

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

**(AB-2009-3)**

**Appellee Submission of the United States of America**

October 19, 2009

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

**(AB-2009-3)**

**SERVICE LIST**

**APPELLANT**

H.E. Mr. Sun Zhenyu, Permanent Mission of the People's Republic of China

**THIRD PARTIES**

H.E. Mr. Peter Grey, Permanent Mission of Australia

H.E. Mr. Eckart Guth, Permanent Delegation of the European Commission

H.E. Mr. Shinichi Kitajima, Permanent Mission of Japan

H.E. Mr. Lee Sung-joo, Permanent Mission of Korea

Mr. Yi-Fu Lin, Permanent Mission of the Separate Customs Territory of Taiwan, Penghu,  
Kinmen and Matsu

## Table of Contents

Table of Reports.....	iv
Table of Abbreviations. ....	vi
I. Introduction. ....	1
II. The Panel Correctly Found that China’s Measures Are Not Justified by Article XX(a) of the GATT 1994. ....	2
A. Factual Background. ....	2
B. The Panel Correctly Found that Neither the State Ownership Requirement Nor the Exclusion of Foreign-Invested Enterprises Is “Necessary” Within the Meaning of Article XX(a). ....	6
1. The State Ownership Requirement. ....	6
(a) China’s Argument Concerning the Cost of the Content Review... .	6
(b) China’s Argument Concerning the Requirement for a Suitable Organization and Qualified Personnel. ....	10
(c) Conclusion on the State Ownership Requirement. ....	12
2. The Foreign-Invested Enterprise Exclusion. ....	13
C. The Panel’s Examination of the Impact of the Measures at Issue on Those Wishing to Engage in Importing Did Not Constitute Error. ....	16
D. The Panel Correctly Found that the WTO-Consistent Alternative Of Having the Chinese Government Conduct Content Review is Reasonably Available to China ....	19
1. Introduction. ....	20
2. The Panel Correctly Found that Having the Chinese Government Conduct Content Review is an WTO-Consistent Alternative that is Reasonably Available to China. ....	21
E. The Appellate Body Should Reject China’s Request for Completion of the Analysis. ....	30
III. The Panel Correctly Found that the Electronic Distribution of Sound Recordings is Within the Scope of China’s Commitments on Sound Recording Distribution Services ....	32
A. Factual Background. ....	32
B. The Panel Correctly Applied the Rules Reflected in Article 31 of the Vienna Convention in Interpreting China’s Services Commitment for Sound Recording Distribution Services. ....	34
1. The Panel Correctly Found that the Ordinary Meaning of “Sound Recording Distribution Services” Included the Electronic Distribution of Sound Recordings. ....	36

(a)	Ordinary Meaning of “Sound Recording”	36
(b)	Ordinary Meaning of “Distribution”	37
(c)	The Panel’s Ordinary Meaning Analysis is Supported by the Appellate Body’s Guidance in <i>U.S. – Gambling</i>	39
2.	The Panel Correctly Concluded that the Relevant Context Supported the Panel’s Interpretation of the Ordinary Meaning of “Sound Recording Distribution Services” as Encompassing the Distribution of Sound Recordings Stored on both Physical and Non-Physical Media	41
(a)	Contextual Analysis of Sector 2.D (Audiovisual Services) as a Whole in China’s Services Schedule	42
(b)	Contextual Analysis of China’s Sector 2.D Commitment on “Videos, including entertainment software and (CPC 83202), distribution services”	43
(c)	Contextual Analysis of Sector 4 in China’s Services Schedule: Distribution Services	48
(d)	Contextual Analysis of Article XXVIII(b) of the GATS	50
3.	The Panel’s Analysis of the Scope of China’s Commitment Accords with the “Object and Purpose” of the GATS	52
C.	The Panel Correctly Applied Article 32 of the Vienna Convention and Found that the Supplementary Means of Interpretation Confirmed its Analysis Under Article 31	55
IV.	The Panel Correctly Found that China’s Measures Restricting the Right to Import Films for Theatrical Release are Inconsistent with China’s Trading Rights Commitments	60
A.	Factual Background	60
B.	The Panel Correctly Found that the Relevant Measures Are Subject to China’s Trading Rights Commitments	62
1.	Introduction	62
2.	China Treats Films for Theatrical Release as Goods	63
3.	Goods Used to Provide a Service Are Still Goods	69
4.	China’s Right to Conduct Content Review Is Not Being Challenged	72
5.	Conclusion	73
V.	The Panel Correctly Found that China’s Measures Regulating Unfinished AVHE Products and Sound Recordings Are Inconsistent with China’s Trading Rights Commitments	74
A.	Factual Background	74
B.	Unfinished AVHE Products and Sound Recordings Are Goods	76
1.	China Treats Unfinished AVHE products and Sound Recordings as Goods	76
2.	Goods Used to Provide a Service Are Still Goods	77
3.	Conclusion	78

