of China's measures to take into account the restrictive effect on beneficiaries of the right to trade. Indeed, this approach seems all the more appropriate in the light of our finding above that, 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 found to be inconsistent with its trading rights commitments under its Accession Protocol and Working Party Report.

⁵⁶⁴ According to Article I:1 of the GATT 1994, "all matters referred to in paragraphs 2 and 4 of Article III" are also subject to the requirement that any advantage, favour, privilege, or immunity be accorded to the like product. This also suggests a broad coverage and consideration of trade effects.

⁵⁶⁵ Appellate Body Report, *Korea – Various Measures on Beef*, paras. 135 and 136. See also Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16, DSR 1996:I, 97, at 109-110.

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 justified as "necessary" under Article XX(a) of the GATT 1994, the Panel assessed *to what extent* the provisions restrict those wishing to engage in importing, as well as *how* the restrictive effect comports with the degree of contribution to the achievement of the objective, and the societal importance and value of the legitimate objective concerned.⁵⁶⁶ The restrictive effect of the provision was relevant to each of these distinct analytical inquiries. Therefore, we do not believe that the Panel's approach constitutes circular reasoning. On the contrary, it is the result of a proper sequential analysis.⁵⁶⁷

309. We also do not consider that, as China alleges, the Panel committed a mistake similar to that of the panel in *US – Gasoline*.⁵⁶⁸ In that case, the panel assessed the United States' Article XX(g) defence to a finding of violation of Article III:4 of the GATT 1994. The Appellate Body faulted the panel for having assessed whether the *less favourable treatment* of imported products was related to the conservation of natural resources, rather than whether the *measure at issue* was related to the conservation of natural resources. In the present case, the Panel did examine whether the Chinese *measures at issue* were necessary to protect public morals, and, for each relevant provision or

⁵⁶⁶We note that in analyzing a defence of a measure found to be inconsistent with the GATT 1994, a panel may also have to assess the consistency of the measure with the chapeau of Article XX, which would require the panel to analyze whether the measure is applied in a manner that constitutes "a disguised *restriction* on international trade" or "arbitrary or unjustifiable discrimination". (emphasis added)

⁵⁶⁷The approach of the panel in *US – Gambling* also illustrates this logical sequence. The panel assessed restrictions on market access in its analysis of Articles XVI:2(a) and XVI:2(c) of the GATS. Subsequently, in its analysis of necessity in the context of Article XIV of the GATS, the panel assessed the restrictive effect of the measures at issue in that dispute and agreed with Antigua and Barbuda that the United States' measures had the effect of a "total prohibition, which is the most trade-restrictive approach possible." (Panel Report, *US – Gambling*, para. 6.495)

⁵⁶⁸Appellate Body Report, *US – Gasoline*, p. 16, DSR 1996:I, 3, at 15.

requirement, assessed its restrictive effect on imports and on potential importers.⁵⁶⁹ In our view, this demonstrates that the Panel correctly assessed the restrictive effect of the specific measures at issue.

310. Furthermore, the Panel did not, as China alleges, place an "unsustainable burden of proof"⁵⁷⁰ on China merely by deciding to take account of the restrictive effect of the measures at issue on those wishing to engage in importing. The less restrictive the effects of the measure, the more likely it is to be characterized as "necessary".⁵⁷¹ Consequently, if a Member chooses to adopt a very restrictive measure, it will have to ensure that the measure is carefully designed so that the other elements to be taken into account in weighing and balancing the factors relevant to an assessment of the "necessity" of the measure will "outweigh" such restrictive effect. In the present case, the Panel identified differences in the restrictive effect on potential importers of the different measures at issue in this dispute. The Panel found that the State-ownership requirement and the provisions excluding foreign-invested enterprises from engaging in the importation of the relevant products are the most restrictive provisions, because they *a priori* exclude certain enterprises from the right to engage in importing the relevant products.⁵⁷² However, the Panel found a lesser restrictive effect in China's State plan requirement and in the suitable organization and personnel requirement. With respect to both, the Panel found that the requirements did not *a priori* exclude particular enterprises in China from the right to engage in importing.⁵⁷³ In addition, the Panel characterized both of these latter requirements as "necessary", in the absence of a reasonably available alternative, to protect public morals in China. This demonstrates, in our view, that the Panel's assessment of the restrictive effect of China's measures did *not* impose an "unsustainable" burden on China. Instead the Panel's analysis shows that the burden was surmountable.

311. For all these reasons, we *find* that the Panel did not err⁵⁷⁴ in taking into account the restrictive effect that the relevant provisions and requirements have on those wishing to engage in importing as part of its assessment of the restrictive effect of the measures found to be inconsistent with China's trading rights commitments.

⁵⁶⁹The Panel assessed the restrictive effect of the requirement that import entities have a suitable organization and qualified personnel (Panel Report, paras. 7.826 and 7.827); it considered the restrictive effect of the requirement that import entities conform to China's State plan (para. 7.835); it examined the restrictive effects of "the designation requirements" contained in Article 41 of the *Publications Regulation*, Article 27 of the *2001 Audiovisual Products Regulation*, and Article 8 of the *Audiovisual Products Importation Rule* (see paras. 7.845-7.847); and it evaluated the restrictive effects of the State-ownership requirement and the exclusions relating to foreign-invested enterprises (paras. 7.861, 7.862, 7.866, and 7.867, respectively).

⁵⁷⁰China's appellant's submission, para. 39.

⁵⁷¹Appellate Body Report, *Korea – Various Measures on Beef*, para. 163. See also Appellate Body Report, *Brazil – Retreaded Tyres*, para. 150.

⁵⁷²Panel Report, paras. 7.862 and 7.867.

⁵⁷³Panel Report, paras. 7.827 and 7.835.

⁵⁷⁴In paragraphs 7.826, 7.827, 7.834, 7.835, 7.846, 7.847, 7.861, 7.862, 7.866, and 7.867 of the Panel Report.

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 responsibility for conducting content review. The Panel considered that this proposal is an alternative that would be significantly less restrictive and would make a contribution to the protection of public morals in China that is at least equivalent to the contribution made by the suitable organization and qualified personnel requirement and the State plan requirement.⁵⁷⁶ The Panel then examined whether the proposed alternative is reasonably available to China and concluded that China had not demonstrated that this alternative is not "reasonably available".⁵⁷⁷

313. China appeals this finding and submits that the proposed alternative—that the Chinese Government be given sole responsibility for conducting content review—is not "reasonably available", because it is merely theoretical in nature and would impose an undue and excessive burden on China. China alleges that the Panel erred in law and failed to properly address arguments it presented for purposes of demonstrating that the proposed alternative is not "reasonably available".

314. The United States contends that China failed to submit evidence in support of its position that adopting the United States' proposal would impose an undue burden on China. Instead, the evidence before the Panel established that the Chinese Government does have the capacity to carry out content review, because Chinese authorities already carry out content review of films imported for theatrical release, electronic publications, and audiovisual products.

315. In its analysis of reasonably available alternatives, the Panel indicated that it would examine whether at least one of the alternatives proposed by the United States "constitutes a genuine alternative and is reasonably available, taking into account the interest being pursued and China's desired level of protection".⁵⁷⁸ The Panel chose to focus on the United States' proposal that the Chinese Government be given sole responsibility for conducting content review of all relevant

⁵⁷⁵Panel Report, paras. 7.828 and 7.836.

⁵⁷⁶Panel Report, para. 7.898.

⁵⁷⁷Panel Report, para. 7.908; see also paras. 7.911 and 8.2(a)(i).

⁵⁷⁸Panel Report, para. 7.886.

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, or after importation. (See Panel Report, paras. 7.873 and 7.874. See also United States' oral statement at the first Panel meeting, para. 35; and United States' response to Panel Question 21)

⁵⁸⁰ Panel Report, para. 7.887.

⁵⁸¹ See Panel Report, para. 7.898.

⁵⁸² Panel Report, para. 7.906.

merely theoretical in nature, for instance, where the responding party is not capable of taking it, or where the measure imposes an undue burden on that Member, such as "prohibitive costs or substantial technical difficulties".⁵⁸³ Moreover, a "reasonably available" alternative measure must be a measure that would preserve the responding party's right to achieve its desired level of protection with respect to the objective pursued under Article XX of the GATT 1994.⁵⁸⁴

319. As regards the burden of proof with respect to "reasonably available alternatives", the Appellate Body explained in *US – Gambling* that a responding party invoking Article XIV(a) of the GATS bears the burden of demonstrating that its GATS-inconsistent measure is "necessary" to achieve the objective of protecting public morals. This burden does not imply that the responding party must take the initiative to demonstrate that there are *no* reasonably available alternatives that would achieve its objectives. When, however, the complaining party identifies an alternative measure that, in its view, the responding party should have taken, the responding party will be required to demonstrate why its challenged measure nevertheless remains "necessary" in the light of that alternative or, in other words, why the proposed alternative is not a genuine alternative or is not "reasonably available". If a responding party demonstrates that the alternative is not "reasonably available", in the light of the interests or values being pursued and the party's desired level of protection, it follows that the challenged measure must be "necessary".⁵⁸⁵

320. Turning to China's appeal, we first recall that China submits that the Panel erred in its analysis of the restrictive effect of the proposed alternative measure because it made the same "error" as China alleges it to have made in analyzing the restrictive effect of China's measures, namely, taking account of the restrictive effect of the measures on those wishing to engage in importing.⁵⁸⁶ For China, because the Panel's assessment was based on a flawed interpretation of the scope of the restrictive effect of the measure to be considered, the Panel could not have established that the proposed alternative measure would have a less restrictive impact on trade.

321. We have rejected above China's claim on appeal that the Panel erred in examining not only the restrictive effect on imports but also the restrictive effect on potential importers.⁵⁸⁷ It follows that, for the same reasons, we do not accept that, in its analysis of the alternative measure proposed by the United States—which the Panel found to have "significantly less restrictive impact, specifically on

⁵⁸³ Appellate Body Report, *US – Gambling*, para. 308.

⁵⁸⁴ Appellate Body Report, *EC – Asbestos*, paras. 172-174. See also Appellate Body Report, *Korea – Various Measures on Beef*, para. 180; and Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156.

⁵⁸⁵ Appellate Body Report, *US – Gambling*, paras. 309-311.

⁵⁸⁶ We note that China refers to its appeal regarding the Panel's analysis of restrictive effect in this regards. (See *supra*, subsection VI.B.3)

⁵⁸⁷ See *supra*, para. 309.

those who wish to engage in importing"⁵⁸⁸—the Panel erred merely because it took account of the impact the alternative measure would have on potential importers.