VI.	Conclusion.....	78
VII.	Executive Summary.....	79

### Table of Reports

Short Form	Full 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
<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
<i>Canada – Periodicals</i>	Appellate Body Report, <i>Canada – Certain Measures Concerning Periodicals</i> , WT/DS31/AB/R, adopted 30 July 1997
<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
<i>Greek Increase in Bound Duty</i>	GATT Group of Experts Report, <i>Greek Increase in Bound Duty</i> , L/580, 9 November 1956, unadopted
<i>Japan – Apples</i>	Appellate Body Report, <i>Japan – Measures Affecting the Importation of Apples</i> , WT/DS245/AB/R, adopted 10 December 2003
<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
<i>U.S. – Customs Bond Directive</i>	Appellate Body Report, <i>United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties</i> , WT/DS345/AB/R, adopted 1 August 2008
<i>U.S. – 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
<i>U.S. – 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

<i>U.S. – Countervailing Duty Investigation on DRAMS</i>	Appellate Body Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea</i> , WT/DS296/AB/R, adopted 20 July 2005
<i>U.S. – 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
<i>U.S. – 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
<i>U.S. – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996
<i>U.S. – Hot-Rolled Steel</i>	Panel Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/R, adopted 23 August 2001, as modified by Appellate Body Report, WT/DS184/AB/R
<i>U.S. – 1916 Act (Japan)</i>	Panel Report, <i>United States – Anti-Dumping Act of 1916, Complaint by Japan</i> , WT/DS162/R and Add.1, adopted 26 September 2000, as upheld by Appellate Body Report, WT/DS136/AB/R
<i>U.S. – Section 301</i>	Panel Report, <i>United States – Sections 301-310 of the Trade Act of 1974</i> , WT/DS152/R, adopted 27 January 2000
<i>U.S. – Softwood Lumber CVD Final</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

### Table of Abbreviations

Abbreviation	Description
Accession Protocol	<i>Protocol on the Accession of the People's Republic of China, WT/L/432</i>
Audiovisual Products Importation Rule	<i>Rules for the Management of the Import of Audiovisual Products (2002) (Exhibit US-17)</i>
2001 Audiovisual Products Regulation	<i>Regulations on the Management of Audiovisual Products (2001) (Exhibit US-16)</i>
Audiovisual (Sub-)Distribution Rule	<i>Rules for the Management of Chinese-Foreign Contractual Joint Ventures for the Sub-Distribution of Audiovisual Products (2004) (Exhibit US-18)</i>
AVHE Product	Audiovisual Home Entertainment Product
Catalogue	Catalogue of Industries for Guiding Foreign Investment (2007) (Exhibit US-5)
Circular on Internet Culture	The Circular of the Ministry of Culture on Relevant Issues of Implementation of the Interim Regulations on Internet Culture Administration and Notice of the Ministry of Culture on Some Issues Relating to Implementation of the "Interim Rules on the Management of Internet Culture" (2003) (Exhibit US-33)
CNPIEC	China National Publications Import & Export Corporation
DSU	<i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i>
Film Enterprise Rule	Provisional Rules on Entry Criteria for Operating Film Enterprises (2004) (Exhibit US-22)
Film Regulation	Regulations on the Management of Films (2001) (Exhibit US-20)
Foreign Investment Regulation	Regulations Guiding the Orientation of Foreign Investment (2002) (Exhibit US-9)
GAPP	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>



HS	Harmonized Commodity Description and Coding System
MOC	Ministry of Culture
Network Music Opinions	Several Opinions on the Development and Management of Network Music (2006) (Exhibit US-34)
Panel Report	Report of the Panel, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/R & Corr.1, circulated 12 August 2009
Publications Regulation	<i>Regulations on the Management of Publications, 2001</i> (Exhibit US-7)
SARFT	State Administration of Radio, Film and Television
Several Opinions	Several Opinions on the Introduction of Foreign Capital into the Cultural Sector (2005) (Exhibit US-6)
UNON	United Nations Office at Nairobi
Vienna Convention	<i>Vienna Convention on the Law of Treaties</i>
W/120	<i>Note by the Secretariat on the Services Sectoral Classification List</i> , MTN.GNS/W/120, dated 10 July 1991
Working Party Report	<i>Report of the Working Party on the Accession of China</i> , WT/MIN(01)/3

## I. Introduction

1. This dispute focuses on important commitments China made upon acceding to the WTO – to liberalize trading rights, trade in services and trade in goods related to films, DVDs, publications and sound recordings. The dispute reflects the deep concerns of the United States about problems in China’s legal regime governing the importation and distribution of these copyright-intensive products.

2. The Panel’s report<sup>1</sup> addressed every significant problem challenged by the United States, and found that important Chinese restrictions on the importation and distribution of the relevant products are inconsistent with China’s WTO obligations. *First*, the Panel found that China’s key importation restrictions on foreign films, DVDs, publications, and sound recordings were inconsistent with China’s obligations under the *Protocol on the Accession of the People’s Republic of China* (the “Accession Protocol”).<sup>2</sup> *Second*, the Panel found that China’s key prohibitions and discriminatory operating requirements imposed on foreign-invested distributors of publications, DVDs and sound recordings were inconsistent with China’s obligations under the *General Agreement on Trade in Services* (the “GATS”). *Third*, the Panel found key measures relating to the discriminatory treatment of imported reading materials to be inconsistent with China’s obligations under the *General Agreement on Tariffs and Trade 1994* (the “GATT 1994”).

3. China’s WTO commitments to open up trading rights for these products and to allow U.S. and other foreign distributors of sound recordings into its domestic market represent

---

<sup>1</sup> Report of the Panel, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R & Corr.1 (“Panel Report”).