322. China's main arguments on appeal allege that the Panel erred in law and failed to properly address arguments presented by China in finding that the proposed alternative—that the Chinese Government be given sole responsibility for conducting content review—is reasonably available to China. China contends that this proposed alternative would impose an undue financial and administrative burden on China. China emphasizes that, in the current system, importation entities participate in the content review process, and that, in particular with respect to reading materials, these importation entities carry most of the burden of content review. The alternative considered by the Panel would require China to engage in "tremendous restructuring"⁵⁸⁹ and create a new, multi-level structure for content review within the Government.⁵⁹⁰ China points, in addition, to the large quantities of imported reading materials and to time constraints, especially for newspapers and periodicals, which mean that the content review mechanism must have a wide geographic coverage, sufficient manpower, and a capacity to respond quickly. To expect the Chinese Government to assume sole responsibility for the conduct of content review would require the training and assignment of a large number of qualified content reviewers to numerous locations.⁵⁹¹ China adds that the Panel erred in failing to find that "substantial technical difficulties"⁵⁹² demonstrate that the proposed alternative is not reasonably available to China. The Panel simply assumed that time-sensitive publications could be submitted electronically to the Chinese Government for content review, when in fact the Government would have to implement a completely upgraded electronic communications system to perform efficiently such an electronic review.⁵⁹³ China also contends that, if content review were performed at a single central location, according to the proposed alternative, this would make it impossible to "double check" content at the customs level, as is done under the current system.⁵⁹⁴

323. The United States responds that, because China failed to submit evidence substantiating its position that adopting the United States' proposal would impose an undue burden on China, the Panel rightly found that China had failed to establish that content review under the sole responsibility of the Chinese Government is not reasonably available to it. Instead, the evidence before the Panel suggested that the Chinese Government does have the capacity to carry out content review, because

⁵⁸⁸Panel Report, para. 7.899.

⁵⁸⁹China's appellant's submission, para. 62.

⁵⁹⁰China's appellant's submission, paras. 56 and 57.

⁵⁹¹China's appellant's submission, paras. 62-65.

⁵⁹²China's appellant's submission, para. 67 (referring to Appellate Body Report, *US – Gambling*, para. 308).

⁵⁹³China's appellant's submission, para. 66.

⁵⁹⁴China's appellant's submission, para. 69.

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 the importation entities, the Government is in effect already financing content review of imported publications.

324. In reviewing the Panel's analysis of whether content review under the sole responsibility of the Chinese Government is an alternative measure reasonably available to China, we note first that the Panel articulated the proper approach to its analysis.⁵⁹⁵ The Panel first scrutinized the alternative measure proposed by the United States and compared it to the existing measures in terms of contribution to the protection of public morals in China and restrictive impact. The Panel then assessed whether China had demonstrated that the proposed alternative measure is not reasonably available because it would impose an undue financial and administrative burden on China. The Panel's analysis makes clear that the Panel considered that the burden of establishing that the alternative is not reasonably available rested on China and, indeed, China does not contend otherwise on appeal.

325. In our view, the Panel did not ignore the fact that the proposal put forward by the United States would require changes to the current system, and that these could entail additional costs for China. To the contrary, the Panel noted China's argument that implementing the United States' proposal "would impose an undue burden", create the risk of "undue delays", and demand "substantial resources" given the large quantities of imports involved and the time-sensitive nature of newspapers and periodicals.⁵⁹⁶ The Panel expressly recognized that the alternative might require China to allocate additional human and financial resources to content review authorities, in particular for content review of reading materials.⁵⁹⁷ This recognition was, however, tempered by additional observations that the Panel considered pertinent. Thus, the Panel observed that, for products other than reading materials (electronic publications, audiovisual products and films for theatrical release), the Chinese Government already makes the final content review decision under its current system.⁵⁹⁸ In addition, the Panel was not convinced that the cost to the Chinese Government would necessarily be higher under the alternative proposed by the United States. Given that, at present, all import entities are wholly owned by the State, it was "not apparent" to the Panel that the cost to the Chinese Government

⁵⁹⁵We note that the Panel referred, in paragraph 7.870, to Appellate Body Report, *US – Gambling*, para. 311; and, in paragraph 7.871, to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156.

⁵⁹⁶Panel Report, para. 7.902 (referring to China's response to Panel Question 185).

⁵⁹⁷Panel Report, para. 7.903.

⁵⁹⁸Panel Report, para. 7.901.

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 Regulation* 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

⁵⁹⁹Panel Report, para. 7.904.

⁶⁰⁰Panel Report, para. 7.905. Indeed, in response to the Panel's question whether the Government could charge fees for the review of content in respect of the products relevant to this dispute, China answered that content review conducted by the Government was "not only a matter of money". (China's response to Panel Question 195)

⁶⁰¹Panel Report, para. 7.906.

⁶⁰²Panel Report, para. 7.907. The Panel also noted that China had not argued that the proposed alternative would be WTO-inconsistent, and that the Panel saw "no reason to believe that the alternative in question would be inherently WTO-inconsistent or that it could not be implemented by China in a WTO-consistent manner". (*Ibid.*)

⁶⁰³We observe, in this regard, that a Member's right to secure a high level of protection with respect to one of the objectives listed in Article XX of the GATT 1994 has been recognized by the Appellate Body in *Korea – Various Measures on Beef*. However, the Appellate Body also noted that implementing such choice through a WTO-consistent measure may entail higher costs for its national budget. (See Appellate Body Report, *Korea – Various Measures on Beef*, para. 181)

⁶⁰⁴Appellate Body Report, *US – Gambling*, para. 308.

that would allow us to conclude that the Panel erred in failing to attribute sufficient significance to the evidence of financial and administrative burden that may attach to the proposed alternative measure. Instead, China simply argues that the proposal would involve "tremendous restructuring" and would "obviously put on China an excessively heavy financial and administrative burden".⁶⁰⁵ However, as we see it, adopting any alternative measure will, by definition, involve some change, and this alone does not suffice to demonstrate that the alternative would impose an undue burden.

329. We are also not convinced that China established that the proposed alternative measure involves substantial technical difficulties. On appeal, China contends that the alternative proposed by the United States would require the establishment of an electronic sampling system and the upgrading of the current electronic transmission system, and that it is unclear how, under such a system, elements of content found to be contrary to public morals could be removed from relevant products before they are imported.

330. In response to a request at the oral hearing in this appeal to point to evidence in the Panel record establishing such substantial technical difficulty, China referred us to its first written submission⁶⁰⁶ and to an exhibit containing the report on operations of the CNPIEC, an approved, wholly State-owned publication import entity.⁶⁰⁷ Neither of these documents addresses directly the current technology systems within the Chinese Government, or the technical difficulties that might arise in the implementation of the proposed alternative measure. The report on operations explains that the CNPIEC makes full use of Internet technology to improve the efficiency of its content review. China, however, has not explained why the Chinese Government could not use this same technology if it were to be entrusted with sole responsibility for content review.

331. Lastly, we are not persuaded by China's argument on appeal that the proposed alternative would make it impossible to "double check"⁶⁰⁸ content at customs. China's argument in this regard assumes that the alternative put forward by the United States necessarily implies that content review would be carried out in a single, central location. We do not see any such necessary implication. Indeed, China itself seems to acknowledge as much in arguing that the costs of implementing the proposed alternative would be high because, *inter alia*, the alternative would require the training and assignment of a large number of qualified content reviewers *to numerous locations*.⁶⁰⁹

⁶⁰⁵China's appellant's submission, para. 65.

⁶⁰⁶China's first written submission to the Panel, para. 225.

⁶⁰⁷Panel Exhibit CN-26, *supra*, footnote 141.

⁶⁰⁸China's appellant's submission, para. 69.

⁶⁰⁹China's appellant's submission, para. 64.

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 paragraph 7.908 of the Panel Report, in finding that at least one of the alternative measures proposed by the United States is an alternative "reasonably available" to China.

333. In addition, China claims that the Panel failed to make an objective assessment of the matter before it, as required by Article 11 of the DSU. China asserts that, in response to a question by the Panel, it explained that importers carry most of the burden of reviewing the content of imported reading materials, while the Government's involvement is rather limited. China contends that the Panel misrepresented this position when it stated that "China has not asserted that its Government would lack the capacity to make content review decisions with regard to books, newspapers or periodicals"⁶¹⁰, and thereby failed to make an objective assessment of the facts before it, in violation of Article 11 of the DSU.⁶¹¹

334. We note that, in the course of its analysis, the Panel stated:

We recognize that implementing the [United States'] proposal might make it necessary for China to allocate additional human and financial resources to the authorities tasked with performing content review.⁶¹²

In our view, this statement by the Panel demonstrates that the Panel correctly understood China's argument. In recognizing that additional resources may be necessary, the Panel implicitly recognized that China's content review authorities may not currently have the human and financial resources for reviewing the content of all imported reading materials. In its appellant's submission, China itself recognizes that, in making the above statement, the Panel acknowledged China's argument.⁶¹³ Thus, in our view, it cannot be said that the Panel failed to consider China's argument and we are not persuaded that the Panel misrepresented China's position. Rather, the Panel considered that the additional resources that may be required to adopt an alternative approach to content review had not been shown to amount to an undue burden. We are therefore of the view that the Panel did not fail to make an objective assessment of the matter in concluding that an alternative measure is "reasonably available" to China.

335. Finally, it may be useful to indicate what we are *not* saying in reaching the above conclusion. We are *not* holding that China is under an obligation to ensure that the Chinese Government assumes sole responsibility for conducting content review. Rather, we are agreeing with the Panel that the

⁶¹⁰China's appellant's submission, para. 58 (referring to Panel Report, para. 7.901).

⁶¹¹China's appellant's submission, para. 58.

⁶¹²Panel Report, para. 7.903.

⁶¹³China's appellant's submission, para. 61.

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

⁶¹⁴In 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 *Circular on Internet Culture* (Article II), the *Network Music Opinions* (Article 8), and the *Several Opinions* (Article 4), each is inconsistent with China's national treatment commitments under Article XVII of the GATS. Article X:7 of the [List] of Prohibited Foreign Investment Industries of the *Catalogue*, in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*, is also inconsistent with Article XVII of the GATS.⁶¹⁷

339. Each of the provisions found by the Panel to be inconsistent with China's obligations under Article XVII of the GATS prohibits foreign-invested enterprises from engaging in the electronic distribution of sound recordings in China, while like domestic service suppliers are not similarly prohibited.⁶¹⁸

340. China appeals the Panel's finding that the above provisions in China's measures are inconsistent with Article XVII of the GATS. More specifically, China contends that the Panel erred in interpreting the entry "Sound recording distribution services" in China's GATS Schedule as encompassing distribution by electronic means.