<sup>2</sup> WT/L/432.

important commitments to open trade. They also constitute important tools to fight intellectual property piracy, because restricting the legitimate pathways to market simply gives pirates more sway in the marketplace for these popular products.

4. As detailed below, the Panel meticulously assessed the facts and arguments presented by both parties. The Panel report also carefully examined the scope of China’s commitments. In this appeal, China largely recycles many arguments that the Panel found wanting. For the reasons outlined in this submission, the Panel’s findings were sound, and China’s appeal should be denied.

## **II. The Panel Correctly Found that China’s Measures Are Not Justified by Article XX(a) of the GATT 1994**

### **A. Factual Background**

5. Paragraphs 5.1 and 5.2 of the Accession Protocol, as well as paragraphs 83 and 84 of the Working Party Report, contain China’s commitments on “trading rights.” In general terms, paragraph 5.1 provides that “all enterprises in China shall have the right to trade in all goods throughout the customs territory of China,”<sup>3</sup> and defines the right to trade as “the right to import and export goods.” Paragraph 5.2 of the Accession Protocol and paragraphs 83 and 84 of the Working Party Report contain additional commitments regarding trading rights, including a commitment to accord foreign individuals and enterprises treatment no less favorable than accorded to Chinese enterprises with respect to trading rights, commitments to grant trading rights in a non-discriminatory and non-discretionary way, and a commitment that any

---

<sup>3</sup> This obligation is subject to a phase-in period and a reservation of certain categories of goods to state trading, although neither of these applies to the U.S. claims in this dispute. The obligation is subject as well to the “without prejudice” clause at the beginning of paragraph 5.1.

requirements for obtaining trading rights would be for customs and fiscal purposes only.

Paragraph 1.2 of the Accession Protocol incorporates, *inter alia*, the commitments made by China in paragraphs 83 and 84 of the Working Party Report.

6. As relevant to this portion of China’s appeal, the matter before the Panel included claims by the United States that various provisions of the following measures are inconsistent with China’s trading rights obligations: the Catalogue and the Foreign Investment Regulation; the Several Opinions; the Publications Regulation; the 2001 Audiovisual Products Regulation; the Audiovisual Products Importation Rule; and the Audiovisual (Sub-)Distribution Rule. The Panel found these measures to be inconsistent with those obligations, as follows:

- Several requirements in Articles 41 and 42 of the Publications Regulation, including the requirement that only state-owned enterprises may import publications into China, which the Panel found to be inconsistent with paragraph 5.1 of the Accession Protocol and paragraphs 83(d) and 84(a) of the Working Party Report,<sup>4</sup> and the “designation” provision in Article 41, which the Panel found causes China to exercise discretion in the grant of trading rights and is therefore inconsistent with paragraph 84(b) of the Working Party Report;<sup>5</sup>
- Articles X.2 and X.3 of the Catalogue, taken in conjunction with Articles 3 and 4 of the Foreign Investment Regulation, which the Panel found prevent foreign-invested enterprises from importing any of the products at issue in this dispute (films for theatrical release, reading materials, and audiovisual products (including sound recordings)). The

---

<sup>4</sup> Panel Report, paras. 7.398, 7.401, and 7.706.

<sup>5</sup> Panel Report, paras. 7.436 and 7.706.

Panel therefore found these articles to be inconsistent with paragraph 5.1 of the Accession Protocol and paragraphs 83(d) and 84(a) of the Working Party Report;<sup>6</sup>

- Article 4 of the Several Opinions, which the Panel found results in foreign-invested enterprises being prevented from having the right to import any of the products at issue in this dispute (films for theatrical release, reading materials, and audiovisual products (including sound recordings)). The Panel therefore also found this article to be inconsistent with paragraph 5.1 of the Accession Protocol and paragraphs 83(d) and 84(a) of the Working Party Report;<sup>7</sup>
- Article 27 of the 2001 Audiovisual Products Regulation and Article 8 of the Audiovisual Products Importation Rule, each of which provides that enterprises that have not been “designated” may not engage in the importation of audiovisual products. The Panel found that these articles contain no criteria to guide “designation” and that “designation” is not automatic. Accordingly, the Panel found these articles to be inconsistent with paragraph 84(b) of the Working Party Report;<sup>8</sup> and
- Article 21 of the Audiovisual (Sub-)Distribution Rule, which the Panel found prevents Chinese-foreign contractual joint ventures from obtaining the right to import audiovisual products, and which the Panel therefore found to be inconsistent with paragraph 5.1 of the Accession Protocol and paragraphs 83(d) and 84(a) of the Working Party Report.<sup>9</sup>

7. China has not appealed any of the findings listed in the previous paragraph.

---

<sup>6</sup> Panel Report, paras. 7.351-7.352 and 7.706.

<sup>7</sup> Panel Report, paras. 7.374 and 7.706.

<sup>8</sup> Panel Report, paras. 7.633, 7.690, and 7.706.

<sup>9</sup> Panel Report, paras. 7.703 and 7.706.

8. Before the Panel, China asserted that, notwithstanding any inconsistencies with its trading rights commitments, the provisions at issue were justified by Article XX(a) of the GATT 1994.

The Panel considered this defense on an *arguendo* basis, drawing on the approach of the Appellate Body in the *U.S. – Customs Bond Directive* dispute. As the Panel said:

[W]e will 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). Should we find that this is the case, we would revert to the issue of whether Article XX(a) can, in fact, be directly invoked as a defence to a breach of China’s trading rights commitments under the Accession Protocol.<sup>10</sup>

9. The Panel ultimately concluded that none of the provisions that it had found to be inconsistent with China’s trading rights commitments was “necessary” within the meaning of Article XX(a) of the GATT 1994.<sup>11</sup> Consequently, the Panel declined to make a finding of whether or not Article XX(a) of the GATT 1994 can be invoked as a defense to an inconsistency with China’s trading rights obligations.<sup>12</sup>

10. China has appealed various, but not all, aspects of the Panel’s analysis of Article XX(a).<sup>13</sup> For the reasons given in this submission, China’s appeal lacks merit and should be rejected.<sup>14</sup>

---

<sup>10</sup> Panel Report, para. 7.745.

<sup>11</sup> Panel Report, paras. 7.911 and 7.913. In view of this finding, the Panel did not address the question of whether China’s measure satisfied the requirements of the chapeau to Article XX. Panel Report, para. 7.912.

<sup>12</sup> Panel Report, para. 7.914.

<sup>13</sup> We note that China has not appealed the Panel’s analysis under GATT Article XX(a) of the designation provisions in Article 41 of the Publications Regulation, Article 27 of the 2001 Audiovisual Products Regulation, and Article 8 of the Audiovisual Products Importation Rule.

<sup>14</sup> The responses by the United States to China’s appeal of the Panel’s analysis under Article XX(a) of the GATT 1994 are without prejudice to the question of whether Article XX(a) is applicable or provides a defense for China in this dispute.

**B. The Panel Correctly Found that Neither the State Ownership Requirement Nor the Exclusion of Foreign-Invested Enterprises Is “Necessary” Within the Meaning of Article XX(a)**

**1. The State Ownership Requirement**

11. As its first ground of appeal, China argues that the Panel incorrectly found that the state-ownership requirement in Article 42 of the Publications Regulation does not make a material contribution to China’s content review objectives. In fact, however, the Panel’s analysis of this issue was sound, and its conclusion correct.

12. China’s appellant submission divides this issue into two parts (although the Panel considered them in a single section of its report); this appellee submission follows China’s organization and takes up the two subparts separately.

**(a) China’s Argument Concerning the Cost of the Content Review**

13. China had the burden of proof with respect to any defense based on Article XX(a) of the GATT 1994.<sup>15</sup> China’s defense would fail if it could not prove that state ownership of the equity of importing entities was necessary to achieve its content review objectives.<sup>16</sup> China did not,

---

<sup>15</sup> *See, e.g.*, Appellate Body Report, *U.S. – Gambling*, para. 309 (“It is well-established that a responding party invoking an affirmative defence bears the burden of demonstrating that its measure, found to be WTO-inconsistent, satisfies the requirements of the invoked defence. In the context of Article XIV(a) [of the GATS], this means that the responding party must show that its measure is ‘necessary’ to achieve objectives relating to public morals or public order.”).

<sup>16</sup> In addition, China had to overcome the difficulty that in many contexts, content review is not performed by importers, but by a government agency. *See, e.g.*, China Answer to Panel Question 191 (“For electronic publications, audiovisual products and films for theatrical release, samples are firstly brought in through temporary importation procedures. These samples are submitted to relevant authorities for content review. After successful completion of content review, an importation approval will be issued.”); *see also* U.S. Answer to Panel Question 200, para. 102 (“requiring importers to conduct content review is not necessary because in fact China imposes no such requirement. Non-importing components of the Chinese Government are

(continued...)

however, meet this burden. China essentially repeated, in slightly different wording in different submissions to the Panel, the same assertion, without factual support. For example, China said:

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.”<sup>17</sup>

China did not, however, elaborate this argument. In particular, China never explained why these assertions were true, nor did it address what impact state equity ownership might have on content review.

14. China now argues that the Panel misrepresented China’s arguments, but China is incorrect. In the first place, the Panel described China’s argumentation thoroughly and accurately at the beginning of its analysis.<sup>18</sup> Moreover, while China alleges that the Panel

---

<sup>16</sup> (...continued)

currently responsible for the exclusive review of content of all of the products at issue in this dispute, except reading materials. . . .”). As the United States pointed out, in any situation where a government agency can conduct content review, the equity ownership of the importing entity is entirely unrelated to content review. *See, e.g.*, U.S. Second Oral Statement, para. 29. For that reason as well, the state-owned enterprise requirement, which China combines with the requirement that only importing entities may conduct content review, cannot be justified under Article XX(a). China’s argumentation concerning state-owned enterprises did not rebut this point. In the section of the Panel Report subject to this portion of China’s appeal, the Panel proceeded on the assumption that the importer would be responsible for content review, and found that – even on that assumption – the state ownership requirement did not make a material contribution to China’s content review objective. Panel Report, para. 7.863. We note, therefore, that if the Appellate Body were to reverse the Panel’s finding concerning the state ownership requirement, the Appellate Body could not complete the analysis of China’s Article XX(a) defense (as China has requested) without considering the contribution made by the requirement in Article 42 of the Publications Regulation that content review must be conducted by importers.