341. According to China, the Panel erred in its analysis of the ordinary meaning to be given to the entry "Sound recording distribution services", taken in its context and in the light of the object and purpose of the treaty, and in concluding that an analysis of this entry based on supplementary means of interpretation under Article 32 of the *Vienna Convention* confirmed its earlier analysis under

⁶¹⁵See also Panel Report, para. 7.911.

⁶¹⁶Panel Report, para. 7.1265.

⁶¹⁷Panel Report, para. 8.2.3(b)(i).

⁶¹⁸Panel Report, paras. 7.1300-7.1311. The texts of these provisions along with an excerpt from China's GATS Schedule are set out in Annex III to this Report.

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

⁶¹⁹China's appellant's submission, para. 79.

⁶²⁰China's appellant's submission, para. 197.

⁶²¹China's appellant's submission, para. 194.

⁶²²United States' appellee's submission, para. 71 (quoting Panel Report, para. 7.1311).

⁶²³Panel Report, para. 7.1181.

⁶²⁴Panel Report, para. 7.1202.

⁶²⁵Panel Report, para. 7.1201.

⁶²⁶Panel Report, para. 7.1194.

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 List⁶³¹ 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. Accordingly, the Panel deemed these circumstances to be "consistent with"⁶³⁴ its analysis under Article 31 of the *Vienna Convention*.

346. On the basis of all of the above reasoning, the Panel found that:

... the inscription of "sound recording distribution services" under the heading of Audiovisual Services (Sector 2.D) of China's Services Schedule extends to the distribution of sound recordings in non-physical form, notably through electronic means.⁶³⁵

⁶²⁷Panel Report, para. 7.1203.

⁶²⁸Panel Report, para. 7.1219.

⁶²⁹Panel Report, para. 7.1220. The Panel found that the United States' claims were not, as alleged by China, limited to claims relating to the digital distribution of sound recordings over the Internet. Instead, the Panel accepted that the claims in respect of "digital distribution" also referred to other forms of digital communication, "which might include, for example, mobile telephone networks". (*Ibid.*, para. 7.1152)

⁶³⁰Panel Report, para. 7.1221.

⁶³¹MTN.GNS/W/120, 10 July 1991.

⁶³²MTN.GNS/W/164, 3 September 1993.

⁶³³Panel Report, para. 7.1234.

⁶³⁴Panel Report, para. 7.1247.

⁶³⁵Panel Report, para. 7.1265.

B. *Article 31 of the Vienna Convention*

347. China challenges several elements of the Panel's analysis and findings under Article 31(1) of the *Vienna Convention*. According to that provision:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

1. Ordinary Meaning and the Panel's Use of Dictionary Definitions

348. The Appellate Body has previously held that, while a panel may start with the dictionary definitions of the terms to be interpreted, in the process of discerning the ordinary meaning, dictionaries alone are not necessarily capable of resolving complex questions of interpretation because they typically catalogue all meanings of words.⁶³⁶ Dictionaries are important guides to, but not dispositive of, the meaning of words appearing in treaties.⁶³⁷ For these reasons, the Appellate Body has cautioned panels against equating the "ordinary meaning" of a term with the definition provided by dictionaries. Under Article 31 of the *Vienna Convention*, the "ordinary meaning" of treaty terms may be ascertained only in their context and in the light of the object and purpose of the treaty.⁶³⁸ In this respect, the Appellate Body has explained that interpretation pursuant to the customary rule codified in Article 31 of the *Vienna Convention* is ultimately a holistic exercise that should not be mechanically subdivided into rigid components.⁶³⁹

349. The relevant entry in China's GATS Schedule reads "Sound recording distribution services". This entry is inscribed under sector 2.D "Audiovisual Services".⁶⁴⁰ According to China, this entry covers only the distribution of sound recordings in physical form, for example, music embedded on compact discs ("CDs"). The United States, in contrast, maintains that the entry encompasses the distribution of sound recordings in both physical and electronic form, for example, through the Internet or by other electronic means.

⁶³⁶ Appellate Body Report, *US – Gambling*, para. 164. See also Appellate Body Report, *US – Softwood Lumber IV*, para. 59; Appellate Body Report, *Canada – Aircraft*, para. 153; and Appellate Body Report, *EC – Asbestos*, para. 92.

⁶³⁷ Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 248.

⁶³⁸ See also Appellate Body Report, *US – Gambling*, paras. 166 and 167.

⁶³⁹ Appellate Body Report, *EC – Chicken Cuts*, para. 176.

⁶⁴⁰ This entry is not based on the Services Sectoral Classification List that would correspond to this part of China's Schedule (MTN.GNS/W/120, 10 July 1991, at sector 2.D), nor does it refer to the 1991 United Nations Provisional Central Product Classification (the "CPC").

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 an object of trade, *esp.* a raw material or agricultural crop"; or a "thing one deals in or makes use of"⁶⁴⁶, and considered that this definition referred to anything of value, whether tangible or intangible. On this basis, the Panel concluded that the term "distribution" can be understood as "the dispersal of things of value"⁶⁴⁷, and that this can involve tangible or intangible products.

352. China argues that, in interpreting the ordinary meaning of "Sound recording distribution services", the Panel failed to perform a holistic exercise under Article 31 of the *Vienna Convention*, which requires reaching a definitive conclusion on the meaning of a treaty term only after an examination of its context and the relevant object and purpose.⁶⁴⁸ According to China, the Panel prematurely concluded that "Sound recording distribution services" extends to the distribution of content in non-physical products⁶⁴⁹, and, in so doing, disregarded relevant dictionary definitions submitted by China. In particular, the Panel did not consider alternative dictionary definitions of the terms "recording" ("something on which sound or visual images have been recorded"⁶⁵⁰) and

⁶⁴¹*Shorter Oxford English Dictionary*, 5th edn., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 2, p. 2493. See Panel Report, para. 7.1173.

⁶⁴²Panel Report, para. 7.1173.

⁶⁴³Panel Report, para. 7.1175.

⁶⁴⁴Panel Report, para. 7.1176.

⁶⁴⁵*Shorter Oxford English Dictionary*, 5th edn., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 1, p. 717. See Panel Report, para. 7.1178.

⁶⁴⁶*Shorter Oxford English Dictionary*, 5th edn., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 1, p. 461. See Panel Report, para. 7.1179.

⁶⁴⁷Panel Report, para. 7.1181.

⁶⁴⁸China's appellant's submission, para. 97.

⁶⁴⁹China's appellant's submission, para. 119.

⁶⁵⁰China's appellant's submission, paras. 102 (quoting *The American Heritage Dictionary of the English Language*, 4th edn. (Houghton Mifflin Harcourt, 2000) (Panel Exhibit CN-71)), and 105.

"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, and that "distribution" can be understood as referring to the dispersal among consumers of anything of value, tangible or intangible.⁶⁵⁵

354. We observe that the dictionary definitions submitted by China to the Panel included a range of meanings for the terms "recording" and "distribution". China itself referred to "recorded material"⁶⁵⁶, which was the definition that the Panel considered "most relevant".⁶⁵⁷ Although China contends that the Panel disregarded alternative definitions from *The American Heritage Dictionary of the English Language*, in particular the definition of "recording" as "[s]omething on which sound or visual images have been recorded", we note that this same dictionary also provides a definition of "recording" as "[a] recorded sound or picture".⁶⁵⁸ Whilst the Panel did not quote the latter two definitions from the dictionary in question, it did assess whether the term "sound recording" encompasses only the "particular medium on which the content is embedded or transferred", or also "material that is recorded" and "content".⁶⁵⁹ The Panel was not required in doing so to quote each dictionary definition submitted by the parties expressing these meanings in similar form. We, therefore, do not believe that the Panel failed to consider whether "sound recording" could be read as "something on which sound or visual images have been recorded." Rather, the Panel explored whether the entry at issue covered only distribution of sound recordings in physical form, or extended to their distribution in electronic form. Ultimately, the Panel was not persuaded that the meaning of the term "sound recording" excluded recorded content stored or distributed in electronic form.

⁶⁵¹China's appellant's submission, para. 113 (quoting *The American Heritage Dictionary of the English Language*, 4th edn. (Houghton Mifflin Harcourt, 2000) (Panel Exhibit CN-72)).

⁶⁵²China's appellant's submission, para. 127.

⁶⁵³United States' appellee's submission, para. 79.

⁶⁵⁴United States' appellee's submission, para. 77.

⁶⁵⁵United States' appellee's submission, para. 82.

⁶⁵⁶*Shorter Oxford English Dictionary*, 5th edn., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 2, p. 2493. See China's appellant's submission, para 100; and China's first written submission to the Panel, para. 456.

⁶⁵⁷Panel Report, para. 7.1173.

⁶⁵⁸*The American Heritage Dictionary of the English Language*, 4th edn. (Houghton Mifflin Harcourt, 2000) (Panel Exhibit CN-71).

⁶⁵⁹Panel Report, paras. 7.1175 and 7.1176.

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 definitions were more relevant than others. However, we do not believe that the absence of a clear explanation amounts to an error in the Panel's analysis of dictionary definitions, because its analysis makes clear that it took into consideration the meaning advocated by China, regardless of the dictionary sources of the various definitions before it.⁶⁶²

⁶⁶⁰See China's appellant's submission, para. 111. The *Shorter Oxford English Dictionary* defines "distribution" as, *inter alia*:

1 The action of dealing out in portions or shares among a number of recipients; apportionment, allotment; *ECONOMICS* the dispersal of commodities among consumers effected by commerce. >b *ECONOMICS*. The way in which individuals or classes share in the aggregate products of a community.

...

2 The action of spreading or dispersing throughout a region: the state or manner of being located in different places all over a region.

...

3 The division of a whole or collective body into parts, *esp.* with distinctive characters or functions; division and arrangement; classification.

...

(*Shorter Oxford English Dictionary*, 5th edn., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 1, p. 717)

The American Heritage Dictionary of the English Language defines "distribution" as, *inter alia*:

1. The act of distributing or the condition of being distributed; apportionment. 2. Something distributed; an allotment. 3. The act of dispersing or the condition of being dispersed; diffusion. ... 5. Division into categories; classification. 6. The process of marketing and supplying goods, especially to retailers. ...

(*The American Heritage Dictionary of the English Language*, 4th edn. (Houghton Mifflin Harcourt, 2000))

⁶⁶¹Panel Report, para. 7.1180.

⁶⁶²The Appellate Body has noted that "information placed before a panel is often voluminous in nature and that the probative value of specific pieces of evidence varies considerably. A panel must examine and consider all of the evidence placed before it, must identify the evidence upon which it has relied in reaching its findings, and must not make findings that are unsupported by evidence. Yet, a panel is also afforded a considerable margin of discretion in its appreciation of the evidence. This means, among other things, that a panel is not required, in its report, to explain precisely how it dealt with each and every piece of evidence on the panel record." (Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 240)

357. We recognize, as China argues, that certain language used by the Panel suggests that it may have reached conclusions on the ordinary meaning based on only certain dictionary definitions.⁶⁶³ The Panel also did not quote in its reasoning the alternative dictionary definitions submitted by China and contained in *The American Heritage Dictionary of the English Language*.⁶⁶⁴ However, the Panel did consider whether the meaning of the entry "Sound recording distribution services" was limited to the distribution of physical goods or whether it extended to electronic distribution, and it continued to do so in its subsequent analysis of relevant context, and object and purpose, as explained below. We, therefore, do not consider that, in its analysis of the ordinary meaning of "Sound recording distribution services", the Panel disregarded the definitions put forward by China. Neither are we persuaded that the Panel prematurely reached conclusions on the ordinary meaning of "Sound recording distribution services" based only on dictionary meanings before analyzing the relevant context and the object and purpose of the GATS. In sum, based on our review of the Panel's reasoning, we believe that the Panel did not err in its consideration of dictionary definitions of the terms "sound recording" and "distribution".

2. Context

358. In its analysis of context, the Panel reviewed relevant parts of China's GATS Schedule, provisions of the GATS, and the GATS Schedules of other Members. In China's GATS Schedule, the Panel assessed the contextual relevance of the sector heading "Audiovisual Services", the specific commitments undertaken for "Sound recording distribution services", the other two subsectors scheduled under "Audiovisual Services"—namely, "Videos, including entertainment software and (CPC 83202), distribution services" and "Cinema Theatre Services"—and the entries under sector 4, "Distribution Services". The Panel found that, overall, the context provided by China's inscriptions in the "Audiovisual Services" sector of its GATS Schedule supported the interpretation that the entry "Sound recording distribution services" extends to the distribution of content through electronic means.⁶⁶⁵ Based on the context given by the sector "Distribution Services" in China's GATS Schedule, the Panel considered that it was "reasonable to presume that the coverage of the entries in China's Schedule under 'Audiovisual Services' should extend to the distribution in *non-physical* form of audiovisual products".⁶⁶⁶ The Panel found that relevant context in Article XXVIII:(b) of the GATS

⁶⁶³For instance, in paragraph 7.1177 of the Panel Report, the Panel appears to have used the notion of "ordinary meaning" as a synonym for "dictionary meaning". In paragraph 7.1181, the Panel appears to have drawn preliminary conclusions on the ordinary meaning, based only on dictionary meanings.

⁶⁶⁴The Panel, however, makes express reference to China's reliance on the definitions of "recording" and "distribution" contained in *The American Heritage Dictionary of the English Language* when describing China's arguments in paragraph 7.1162 of its Report.

⁶⁶⁵Panel Report, para. 7.1203.

⁶⁶⁶Panel Report, para. 7.1205. (original emphasis)

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 element of context was "inconclusive" as to whether "Sound recording distribution services" extends to electronic distribution and that the Panel erred in concluding that its contextual analysis supported its initial understanding of the ordinary meaning.⁶⁶⁸ The United States responds 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 further argues that, contrary to China's assertions, the Panel did not rely on any single element of the context as "conclusive", but conducted a comprehensive examination of relevant contextual and other elements under Article 31 of the *Vienna Convention*.⁶⁶⁹

360. In its examination, the Panel came to the conclusion that some of the contextual elements supported the view that "Sound recording distribution services" extended to the electronic distribution of non-physical products. The Panel also found that other contextual elements were consistent with or did not contradict such an interpretation of "Sound recording distribution services". The Panel, however, did not consider that any of the elements of context it reviewed supported an interpretation of the entry in China's GATS Schedule as being limited to the distribution of physical sound recordings. With this in mind, we review below elements of context relevant to discerning the ordinary meaning of the entry "Sound recording distribution services" in China's GATS Schedule, bearing in mind China's assertion that the Panel's analysis of each element of context was inconclusive.

(a) China's GATS Schedule

361. We start by reviewing the contextual relevance of the heading to sector 2.D, "Audiovisual Services", under which the "Sound recording distribution services" entry is inscribed, followed by the actual commitments scheduled for this entry and the other subsectors scheduled under "Audiovisual Services".

⁶⁶⁷Panel Report, para. 7.1209.

⁶⁶⁸China's appellant's submission, paras. 129 and 162.

⁶⁶⁹United States' appellee's submission, paras. 75 and 87.

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 national treatment limitations listed for this subsector in the four modes of supply also apply to "Videos, including entertainment software and (CPC 83202), distribution services".⁶⁷³ In these two subsectors, China has made full market access and national treatment commitments in modes 1, 2, and 3, except for certain limitations to mode 3 in the market access column. Specifically, China limits the type of legal entity or joint venture through which foreign service suppliers may engage in the distribution of audiovisual products, by requiring that they form contractual joint ventures with Chinese partners and subject to China's right to examine the content of audio and video products. In addition, motion pictures are explicitly referred to, and excluded from, the scope of the commitments under "Audiovisual Services". Notwithstanding this exclusion, China scheduled an additional commitment, allowing the annual importation of 20 motion pictures for theatrical release on a revenue-sharing basis.

364. We observe that the reference to audiovisual "products" in the scheduled market access limitation can encompass both physical and non-physical sound recordings, because, as the Panel found, the term "product" is used to refer to both tangible and intangible goods, as well as services.⁶⁷⁴ Thus, China's commitment on "Sound recording distribution services" does not specify whether it is limited to the distribution of physical goods, but it does include a market access limitation on the distribution of audiovisual "products" that refers to both tangibles and intangibles. Such commitment might have expressly indicated that it relates only to the distribution of tapes, videocassettes, CDs, digital video discs ("DVDs"), and/or other physical media, but it does not.

⁶⁷⁰Panel Report, para. 7.1186.

⁶⁷¹Panel Report, para. 7.1186.

⁶⁷²China's appellant's submission, para. 134.

⁶⁷³Separate market access and national treatment limitations have been scheduled for the other subsector included under "Audiovisual Services", that is, "Cinema Theatre Services".

⁶⁷⁴The Panel noted that the CPC, on the basis of which the WTO Services Sectoral Classification List was prepared, "is about 'products' that include both goods and services." (Panel Report, para. 7.1188)

365. Regarding the reference to "motion pictures", we observe that it is not disputed that this term refers to non-physical content that can be embedded in physical products.⁶⁷⁵ China's mode 3 market access commitment covers "audiovisual products", excluding "motion pictures", thus implying that motion pictures would otherwise be included within the category of audiovisual products. Moreover, China undertakes an additional commitment on the importation of motion pictures for theatrical release under the heading "Audiovisual Services". Therefore, we consider that the reference to motion pictures under "Audiovisual Services" in China's GATS Schedule supports the view that the term "audiovisual products" is used to refer to both tangible and intangible products and that the term "Sound recording distribution services" also refers to both tangible and intangible products. This also supports the view that this entry covers the electronic distribution of sound recordings.

366. The Panel also considered the other two subsectors scheduled by China under "Audiovisual Services", that is, "Videos, including entertainment software and (CPC 83202) distribution services" and "Cinema Theatre Services".

367. China argues that the Panel erred in finding that the term "videos" refers primarily to intangible content⁶⁷⁶ and that it failed to give meaning to the fact that the entry in China's GATS Schedule refers to "videos" in the plural form. The use of the plural form, in China's view, suggests that the noun "videos" must refer to something countable, such as the "physical copies of content recorded on video tape".⁶⁷⁷ In our view, the plural word "videos" in China's Schedule does not suggest a limitation to something tangible, because non-physical products are no less countable than physical ones. Videos contained in electronic files are just as countable as those that are embedded in video tapes, CDs, and DVDs. Accordingly, we do not see how the use of the plural term by itself excludes videos in electronic form.

368. We note that the entry "Videos, including entertainment software and (CPC 83202) distribution services"⁶⁷⁸ is scheduled under "Audiovisual Services" adjacent to "Sound recording distribution services". The Panel observed that the entry "Videos, (...) distribution services" extended to the distribution of both physical and non-physical products⁶⁷⁹ and reasoned that "the concept of

⁶⁷⁵In replying to a question posed by the Panel, China indicated that the distribution of motion pictures is not considered to be the distribution of physical goods. (See China's response to Panel Question 86)

⁶⁷⁶Panel Report, para. 7.1333.

⁶⁷⁷China's appellant's submission, para. 139.

⁶⁷⁸The reference to the CPC in this entry is a reference to a specific category of leasing and rental services concerning video tapes, which is reproduced in paragraph 7.1331 of the Panel Report.

⁶⁷⁹Panel Report, paras. 7.1320-7.1349.

'distribution services' in China's entries relating to videos and to sound recording must have similar meaning"⁶⁸⁰, that is, they both include physical and non-physical products.

369. We agree with this reasoning of the Panel. The fact that the entry "Videos, (...) distribution services" applies to intangible products⁶⁸¹ represents relevant context suggesting that the entry "Sound recording distribution services", which is subject to the same market access and national treatment limitations in the four modes of supply, should also be interpreted as applying to intangible products. We note that the entry "Videos, (...) distribution services" includes "entertainment software", which is also a reference to content that can be incorporated into physical products or transmitted electronically. In our view, this provides further contextual support for interpreting "Sound recording distribution services" as referring to content in both physical and non-physical form, and thus extending to the electronic distribution of sound recordings.

370. The other entry scheduled under the heading "Audiovisual Services" is "Cinema Theatre Services", which is limited to the construction and renovation of cinema theatres. We do not consider that the inclusion of an entry on the construction and renovation of cinema theatres under "Audiovisual Services" provides contextual guidance for the interpretation of "Sound recording distribution services". As we see it, the Panel attached little contextual significance to China's commitment covering the construction and renovation of cinema theatres, stating only that the context of this entry "is consistent with the view"⁶⁸² that "Sound recording distribution services" refers to the distribution of sound recordings as content.⁶⁸³

371. We next turn to the Panel's interpretation of the context represented by China's commitments under sector 4 (Distribution Services) of its GATS Schedule. Like the Panel, we note that China's commitments on "Distribution Services" cover all physical products, except certain products explicitly excluded in the sector column of the Schedule.⁶⁸⁴ Absent the commitment on "Sound recording distribution services" under sector 2.D (Audiovisual Services), the physical distribution of

⁶⁸⁰Panel Report, para. 7.1194.

⁶⁸¹China also claims that the Panel should have relied only on dictionary meanings of the term "videos" that were contemporaneous with China's accession to the WTO, which define "video" as referring to physical items only. We are not persuaded that, in examining the ordinary meaning of the term "videos", the Panel should have relied upon dictionaries that were published at the time of the conclusion of China's accession to the WTO. In any event, we observe that it is not clear that the meaning of the term "videos" is different today than it was in 2001. We consider below, in paragraphs 395 to 397, similar arguments made by China in respect of the terms "sound recording" and "distribution".