<sup>17</sup> China Answer to Panel Question 46(a).

<sup>18</sup> Panel Report, paras. 7.853 and 7.854 (summarizing and citing to China’s submissions on this issue).



reduced China’s arguments to “content review is costly,” citing one sentence in paragraph 7.854 of the Panel Report, China fails to point out that the sentence immediately following the one it cites captures China’s argument fully. The complete quote is as follows:

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. Accordingly, what we need to examine is the latter contention.<sup>19</sup>

15. Thus, the entire premise of China’s appeal is incorrect: the Panel did not misrepresent China’s argumentation.

16. Furthermore, contrary to China’s assertion on appeal, the Panel not only described China’s arguments, but also addressed those arguments. The Panel began by noting, correctly, that China was *not* arguing that only state-owned enterprises could carry out a public policy function;<sup>20</sup> instead, as is evident from China’s own formulations of its position, China always emphasized the allegedly substantial cost of carrying out that function. This aspect of China’s argument led the Panel to consider the role of the cost of content review and its relationship to the state ownership requirement. In this connection, the Panel made several observations, none of which China has challenged on appeal.

17. First, the Panel noted the similarities between the anticipated responses of both state-owned and non-state owned enterprises to an obligation to engage in content review. The Panel noted that the state-owned publication import entities who bore the costs of content review under China’s measures faced cost-based incentives related to these activities, just as non-state owned

---

<sup>19</sup> Panel Report, para. 7.854 (footnote omitted).

<sup>20</sup> Panel Report, para. 7.854.

enterprises would.<sup>21</sup> The Panel also noted that China had explained that state-owned enterprises' conduct of content review was policed, *inter alia*, through dissuasive sanctions; there was no basis for believing that state-owned and non-state-owned enterprises would not react similarly to the prospect of such sanctions.<sup>22</sup> Consequently, there was no basis on which the Panel could conclude that non-state-owned enterprises would be unable to achieve China's content review policy goals, given that they could be expected to face the cost-based incentives of China's measures and respond to China's regime of dissuasive sanctions just like state-owned enterprises.

18. Second, the Panel considered the very limited information that China had provided on the cost of content review.<sup>23</sup> The Panel noted first that China was unable to estimate the cost actually incurred. (The inability even to provide an *estimate* of the cost, of course, itself calls into question China's contention that its measures were based on the burdensomeness of imposing that cost on non-state-owned enterprises.) The Panel then examined the limited information it did have on one Chinese state-owned importer of publications. The Panel compared the cost incurred by that enterprise for content review to the value of the imported publications subject to that enterprise's review and found that it could not conclude that the cost, by itself, would dissuade privately-owned enterprises from entering the publication import business. While China now asserts that that statement was an "erroneous conclusion,"<sup>24</sup> China has articulated no reasoning in support of that assertion. Therefore, the Panel concluded that China's arguments

---

<sup>21</sup> Panel Report, para. 7.854.

<sup>22</sup> Panel Report, para. 7.854.

<sup>23</sup> As noted in paragraph 13 above, China had the burden of proof with respect to any defense based on Article XX(a) of the GATT 1994.

<sup>24</sup> China Appellant Submission, para. 18.

about the cost of content review did not support China’s assertion that only state-owned enterprises would be able to comply with China’s content review requirements or to contribute to the protection of public morals in China.<sup>25</sup>

19. Finally, the Panel also noted that non-state-owned enterprises routinely are required to bear the costs associated with complying with laws and regulations that serve a public policy function. As the Panel rightly noted, “[t]his indicates that the mere fact that certain costs, or taxes, are imposed on enterprises for public policy reasons does not imply that only wholly state-owned enterprises are able, or should be expected, to bear these costs.”<sup>26</sup>

20. In short, the Panel gave thorough and careful consideration to China’s contentions, and it conducted its review of those contentions on the basis of the evidence before it. For all of the reasons described above, the Panel properly concluded 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.”<sup>27</sup> The Panel’s reasoning was sound, and its finding should be upheld.

**(b) China’s Argument Concerning the Requirement for a Suitable Organization and Qualified Personnel**

---

<sup>25</sup> Panel Report, para. 7.857.

<sup>26</sup> Panel Report, para. 7.856 n.590. Indeed, while China asserted that non-state-owned enterprises could not be expected to pay for carrying out content review, China never explained why it could not let the market resolve this issue. If China removed the state ownership requirement, non-state-owned enterprises could make the decision whether or not they wished to enter the publication importation business and bear the costs of content review – just as enterprises wishing to enter any other line of business would consider whether they were willing to bear the costs of compliance with the relevant laws and regulations.

<sup>27</sup> Panel Report, para. 7.860.

21. China also asserts that the Panel misrepresented, and therefore failed to analyze properly, China’s argument that the state-owned enterprise requirement is justified by the need for publication import entities to have a suitable organization and qualified personnel (the “organization and personnel criterion”). This assertion does not withstand scrutiny either.

22. Before the Panel, China’s argumentation on this point was terse, at best. When asked by the Panel to explain why this criterion could not be met by non-state-owned enterprises, China simply said that this was “for the reasons stated above.”<sup>28</sup> In context, the most plausible meaning for “above” was a reference to China’s answer to the previous sub-question, in which China had stressed that it could not impose the costs of content review on non-state-owned enterprises. Given that context, China cannot now fault the Panel for having said the cost involved in complying with the organization and personnel criterion appeared to be the stated rationale for the criterion.<sup>29</sup>

23. It is true that China also alleged – though it provided no evidence to support this assertion – that state-owned enterprises are the only entities it “currently considered” to fulfill its organization and technical requirements.<sup>30</sup> In the first place, of course, a description of what entities China “currently consider[s]” to fulfill any requirements cannot, as a logical matter, establish that only those entities could fulfill those requirements. Nor did China provide any basis for the assertion that the state’s ownership of all of the equity in those entities is the reason

---

<sup>28</sup> China Answer to Panel Question 46(b).

<sup>29</sup> Panel Report, para. 7.858 (“China appears to suggest that this is because of the cost involved in satisfying the condition”) (citing China Answer to Panel Question 46(b)).

<sup>30</sup> Appellant Submission of China, para. 29 (quoting China Second Written Submission, para. 104).

why those entities meet the organization and personnel requirements. The absence of any argumentation or evidence in support of that proposition meant that the Panel was right not to accept it.

24. In any event, despite China’s assertions on appeal, the Panel did not limit itself to considering the cost of compliance with the organization and personnel criterion. The Panel also pointed out that state-owned publication import entities and Chinese publishing entities had to employ staff capable of understanding and applying content review standards; the Panel found “it was not convinced” that non-state-owned enterprises would be unable to attract qualified personnel or obtain the organizational know-how needed to conduct content review properly.<sup>31</sup> The Panel was right to reach this conclusion; China provided no factual or other basis for believing that having wholly state-owned equity was a prerequisite for obtaining such personnel or such know-how.

25. In short, contrary to China’s assertions on appeal, the Panel both understood and properly considered China’s (very limited) arguments on the organization and personnel criterion. Furthermore, the Panel rightly concluded that China’s arguments did not support China’s assertions, and that the organization and personnel criterion did not make a material contribution to China’s content review objectives. This finding by the Panel also should be upheld.

**(c) Conclusion on the State Ownership Requirement**

26. To summarize, the Panel properly grasped and considered the arguments that China advanced to defend the state ownership requirement in Article 42 of the Publications Regulation.

---

<sup>31</sup> Panel Report, para. 7.858 (noting that one state-owned importer of publications both hires and trains its content review staff). *See also* Exhibit CN-26, page 6.

The Panel’s analysis, as described in the two foregoing subsections, more than satisfied the Panel’s obligation under Article 11 of the DSU to “take account of the evidence before [it]” and to make an objective assessment of China’s assertions.<sup>32</sup> Furthermore, the Panel reached the correct conclusion with respect to Article XX(a) of the GATT 1994: China’s state-ownership requirement does not make a material contribution to achieving China’s content review objectives and is not “necessary” (within the meaning of Article XX(a) of the GATT 1994) to the protection of public morals in China. China’s appeal on this issue therefore should be rejected.

## **2. The Foreign-Invested Enterprise Exclusion**

27. The Panel also concluded that a number of China’s measures prohibiting foreign-invested enterprises from engaging in importation of particular products were inconsistent with China’s trading rights obligations, specifically: Articles X.2 and X.3 of the Catalogue, in conjunction with Articles 3 and 4 of the Foreign Investment Regulation;<sup>33</sup> Article 4 of the Several Opinions;<sup>34</sup> and Article 21 of the Audiovisual (Sub-)Distribution Rule.<sup>35</sup> The Panel then considered, but ultimately rejected, China’s argument that these inconsistencies were “necessary” to protect public morals in China, within the meaning of Article XX(a) of the GATT 1994.<sup>36</sup>

28. As noted, each of these provisions prohibits foreign-invested enterprises from engaging in importation of the products to which it applies. On its face, the exclusion of “foreign-invested

---

<sup>32</sup> See, e.g., Appellate Body Report, *U.S. – Carbon Steel*, para. 142. See also Appellate Body Report, *Brazil – Retreaded Tyres*, para. 202 (“A panel enjoys discretion in assessing whether a given piece of evidence is relevant for its reasoning, and is not required to discuss, in its report, each and every piece of evidence”) (footnotes omitted).

<sup>33</sup> Panel Report, paras. 7.351-7.352 and 7.706.

<sup>34</sup> Panel Report, paras. 7.374 and 7.706.

<sup>35</sup> Panel Report, paras. 7.703 and 7.706.

<sup>36</sup> Panel Report, para. 7.868.

enterprises” appears different from an exclusion of non-state-owned enterprises, in that privately held but wholly Chinese-owned enterprises are not “foreign-invested.” The Panel found, however, in each case, that it was plausible that the exclusion of foreign-invested enterprises reflected an underlying prohibition on non-state-owned enterprises from engaging in importation of the relevant products.<sup>37</sup>

29. Following this line of reasoning, and having already concluded that the state ownership requirement could not be considered to make a material contribution to China’s content review objectives, the Panel considered that the foreign-invested enterprise exclusions also could not be considered to make a material contribution to those objectives.<sup>38</sup>

30. On appeal, China first argues that the Panel’s allegedly erroneous analysis of the state ownership requirement also makes the Panel’s analysis of the foreign-invested enterprise exclusion erroneous. For the reasons given in the previous subsections of this submission, however, the Panel’s analysis of the state ownership requirement was correct, and therefore this Chinese argument should be rejected.<sup>39</sup>

---

<sup>37</sup> Panel Report, paras. 7.773 (Catalogue and Foreign Investment Regulation), 7.776 (Several Opinions), and 7.779 (Audiovisual (Sub-)Distribution Rule).