⁶⁸²Panel Report, para. 7.1202.

⁶⁸³We recall that the Panel did not rely on this element alone to support its finding on ordinary meaning, but on the entire context provided by China's entries in the "Audiovisual Services" sector of its GATS Schedule, as indicated in paragraph 7.1203 of the Panel Report.

⁶⁸⁴The following products are exempted from China's commitments on distribution services: salt and tobacco for commission agents and wholesale services, and tobacco only for retailing services. (Panel Report, para. 7.1204)

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"] under a sector other than Distribution Services, where the distribution of physical goods are generally covered in China's Schedule."⁶⁸⁶ This alone does not demonstrate that this entry also covers the electronic distribution of sound recordings. However, we recognize the contextual relevance of the fact that the entry "Sound recording distribution services" has been inscribed under the sector concerned with audiovisual content, "Audiovisual Services", as opposed to the sector "Distribution Services", which covers the distribution of physical goods in China's GATS Schedule.⁶⁸⁷ This, in our view, provides contextual support for an interpretation of the entry "Sound recording distribution services" as extending also to the distribution of non-physical products.

(b) Provisions of the GATS

373. We examine next whether relevant context for the interpretation of the phrase "Sound recording distribution services" can be found in the provisions of the GATS. We start by considering the rules in the GATS itself that govern the scheduling of specific commitments and Articles I and XXVIII(b) of the GATS. We then turn to the Panel's analysis of the meaning imparted by Article XXVIII(b) of the GATS to the notion of "distribution" in China's GATS Schedule.

374. We observe that the meaning of terms used in specific commitments inscribed in Members' Schedules is also informed by the rules in the GATS itself that govern the scheduling of such commitments. Thus, in *US – Gambling*, the Appellate Body examined "the context provided by the

⁶⁸⁵We recall that, in *US – Gambling*, the Appellate Body found that:

... because a Member's obligations regarding a particular service depend on the specific commitments that it has made with respect to the sector or subsector within which that service falls, a specific service cannot fall within two different sectors or subsectors. In other words, the sectors and subsectors in a Member's Schedule must be mutually exclusive.

(Appellate Body Report, *US – Gambling*, para. 180)

Before the Panel, both China and the United States agreed that the physical distribution of sound recordings embedded in physical media is covered by the more specific entry "Sound recording distribution services" under the "Audiovisual Services" sector and not by the commitment on "Distribution Services". (See China's and the United States' responses to Panel Question 119)

⁶⁸⁶Panel Report, para. 7.1205.

⁶⁸⁷We further note that the CPC describes "Distributive Trade Services" as consisting of "selling merchandise". The CPC classifies wholesale trade services and retail trade services according to the goods that are distributed.

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 joint ventures to distribute audiovisual products (excluding motion pictures) and without prejudice to China's right to examine the content of audiovisual products. China does not limit the subsectoral scope of this commitment to specific segments of sound recordings (for example, songs, instrumental works, ring tones, speeches), but commits to sound recording distribution generally. Moreover, China's GATS Schedule does not expressly exclude or include any particular form of delivery, for example, by indicating that the commitment is limited to the physical distribution of sound recordings embedded in physical media, or that it also covers electronic distribution. It merely specifies that supply of the relevant services through mode 3 (commercial presence) is permitted only for contractual joint ventures with Chinese partners (except for motion pictures) and restates China's right to examine audiovisual content.

376. The provisions of the GATS itself, insofar as they concern the scheduling of specific commitments, also provide relevant context for the interpretation of specific commitments. Article I defines "trade in services" as the supply of a service through the four modes of supply.⁶⁸⁹ The GATS distinguishes four modes of supply, but does not provide for further distinctions between forms of delivery. Article XXVIII(b) of the GATS defines the "supply of a service" as including "the production, distribution, marketing, sale and delivery of a service". Article XX of the GATS requires each Member to set out in a Schedule the specific commitments it undertakes and to specify by sector any limitations, conditions, or qualifications on market access and national treatment, and any additional commitments.⁶⁹⁰ Members undertake specific commitments in sectors or subsectors and according to the four modes of supply. The GATS also allows Members to circumscribe the scope of

⁶⁸⁸Appellate Body Report, *US – Gambling*, para. 180.

⁶⁸⁹Article I of the GATS defines trade in services as the supply of a service:

- (a) from the territory of one Member into the territory of any other Member;
- (b) in the territory of one Member to the service consumer of any other Member;
- (c) by a service supplier of one Member, through commercial presence in the territory of any other Member;
- (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

⁶⁹⁰Pursuant to Article XX:1 of the GATS, each Member shall set out in a Schedule the specific commitments it undertakes under Part III of the Agreement on market access, national treatment, and any additional commitments. With respect to sectors where such commitments are undertaken, each Schedule shall specify terms, limitations, and conditions on market access, conditions and qualifications on national treatment, and undertakings relating to additional commitments.

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 market access and national treatment.

377. We observe that, unless a sector is included in a Schedule, it is not subject to specific commitments. However, having included a sector or subsector and having specified commitments for one or more modes of supply in its Schedule, a Member undertakes to liberalize "the production, distribution, marketing, sale and delivery" of the service(s) falling within that sector or subsector and mode(s) of supply, unless it has specified otherwise by inserting conditions, limitations, or qualifications in the Schedule. This implies that, in the absence of specific limitations, conditions, or qualifications, the meaning of "Sound recording distribution services" is not limited to the physical delivery of sound recordings. Rather, this entry would encompass distribution in electronic form.

378. In interpreting the term "distribution" as it appears in China's commitment on "Sound recording distribution services", the Panel also considered the contextual relevance of the definition of "supply of a service" in Article XXVIII(b), which includes "the production, *distribution*, marketing, sale and delivery of a *service*".⁶⁹¹ China contends that, even if the term "distribution" could, in the abstract, relate to the distribution of both physical and intangible products, this does not resolve the question of whether the specific entry in China's GATS Schedule covers distribution of audiovisual products only on physical carriers or extends also to such products stored in intangible form.⁶⁹²

379. The definition of "supply of a service" in Article XXVIII(b) of the GATS would not in itself exclude the possibility of drafting a Schedule entry in a way that covers only the distribution of physical goods. However, the interpretative question in this dispute is whether China's entry has been formulated in such a way. It is clear that the term "distribution" as used in Article XXVIII(b) of the GATS refers to the distribution of something intangible—services. We agree with the Panel that this is relevant context in interpreting the meaning of the term "distribution" in China's entry "Sound recording distribution services" in its GATS Schedule, and that Article XXVIII(b) of the GATS lends support to an interpretation of the term "distribution" in the relevant entry in China's Schedule as covering the distribution of both tangible and intangible products.

⁶⁹¹Emphasis added.

⁶⁹²China's appellant's submission, para. 161.

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.

⁶⁹³Panel Report, para. 7.1218.

⁶⁹⁴Appellate Body Report, *US – Gambling*, para. 182.

⁶⁹⁵Appellate Body Report, *US – Gambling*, para. 182 (quoting Panel Report, *US – Gambling*, para. 6.98).

⁶⁹⁶Panel 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 Members to be of limited contextual relevance to the interpretation of the particular entry in China's Schedule, it concluded that the Schedules of other Members did not suggest that electronic distribution should be excluded.

385. Therefore, we do not see merit in China's argument that the Panel could not derive any inferences from the GATS Schedules of other Members for the interpretation of "Sound recording distribution services" in China's GATS Schedule.⁶⁹⁸ As we consider below, the Panel did not rely on any particular element of context as conclusive, but found instead that its overall analysis of context supported an interpretation that China's entry "Sound recording distribution services" extends also to electronic distribution. Under these circumstances, we do not consider that the Panel erred in its consideration of the GATS Schedules of other Members as context.

(d) Summary

386. China argues that the Panel's analysis of each element of context was "inconclusive" as to whether "Sound recording distribution services" extends to electronic distribution and that the Panel erred in concluding that its contextual analysis supported its original understanding of the ordinary meaning of this entry.⁶⁹⁹

387. As we have considered above, while certain elements of context clearly support the Panel's interpretation of "Sound recording distribution services" as extending to the electronic distribution of sound recordings, other elements considered by the Panel are consistent with or do not contradict such an interpretation of the scope of this commitment. On balance, we are persuaded that the analysis of a number of contextual elements supports the interpretation of China's commitment on "Sound recording distribution services" as including the electronic distribution of sound recordings.

388. We further note that the Panel did not regard any of the specific elements it reviewed under Article 31 of the *Vienna Convention* as in and of itself "conclusive" as to the question of whether "Sound recording distribution services" should be interpreted as encompassing electronic distribution.

⁶⁹⁷Panel Report, para. 7.1218.

⁶⁹⁸China's appellant's submission, para. 157.

⁶⁹⁹China's appellant's submission, paras. 129 and 162.

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 "Sound recording distribution services" is inconsistent with the object and purpose of the GATS and, in particular, with the principle of progressive liberalization. China claims that the Panel interpreted the entry "Sound recording distribution services" according to the contemporary meaning of the words it contains, but that the principle of progressive liberalization does not allow for the expansion of the scope of the commitments of a WTO Member by interpreting the terms used in the Schedule based on the meaning of those terms at the time of interpretation.⁷⁰¹

391. The United States responds that compliance with current commitments is essential to the credibility and success of "progressive liberalization" in the future. The United States disagrees that the principle of progressive liberalization required the Panel to base its analysis of the relevant terms in China's GATS Schedule on their meaning at the time of China's accession to the WTO. According to the United States, construing the objective of progressive liberalization in this way would place a limitation on China's commitments that does not exist in its Schedule, and would not conform to the requirements of the *Vienna Convention*.⁷⁰²

392. We observe that the GATS preamble lists various objectives, including the "establish[ment] of a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization", and the "early achievement of progressively higher levels of liberalization of trade in services through successive

⁷⁰⁰Panel Report, para. 7.1219.

⁷⁰¹China's appellant's submission, para. 173.

⁷⁰²United States' appellee's submission, paras. 104 and 106.

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

⁷⁰³The second and third recital of the preamble of the GATS read:

Members,

...

Wishing to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries; (underlining added)

Desiring the early achievement of progressively higher levels of liberalization of trade in services through successive rounds of multilateral negotiations aimed at promoting the interests of all participants on a mutually advantageous basis and at securing an overall balance of rights and obligations, while giving due respect to national policy objectives; (underlining added)

⁷⁰⁴Panel Report, para. 7.1219.

services—that is, of intangibles. This lends support to interpreting the meaning of "distribution" as applying to both tangible and intangible products, and would equally have done so in 2001, and at the time the Panel interpreted the entry "Sound recording distribution services" in China's GATS Schedule.