<sup>38</sup> Panel Report, para. 7.865.

<sup>39</sup> In fact, as the Panel pointed out (though China does not address this point in its appeal), China’s argumentation is “even less convincing” with respect to electronic publications and finished audiovisual products, because it is Chinese government agencies, not the importing entities, that make the final content review decisions for these products. Panel Report, para. 7.865 n.594; *see also* China Answer to Panel Question 191 (confirming that the final content review of electronic publications and finished audiovisual products is performed by the relevant Chinese authorities). Because government agencies make those decisions, there is no link of any kind between importation and content review, let alone a link between the equity ownership of the importing entity and content review.

31. China also argues that foreign-invested enterprises “may not have” the required understanding of public morals and knowledge of the applicable standards of public morals to ensure the necessary level of protection sought by China.<sup>40</sup> In the first place, it is not clear that China presented this argument to the Panel, and China provides no citation for it.<sup>41</sup> Second, this argument suffers from a defect similar to the one discussed in paragraph 23 with respect to the state-owned enterprise requirement<sup>42</sup>: China’s impression that such enterprises “may not have” certain qualifications does not, as a logical matter, lead to the conclusion that such enterprises do not or could not have them.

32. Third, China is wrong to argue that the Panel’s finding is inconsistent with an earlier Panel finding concerning Article 42 of the Publications Regulation. The Panel did find that the requirement in Article 42 concerning qualified content review personnel makes a material contribution to China’s content review objectives. However, China provides no reason to believe that foreign-invested enterprises would be unable to hire such personnel. Indeed, the Panel reached precisely the opposite conclusion in its discussion of the state ownership requirement,<sup>43</sup> but China does not address this point. There is thus no contradiction between the Panel’s finding

---

<sup>40</sup> China Appellant Submission, para. 34.

<sup>41</sup> China argued to the Panel, without factual support, that “foreign” entities may not have the requisite understanding and knowledge. While the United States does not agree with that argument, the United States notes that the measures in question apply to “foreign-invested” enterprises, which can include an entity that combines both Chinese and non-Chinese investment.

<sup>42</sup> To recall, China’s assertion in that connection was that the only entities that it “currently considered” to fulfill its organization and technical requirements were state-owned enterprises.

<sup>43</sup> Panel Report para. 7.858, and *see* paragraph 24 above.



on the foreign-invested enterprise exclusion and its finding on the qualified content review personnel requirement.

33. For all the foregoing reasons, the Panel was correct to find that the foreign-invested enterprise exclusions in the Catalogue and Foreign Investment Regulation, the Several Opinions, and the Audiovisual (Sub-)Distribution Regulation do not contribute to the protection of public morals in China, and its analysis of China’s arguments satisfied the requirements of Article 11 of the DSU. Therefore, China’s appeal of this finding should be rejected.

**C. The Panel’s Examination of the Impact of the Measures at Issue on Those Wishing to Engage in Importing Did Not Constitute Error**

34. As its next ground of appeal, China contends that the Panel’s Article XX(a) analysis should not have considered the restrictive impact of its measures on those wishing to engage in importation of the products at issue, and that therefore the Panel’s findings that the measures at issue are not “necessary” are flawed. China’s contention is incorrect.

35. First, China’s argument is fundamentally beside the point. For each of the measures that is the subject of this part of China’s appeal,<sup>44</sup> the Panel reached the conclusion that the measure did not make a contribution to the achievement of China’s content review objectives. That conclusion alone supports the Panel’s ultimate conclusion that the measures were not “necessary” within the meaning of Article XX(a) of the GATT 1994.

---

<sup>44</sup> China’s Appellant Submission does not, in fact, explicitly identify these measures. The measures discussed here are the ones that are discussed in the Panel Report paragraphs cited in the submission and in footnote 6 of China’s notice of appeal: the designation requirements in Article 41 of the Publications Regulation, Article 27 of the 2001 Audiovisual Products Regulation, and Article 8 of the Audiovisual Products Importation Rule; the state ownership requirement in Article 42 of the Publication Regulation; and the foreign-invested enterprise exclusion in the Catalogue, the Several Opinions, and the Audiovisual (Sub-)Distribution Rule.

36. Thus, with respect to the designation requirement in Article 41 of the Publications

Regulation,<sup>45</sup> the Panel found that:

we are not convinced, based on China’s explanation, that the designation requirement applicable in the newspaper and periodicals sectors makes an independent contribution to the protection of public morals in China. As stated by China, the designation requirement is imposed to ensure that newspapers and periodicals are reviewed efficiently and with a view to avoiding unnecessary delays, which is important notably in the case of publications that appear daily. This efficiency aspect appears to relate to the effect on trade of the content review carried out by publication import entities, not to how effective their content review is in protecting public morals.<sup>46</sup>

37. This finding makes clear, by itself, that the designation requirement in Article 41 is not “necessary” to protect public morals in China.