396. More generally, we consider that the terms used in China's GATS Schedule ("sound recording" and "distribution") are sufficiently generic that what they apply to may change over time. In this respect, we note that GATS Schedules, like the GATS itself and all WTO agreements, constitute multilateral treaties with continuing obligations that WTO Members entered into for an indefinite period of time, regardless of whether they were original Members or acceded after 1995.⁷⁰⁵

397. We further note that interpreting the terms of GATS specific commitments based on the notion that the ordinary meaning to be attributed to those terms can only be the meaning that they had at the time the Schedule was concluded would mean that very similar or identically worded commitments could be given different meanings, content, and coverage depending on the date of their adoption or the date of a Member's accession to the treaty. Such interpretation would undermine the predictability, security, and clarity of GATS specific commitments, which are undertaken through successive rounds of negotiations⁷⁰⁶, and which must be interpreted in accordance with customary rules of interpretation of public international law.⁷⁰⁷

⁷⁰⁵We consider such reading of the terms in China's GATS Schedule to be consistent with the approach taken in *US – Shrimp*, where the Appellate Body interpreted the term "exhaustible natural resources" in Article XX(g) of the GATT 1994. (Appellate Body Report, *US – Shrimp*, paras. 129 and 130)

We observe that the International Court of Justice, in *Costa Rica v. Nicaragua*, found that the term "*comercio*" ("commerce"), contained in an 1858 "Treaty of Limits" between Costa Rica and Nicaragua, should be interpreted as referring to both trade in goods and trade in services, even if, at the time of the conclusion of the treaty, such term was used to refer only to trade in goods. (International Court of Justice, Judgment, *Case concerning the Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, 13 July 2009)

⁷⁰⁶The GATS Uruguay Round specific commitments entered into force on 1 January 1995. The specific commitments on the movement of natural persons, attached to the Third Protocol to the GATS, entered into force on 30 January 1996; the specific commitments on financial services, attached to the Second Protocol to the GATS, entered into force on 1 September 1996; the specific commitments on basic telecommunications services, attached to the Fourth Protocol to the GATS, entered into force on 5 February 1998; the specific commitments on financial services, attached to the Fifth Protocol to the GATS, entered into force on 1 March 1999. The specific commitments of individual acceding countries entered into force at the time of each accession.

⁷⁰⁷We further observe that the fact that parts of a service sector included in a GATS Schedule can be described by terms other than those used to inscribe the commitment in a Schedule, does not change the meaning of the treaty terms used in the Schedule, which must be interpreted in accordance with the rules of the *Vienna Convention*. Thus, even if a certain type of electronic distribution of sound recordings can be referred to as "network music services", the terms of the entry "Sound recording distribution services" as embodied in the Schedule would still have to be interpreted in accordance with the rules of the *Vienna Convention*. In our view, this is so even if the distinction between physical and electronic distribution is reflected in international classification but has not been used in the scheduling of the commitments at issue.

4. Summary under Article 31 of the *Vienna Convention*

398. Having examined the ordinary meaning of the entry "Sound recording distribution services" in China's GATS Schedule, in its context and in the light of the object and purpose of the GATS, we reach the conclusion that China's commitment covers both physical distribution as well as the electronic distribution of sound recordings. We, therefore, do not consider that the Panel erred under Article 31 of the *Vienna Convention* in reaching "the preliminary conclusion that this commitment extends to sound recordings distributed in non-physical form, through technologies such as the Internet".⁷⁰⁸

399. We are also persuaded that the application of the interpretative rule set out in Article 31 of the *Vienna Convention* to the entry "Sound recording distribution services" does not result in "inconclusiveness" or ambiguity as to the ordinary meaning of China's commitment. In this respect, we note that the purpose of the interpretative exercise is to narrow the range of possible meanings of the treaty term to be interpreted, not to generate multiple meanings or to confirm the ambiguity and inconclusiveness of treaty obligations. Rather, a treaty interpreter is required to have recourse to context and object and purpose to elucidate the relevant meaning of the word or term. This logical progression provides a framework for proper interpretative analysis, bearing in mind that treaty interpretation is an integrated operation, where interpretative rules and principles must be understood and applied as connected and mutually reinforcing components of a holistic exercise.⁷⁰⁹

400. Having reached a conclusion on the interpretation of China's commitment on "Sound recording distribution services" under Article 31 of the *Vienna Convention*, we observe that we would not need to proceed to an examination of supplementary means of interpretation pursuant to Article 32 of the *Vienna Convention* to decide this appeal. The Panel, however, considered that recourse to supplementary means of interpretation was useful to confirm its preliminary conclusion based on the application of Article 31 and proceeded to examine the preparatory work of the treaty and the circumstances of the conclusion of the GATS pursuant to Article 32 of the *Vienna Convention*. China has appealed the Panel's application of Article 32. We therefore address the issues raised by China in respect of the Panel's analysis of supplementary means of interpretation pursuant to Article 32 of the *Vienna Convention*.

⁷⁰⁸Panel Report, para. 7.1220.

⁷⁰⁹Appellate Body Report, *US – Continued Zeroing*, para. 268; see also para. 273.

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

402. The United States responds that the Panel did not err in resorting to supplementary means of interpretation under Article 32 of the *Vienna Convention* only for the purpose of confirming the conclusions it had reached under Article 31 of the *Vienna Convention*. According to the United States, the Panel's analysis of the supplementary means of interpretation was correct, and the circumstances of the conclusion of China's accession to the WTO supported the finding that China undertook a GATS specific commitment with respect to the electronic distribution of sound recordings.⁷¹⁵

403. Although the Panel's application of Article 31 of the *Vienna Convention* to "Sound recording distribution services" led it to a "preliminary conclusion" as to the meaning of that entry, the Panel nonetheless decided to have recourse to supplementary means of interpretation to *confirm* that meaning. We note, in this regard, that China's argument on appeal appears to assume that the Panel's analysis under Article 32 of the *Vienna Convention* would *necessarily* have been different if the Panel had found that the application of Article 31 left the meaning of "Sound recording distribution

⁷¹⁰Article 32 of the *Vienna Convention* states:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.

⁷¹¹China's appellant's submission, para. 177.

⁷¹²China's appellant's submission, para. 179.

⁷¹³China's appellant's submission, para. 182.

⁷¹⁴China's appellant's submission, para. 188.

⁷¹⁵United States' appellee's submission, paras. 108 and 114.

services" ambiguous or obscure, and if the Panel had, therefore, resorted to Article 32 to *determine*, rather than to *confirm*, the meaning of that term. We do not share this view. The elements to be examined under Article 32 are distinct from those to be analyzed under Article 31, but it is the same elements that are examined under Article 32 irrespective of the outcome of the Article 31 analysis. Instead, what may differ, depending on the results of the application of Article 31, is the weight that will be attributed to the elements analyzed under Article 32.

404. In the present case, we do not consider that, under Article 32 of the *Vienna Convention*, the Panel was required, as China seems to argue, to establish whether the preparatory work and the circumstances of the treaty's conclusion were *conclusive* as to whether or not China's commitment on "Sound recording distribution services" was limited to the distribution of sound recordings in physical form. The Panel had come to the "preliminary conclusion" under Article 31 of the *Vienna Convention* that the ordinary meaning of "Sound recording distribution services" extended to the distribution of both physical and non-physical sound recordings. We do not think that the Panel committed any error by seeking confirmation of this finding under Article 32 of the *Vienna Convention*.

405. We further note that the purpose of treaty interpretation under Articles 31 and 32 of the *Vienna Convention* is to ascertain the "common intention" of the parties, not China's intention alone. We recall that, in this respect, in *US – Gambling*, the Appellate Body found that "the task of ascertaining the meaning of a concession in a Schedule, like the task of interpreting any other treaty text, involves identifying the *common intention* of Members".⁷¹⁶ The circumstances of the conclusion of the treaty may thus be relevant to this "common intention".

406. Regarding the preparatory work, China has not persuaded us that the Panel erred. China simply argues that the Panel's analysis of the Services Sectoral Classification List and the 1993 Scheduling Guidelines was largely based on the same flawed premises as its analysis of the sector heading "Audiovisual Services", and that the Panel should have found the preparatory work to be equally inconclusive. China does not identify a specific legal error committed by the Panel in its consideration of the preparatory work. Moreover, we recall that, in our review of the Panel's analysis of context, we agreed with the Panel's findings that China's sector heading and scheduled entries in sector 2.D (Audiovisual Services) suggest that the entry "Sound recording distribution services" includes the electronic distribution of such recordings.

⁷¹⁶Appellate Body Report, *US – Gambling*, para. 159. (original emphasis) See also Appellate Body Report, *EC – Computer Equipment*, para. 84.

407. Regarding the circumstances of the conclusion of the treaty, we observe that China appears to be asking us to draw inferences from the facts that the Panel did not draw. The Panel found that "the electronic distribution of [sound recordings] had become a technical possibility and commercial reality ... before the entry into force of China's GATS Schedule."⁷¹⁷ The Panel also seems to have accepted that, at the time of China's accession to the WTO, there was not yet an international or a domestic legal framework in place for the electronic distribution of sound recordings, although both were under discussion.⁷¹⁸ Based on these findings, the Panel rejected China's argument that the entry "Sound recording distribution services" could not have included the electronic distribution of sound recordings because such business, or any legal framework for such business, emerged only after China's accession to the WTO.⁷¹⁹

408. We are not persuaded that the Panel relied on the fact that it found the electronic distribution of sound recordings to be technically feasible and a commercial reality when China acceded to the WTO.⁷²⁰ We do not see that the Panel erred in its assessment that the absence of a regulatory framework within China and internationally at the time of China's WTO accession would not have prevented China from making a commitment on the electronic distribution of sound recordings in its GATS Schedule.⁷²¹ More importantly, it is not clear to us that the Panel found, as China's appeal suggests, that the circumstances of the conclusion of the treaty *supported* the Panel's interpretation under Article 31 of the *Vienna Convention*. To the contrary, various statements by the Panel indicate that the Panel simply found that this element did not establish that China could not have undertaken a commitment on the electronic distribution of sound recordings in 2001.⁷²² The Panel rejected China's argument about the factual situation and about the significance of the circumstances of the conclusion of the treaty, but it did not itself draw interpretative conclusions on the basis of the evidence of such circumstances.

409. Thus, in its analysis under Article 32 of the *Vienna Convention*, the Panel simply concluded that certain circumstances of the conclusion of the treaty did not exclude the possibility that China's GATS commitment also extends to the electronic distribution of sound recordings, and that this was

⁷¹⁷Panel Report, para. 7.1242.

⁷¹⁸Panel Report, paras. 7.1243-7.1246.

⁷¹⁹Panel Report, paras. 7.1235 and 7.1245-7.1247.

⁷²⁰Panel Report, para. 7.1242. In so finding, the Panel was merely rejecting China's argument that this business was neither technically feasible nor commercially viable at the time of the conclusion of the treaty.

⁷²¹Panel Report, paras. 7.1243 and 7.1245.

⁷²²In paragraph 7.1245 of the Panel Report, the Panel stated that the alleged lack of a domestic legal framework "would not in itself have prevented China from making a valid commitment on these services in its Schedule". Moreover, in paragraph 7.1247, the Panel stated that it was not persuaded that "the meaning of the phrase 'sound recording distribution services' cannot extend to the distribution of sound recordings in non-physical form, for the reason that negotiators of China's GATS Schedule and, more broadly, WTO Members, had at the time no conception of the technical or commercial viability of this form of distribution."

consistent with its earlier analysis under Article 31 of the *Vienna Convention*. We see no error in such reasoning.

410. Finally, China claims that the Panel should have found that the application of both Articles 31 and 32 of the *Vienna Convention* left the issue of whether China's GATS commitment on "Sound recording distribution services" included the distribution of sound recordings by electronic means largely "inconclusive".⁷²³ In China's view, when confronted with such a high level of ambiguity, the Panel should have applied the *in dubio mitius* principle and refrained from adopting the interpretation that was the least favourable to China. The United States responds that there was no basis for applying the *in dubio mitius* principle in this dispute because the Panel correctly interpreted China's GATS specific commitment based on Articles 31 and 32 of the *Vienna Convention*.⁷²⁴

411. We have found above that the Panel did not err in its interpretation of "Sound recording distribution services" in accordance with Article 31 of the *Vienna Convention*. We have expressed the view that the Panel's recourse to Article 32 of the *Vienna Convention* was not in error, but that it was also not necessary, given that the application of Article 31 yielded a conclusion on the proper interpretation of this entry in China's GATS Schedule. We have also observed that we see no error in the Panel's analysis under Article 32. We therefore do not accept China's contention that the Panel should have found that the meaning of the entry "Sound recording distribution services" remains inconclusive or ambiguous after its analysis under Articles 31 and 32 of the *Vienna Convention*. Consequently, even if the principle of *in dubio mitius* were relevant in WTO dispute settlement, there is no scope for its application in this dispute.

D. Conclusions

412. We therefore *find* that the Panel did not err, in paragraph 7.1265 of the Panel Report, in finding that the entry "Sound recording distribution services" under the heading "Audiovisual Services" (sector 2.D) in China's GATS Schedule extends to the distribution of sound recordings in non-physical form, notably through electronic means.

413. In the light of the above, we *uphold* the Panel's conclusion, in paragraph 8.2.3(b)(i) of the Panel Report, that, as regards the electronic distribution of sound recordings, "[t]he *Circular on Internet Culture* (Article II), the *Network Music Opinions* (Article 8), and the *Several Opinions* (Article 4), each is inconsistent with China's national treatment commitments under Article XVII of the GATS. Article X:7 of the [List] of Prohibited Foreign Investment Industries of the *Catalogue*, in

⁷²³China's appellant's submission, para. 193.

⁷²⁴United States' appellee's submission, para. 115.

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

ANNEX I

**WORLD TRADE
ORGANIZATION**

WT/DS363/10
23 September 2009

(09-4455)

Original: English

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

Notification of an Appeal by China
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 20(1) of the Working Procedures for Appellate Review

The following notification, dated 22 September 2009, from the Delegation of the People's Republic of China, is being circulated to Members.

Pursuant to Article 16.4 and Article 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the *Working Procedures for Appellate Review*, China hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report in *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (WT/DS363/R, as amended by WT/DS363/R/Corr.1), and certain legal interpretations developed by the Panel in this Report.¹

1. China seeks review by the Appellate Body of the Panel's legal conclusions set out in paragraphs 7.913 and 8.2(a)(i) and (ii)² of the Panel Report that China's measures³ are not justified under Article XX(a) of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"). The Panel committed errors of law and legal interpretation in concluding that none of the relevant measures are "necessary" to protect public morals, within the meaning of Article XX(a) of the GATT 1994. In particular:

¹For ease of reference, China hereafter refers to this Report as the "Panel Report".

²China makes reference to sub-section (a) under paragraph 8.2 on page 466 of the Panel Report.

³The *Catalogue* and the *Foreign Investment Regulation* (Articles X.2 and X.3 as well as Articles 3 and 4); the *Several Opinions* (Article 4); the *Publications Regulation* (Article 42 in conjunction with Article 41, and Article 41); the *2001 Audiovisual Products Regulation* (Article 27); the *Audiovisual Products Importation Rule* (Article 8); and the *Audiovisual (Sub-)Distribution Rule* (Article 21).

- 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* make no material contribution to the protection of public morals in China.⁵
- 3) 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.⁶
- 4) The Panel committed errors of law and legal interpretation, and failed to make an objective assessment of the facts, in violation of Article 11 of the DSU, in considering that at least one of the alternative measures referred to by the United States was an alternative "reasonably available" to China.⁷

Should the Appellate Body reverse the Panel's findings that China's measures are not "necessary" to protect public morals, within the meaning of Article XX(a) of the GATT 1994, China requests that the Appellate Body complete the Panel's analysis and find that China's measures are fully justified under Article XX(a) of the GATT 1994.

2. China seeks review by the Appellate Body of the Panel's legal conclusions set out in subsection 3.(b)(i) of section VIII of the Panel Report⁸ that the *Circular on Internet Culture* (Article II), the *Network Music Opinions* (Article 8), the *Several Opinions* (Article 4) and Article X:7 of the *Catalogue*, in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*, are inconsistent with Article XVII of the GATS. The Panel's legal conclusions are based on errors of law and legal interpretation in applying the customary rules of interpretation of public international law as codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("the Vienna Convention"), to China's GATS schedule. Such errors led, *inter alia*, to the erroneous finding that China's schedule to the GATS includes specific commitments on the electronic distribution of sound recordings in non-physical form under Sector 2.D "sound recording distribution services", contrary to Articles 3.2 and 19.2 of the DSU.⁹ In particular:

- 1) The Panel erred in its analysis of the ordinary meaning to be given to the terms "sound recording distribution services", taken in their context and in light of the object and purpose of the Treaty.¹⁰

⁴See, e.g., Panel Report, paras. 7.850, 7.852–7.863.

⁵See, e.g., Panel Report, paras. 7.851, 7.864–7.868.

⁶See, e.g., Panel Report, paras. 7.787–7.788, 7.847–7.849, 7.862–7.863, 7.867–7.868.

⁷See, e.g., Panel Report, paras. 7.886–7.909.

⁸Panel Report, page 467.

⁹See, e.g., Panel Report, para. 7.1265.

¹⁰See, e.g., Panel Report, paras. 7.1173–7.1220.

- 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 measures¹² 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

¹¹See, e.g., Panel Report, paras. 7.1221–7.1247.

¹²The *Circular on Internet Culture* (Article II); the *Network Music Opinions* (Article 8); the *Several Opinions* (Article 4); and the *Catalogue* (Article X:7, in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*).

¹³Panel Report, pages 464–465.

¹⁴See, e.g., Panel Report, paras. 7.528–7.560, 7.584.

¹⁵See, e.g., Panel Report, paras. 7.649–7.651, 7.674.

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.

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

ANNEX III

**RELEVANT EXCERPTS FROM
CHINA'S ACCESSION PROTOCOL AND WORKING PARTY REPORT,
CHINA'S GATS SCHEDULE, AND
THE CHINESE MEASURES AT ISSUE IN THIS APPEAL**

China's Trading Rights Commitments Relevant to This Appeal

<i>China's Accession Protocol</i>	Panel Exhibits US-1 and CN-1
Paragraph 1.2	The WTO Agreement to which China accedes shall be the WTO Agreement as rectified, amended or otherwise modified by such legal instruments as may have entered into force before the date of accession. This Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement.
Paragraphs 5.1 and 5.2	<p>5.1 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. All such goods shall be accorded national treatment under Article III of the GATT 1994, especially paragraph 4 thereof, in respect of their internal sale, offering for sale, purchase, transportation, distribution or use, including their direct access to end-users. For those goods listed in Annex 2B, China shall phase out limitation on the grant of trading rights pursuant to the schedule in that Annex. China shall complete all necessary legislative procedures to implement these provisions during the transition period.</p> <p>5.2 Except as otherwise provided for in this Protocol, all foreign individuals and enterprises, including those not invested or registered in China, shall be accorded treatment no less favourable than that accorded to enterprises in China with respect to the right to trade.</p>

<i>China's Accession Working Party Report</i>	Panel Exhibit US-2
Paragraphs 83(d) and 84(a) and (b)	<p>83. The representative of China confirmed that during the three years of transition, China would progressively liberalize the scope and availability of trading rights.</p> <p>...</p> <p>(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.</p> <p>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 China's Schedule of Specific Commitments under the GATS.</p> <p>(b) 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.</p>
Paragraph 342	<p>The Working Party took note of the explanations and statements of China concerning its foreign trade regime, as reflected in this Report. The Working Party took note of the commitments given by China in relation to certain specific matters which are reproduced in paragraphs ... 83 [and] 84 ... of this Report and noted that these commitments are incorporated in paragraph 1.2 of the Draft Protocol.</p>

Sector 2.D of China's GATS Schedule*

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons			
Sector or sub-sector	Limitations on market access	Limitation on national treatment	Additional commitments
2. COMMUNICATION SERVICES			
D. Audiovisual Services			
- Videos, including entertainment software and (CPC 83202), distribution services	(1) None (2) None (3) Upon accession, foreign services suppliers will be permitted to establish contractual joint ventures with Chinese partners to engage in the distribution of audiovisual products, excluding motion pictures, without prejudice to China's right to examine the content of audio and video products (see footnote 1).	(1) None (2) None (3) None	Without prejudice to compliance with China's regulations on the administration of films, upon accession, China will allow the importation of motion pictures for theatrical release on a revenue-sharing basis and the number of such imports shall be 20 on an annual basis.
- Sound recording distribution services	(4) Unbound, except as indicated in horizontal commitments.	(4) Unbound, except as indicated in horizontal commitments.	
- Cinema Theatre Services	(1) None (2) None (3) Upon accession, foreign services suppliers will be permitted to construct and/or renovate cinema theatres, with foreign investment no more than 49 per cent.	(1) None (2) None (3) None	
	(4) Unbound, except as indicated in horizontal commitments.	(4) Unbound, except as indicated in horizontal commitments.	

[Footnote 1 to section I. HORIZONTAL COMMITMENTS under "Limitations on market access", mode 3.] The terms of the contract, concluded in accordance with China's laws, regulations and other measures, establishing a "contractual joint venture" govern matters such as the manner of operation and management of the joint venture as well as the investment or other contributions of the joint venture parties. Equity participation by all parties to the contractual joint venture is not required, but is determined pursuant to the joint venture contract.

*The cover note to China's GATS Schedule, GATS/SC/135, states that the Schedule is authentic in English only.

Provisions of the Chinese Measures Relevant to This Appeal**

	United States' Translation	China's Translation
<i>Foreign Investment Regulation</i>	Panel Exhibit US-9	None provided
Article 3	<p>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 Commission, the National Development and Reform Commission, and the Ministry of Foreign Trade and Economic Cooperation, in conjunction with relevant departments of the State Council, shall make timely revisions and promulgate them.</p> <p>The Catalogue of Industries for Guiding Foreign Investment and the Catalog of Priority Industries Available for Foreign Investment in the Mid-West Region are the basis for the examination and approval of foreign-invested projects and FIE applicable policies.</p>	None provided
Article 4	<p>Foreign-invested projects are divided into four categories: Those encouraged, permitted, restricted, and prohibited.</p> <p>The encouraged, restricted and prohibited categories of foreign-invested projects are listed in the Catalog of Industries for Guiding Foreign Investment. Those not included in the encouraged, restricted, and prohibited categories fall into the permitted category of foreign-invested projects. The permitted category is not listed in the Catalogue of Industries for Guiding Foreign Investment.</p>	None provided

**The Panel explained that it would, when referring to a provision of a Chinese measure, use the translation provided by the United States, unless the parties agreed to use the translation provided by China, or if based on the advice of the independent translator the Panel found that the translation provided by the United States was inappropriate. (Panel Report, footnote 84 to para. 7.34) It appears that, for the following listed provisions, the Panel used the translation provided by the United States, except that, for Article 8 of the *Audiovisual Products Importation Rule*, Article II of the *Circular on Internet Culture*, and Article 8 of the *Network Music Opinions*, the Panel used the translation provided by China.

	United States' Translation	China's Translation
<i>Catalogue</i>	Panel Exhibit US-5	Panel Exhibit CN-41
Articles X:2, X:3, and X:7 in the List of Prohibited Foreign Investment Industries	<p>2. Publication, master distribution, and import operations of books, newspapers and periodicals</p> <p>3. Publication, production, and import operations of audiovisual products and electronic publications</p> <p>...</p> <p>7. News websites, network audio-visual program services, internet on-line service operation site, and internet culture operation</p>	<p>2. Publishing, Zong Fa Xing and importation of books, newspapers and periodicals</p> <p>3. Publishing, producing and importation of audiovisual products and electronic publications</p> <p>...</p> <p>7. News websites, service of network audio-visual programs, business sites of internet access services, internet culture operating</p>
<i>Several Opinions</i>	Panel Exhibit US-6	None provided
Article 4	<p>Foreign investors are prohibited from setting up and operating news agencies, radio broadcasting stations, television stations, radio-TV transmission networks, companies producing and broadcasting radio and television programs, companies making motion pictures, business dealing in internet culture and sites for Internet services (Hong Kong and Macao are exceptions), cultural and art performance groups, motion picture import and distribution companies, and video projection companies. Foreign investors are prohibited from engaging in the publication, master distribution and import of books, newspapers and periodicals, and publishing, production, master distribution, and import of audiovisual products and electronic publications, as well as using the information network to provide audiovisual program services, news websites, and internet publication businesses. Foreign investors may not covertly enter into sectors of propaganda such as channels, frequencies, layouts, editing, and publishing through such business operations as sub-distribution, printing, advertising, and reconstruction of cultural facilities.</p>	None provided

	United States' Translation	China's Translation
<i>Publications Regulation</i>	Panel Exhibit US-7	Panel Exhibit CN-14
Article 41	<p>The business of importing publications shall be operated by publication import entities established in compliance with these Regulations, among which those that engage in the business of importing newspapers or periodicals shall be designated by the publication administration under the State Council.</p> <p>No entity or individual shall engage in the business of importing publications without approval; and no entity or individual shall engage in the business of importing newspapers or periodicals without being designated.</p>	<p>The business of importing publications shall be operated by the publication importation entities established in accordance with these Regulations. Among others, those publication importation entities engaged in importing newspapers or periodicals shall be designated by the administrative department of publishings under the State Council.</p> <p>No entity or individual may be engaged in importing publications without approval; and, without being designated, no entity or individual may be engaged in importing newspapers or periodicals.</p>
Article 42	<p>In order to establish a publication import entity, the applicant shall meet the following conditions:</p> <ol style="list-style-type: none"> (1) have a name and articles of association for the publication import entity; (2) be a wholly State-owned enterprise and have a sponsoring entity under a superior agency recognized by the publication administration under the State Council; (3) have a well-defined scope of business; (4) have an organization suited to the needs of its business of importing publications and specialized personnel who meet the qualification requirements determined by the State; (5) have funding suited to its business of importing publications; (6) have a fixed work site; and (7) other conditions stipulated in laws and administrative regulations or by the State. <p>Approval to establish a publication import entity shall not only be in compliance with the conditions listed in the preceding paragraphs, but also conform to the State plan for the total number, structure, and distribution of publication import entities.</p>	<p>The following conditions shall be met for the establishment of a publication importation entity:</p> <ol style="list-style-type: none"> (1) having name and articles of association of the publication importation entity; (2) being a wholly state-owned enterprise and having a sponsoring entity and the <i>supervising entity</i> which are recognized by the administrative department of publishing under the State Council; (3) having a defined scope of business; (4) having an organizational structure adapted to the needs of its business of importing publications and professionals who meet the qualification requirements prescribed by the State; (5) having funds adequate for its business of importing publications; (6) having fixed business premises; (7) other conditions provided for in laws and administrative regulations or by the State. <p>In addition to the conditions prescribed in the preceding paragraph, the approval of the establishment of a publication importation entity shall also be consistent with the plans of the State on the total number, structure and layout of the publication importation entities.</p>

	United States' Translation	China's Translation
<i>2001 Audiovisual Products Regulation</i>	Panel Exhibit US-16	Panel Exhibit CN-2
Article 5	<p>The state institutes a system of licensing in regard to the publishing, production, reproduction, import, wholesale, retail and rental of audiovisual products. No entity or individual may engage in the publishing, production, reproduction, import, wholesale, retail and rental of audiovisual products without necessary permit.</p> <p>Permits and approval documents issued in compliance with these Regulations may not be rented out or lent out, sold or assigned in any other form.</p>	<p>The State shall apply a licensing system in respect of the publication, production, reproduction, importation, wholesale, retail and leasing of audiovisual products. No entity or individual shall, without the license, be engaged in the publication, production, reproduction, importation, wholesale, retail and leasing, etc. of audiovisual products.</p> <p>The certificates of license or approval documents issued in accordance with the Regulations shall not be leased, lent, sold or transferred in any way.</p>
Article 27	The import of finished audiovisual products shall be handled by finished audiovisual product import entities designated by the cultural administration under the State Council. Any entity or individual which have not been designated may not engage in the import of finished audiovisual products.	The importation of finished audiovisual products shall be operated by the importation entity of finished audiovisual products designated by the administrative department of cultural affairs under the State Council; no entity or individual may operate the importation of finished audiovisual products without being designated.
<i>Audiovisual Products Importation Rule</i>	Panel Exhibit US-17	Panel Exhibit CN-15
Article 7	The State shall implement a system of licensing in regard to the import of audiovisual products.	The State shall apply a license system to the importation of audiovisual products.
Article 8	The business of importing finished audiovisual products shall be entrusted to audiovisual units designated by the Ministry of Culture. Without the designation of the Ministry of Culture, no unit or individual may engage in the importing of finished audiovisual products.	The import business of audiovisual finished products shall be operated by the audiovisual product operating entities designated by the Ministry of Culture; no entity or individual shall be engaged in the importation of finished audiovisual products without the designation of the Ministry of Culture.
<i>Audiovisual (Sub-)Distribution Rule</i>	Panel Exhibit US-18	Panel Exhibit CN-54
Article 21	A Chinese-foreign contractual joint venture for sub-distribution of audiovisual products may not engage in the import of audiovisual products.	No Sino-foreign distribution contractual joint venture of audiovisual products may engage in the importation of audiovisual products.

	United States' Translation	China's Translation
<i>Film Regulation</i>	Panel Exhibit US-20	Panel Exhibit CN-11
Article 30	The business of importing films shall be conducted by film importing entities designated by the radio, film, and television administration under the State Council; without being designated, no entity or individual shall engage in the business of importing films.	The business of importing films shall be operated by the film importation entities designated by the administrative department of radio, films and television under the State Council. No entity or individual shall conduct the business of importing films without being designated.
<i>Film Enterprise Rule</i>	Panel Exhibit US-22	Panel Exhibit CN-13
Article 16	The business of importing films shall be exclusively conducted by film import enterprises that are approved by SARFT. The distribution of imported films nationwide shall be carried out by distribution companies that are approved by SARFT and have the right to distribute imported films nationwide.	Importation of films shall be exclusively operated by film importation enterprises approved by the SARFT. Nationwide distribution of imported films shall be conducted by those distribution companies which are approved by SARFT to have rights to distribute imported films in China.
<i>Circular on Internet Culture</i>	Panel Exhibit US-33	Panel Exhibit CN-67
Article II	To apply for the establishment of an Internet cultural unit, the applicant shall meet the application requirements listed in the Rules and the plans for the total number, structure, and deployment for Internet cultural units, and shall also have sources for Internet cultural products or the ability to produce Internet cultural products. To apply to be established as a commercial Internet cultural unit, the applicant shall have ¥1 million RMB or more in registered capital, eight or more professional technical staff such as network administrators and editors, and apply as an enterprise. An applicant to set up a non-commercial Internet cultural unit is not required to go through relevant procedures in the form of an enterprise. Presently, all areas shall not accept applications to engage in Internet cultural activities from Internet information service providers with foreign investment.	Whoever applies to establish an Internet cultural entity shall comply with relevant conditions in the Provisions, and plan of the total number, structure and layout of Internet cultural entities, and have lawful supply channel of Internet cultural works or capacity of producing internet cultural works; whoever applies to establish a commercial Internet cultural entity shall have a registered capital of more than RMB 1 million and at least eight professional technological personnel, such as internet management personnel or editors, and apply and process relevant formalities in the form of an enterprise. Whoever applies to establish a non-commercial internet cultural entity shall not go through the relevant formalities in the form of enterprise. Provisionally, application submitted by internet information service providers with foreign investment for engaging in internet cultural activities shall not be accepted.

	United States' Translation	China's Translation
<i>Network Music Opinions</i>	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.