38. With respect to the designation requirements in Article 27 of the 2001 Audiovisual Products Regulation and Article 8 of the Audiovisual Products Importation Rule, the Panel found that “[w]e are not persuaded . . . that restricting the right to import finished audiovisual products in a discretionary way makes a greater contribution than would be the case under an approval system similar to the one applied by China for books and electronic publications.”<sup>47</sup> The United States did not challenge the WTO-inconsistency of the approval system for books and electronic publications as such.<sup>48</sup> By contrast, the United States challenged the designation requirement,

---

<sup>45</sup> Under the designation provision of Article 41, GAPP “is free to decide whom it wishes to designate” and “there is no application process.” Panel Report, paras. 7.434 and 7.436. The designation requirements in Article 27 of the 2001 Audiovisual Products Regulation and Article 8 of the Audiovisual Products Importation Rule, discussed below, operate in a similar fashion.

<sup>46</sup> Panel Report, para. 7.842.

<sup>47</sup> Panel Report, para. 7.844. The term “approval system” refers to the application of criteria such as those in Article 42 of the Publications Regulation for books. *See, e.g.*, Panel Report, para. 7.392. By contrast, “designation” does not involve the application of such criteria.

<sup>48</sup> *E.g.*, Panel Report, para. 7.396. Of course, the United States did successfully

(continued...)

and the Panel found it to be inconsistent with China’s trading rights commitments.<sup>49</sup>

Consequently, the Panel essentially found that using a WTO-inconsistent designation system was not “necessary” to achieve China’s content review objectives; the unchallenged approval system would contribute just as well to achieving them.

39. Finally, with respect to the two “exclusion” provisions (*i.e.*, the state ownership requirement in Article 42 of the Publication Regulation and the foreign-invested enterprise exclusion in the Catalogue, the Several Opinions, and the Audiovisual (Sub-)Distribution Rule), the Panel found that neither of them contributes to the protection of public morals.<sup>50</sup>

40. In each case, therefore, the Panel’s findings concerning the measures’ lack of contribution to the protection of public morals in China suffice to sustain the Panel’s conclusion that these provisions are not “necessary” to protect public morals within the meaning of Article XX(a) of the GATT 1994. Thus, the Panel’s conclusion would hold, even without the Panel’s discussion and findings concerning trade restrictiveness. For this reason, China is wrong to argue 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.”<sup>51</sup> To the contrary, it was the failure of the measures at issue to make a contribution to China’s content review policy objectives that led to the conclusion they cannot be justified under Article XX(a).

---

<sup>48</sup> (...continued)  
challenge certain of the specific criteria used in the approval system, such as the state ownership requirement.

<sup>49</sup> *E.g.*, Panel Report, paras. 7.633 and 7.690.

<sup>50</sup> Panel Report, paras. 7.860 and 7.865. *See also* the discussion in Part II(B) *supra*.

<sup>51</sup> China Appellant Submission, para. 43.

41. Second, China fails to recognize that the Panel was adapting the “weighing and balancing” approaches taken by the Appellate Body in *U.S. – Gambling* and *Brazil – Retreaded Tyres* to the particular situation it confronted in this dispute. In this connection, it bears recalling that 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 (and in particular, enterprises wishing to engage in the importation of certain goods), rather than an inconsistency regarding China’s obligations concerning the treatment of goods.

42. Consequently, to the extent that the Panel considered as one factor the restrictive effects of the measures being examined,<sup>52</sup> it was logical for the Panel to consider the effects on *enterprises*. China is therefore wrong to argue that the Panel’s Article XX(a) findings are flawed because the Panel did so.<sup>53</sup>

43. For the foregoing reasons, this ground of China’s appeal should be rejected as well.

**D. The Panel Correctly Found that the WTO-Consistent Alternative Of Having the Chinese Government Conduct Content Review is Reasonably Available to China**

44. In its final ground of appeal concerning the Panel’s analysis of Article XX(a) of the GATT 1994, China contends that the Panel incorrectly evaluated one of the alternatives that the

---

<sup>52</sup> However, as noted in the previous paragraphs of this section, the Panel’s findings about the measures’ lack of contribution to China’s objectives sufficed to sustain the Panel’s ultimate finding.

<sup>53</sup> China’s citation to the *U.S. – Gasoline* Appellate Body report is also inapposite. In the sentence cited by China, the Appellate Body criticized the panel for examining whether *the less favorable treatment* was primarily aimed at the conservation of natural resources, rather than whether *the challenged measure* was primarily aimed at the conservation of natural resources. In the first part of the Panel’s analysis in this dispute, however, the Panel properly examined whether China’s measures are “necessary” to the protection of public morals. The Panel’s examination of the impact and degree of restrictiveness was a separate inquiry.

United States had proposed to certain of China’s WTO-inconsistent measures. China’s contentions, however, are incorrect.

### **1. Introduction**

45. Earlier in its report, the Panel had concluded, *inter alia*, that the following two requirements in Article 42 of the Publication Regulation were inconsistent with China’s trading rights obligations:

- The condition that publications import entities must maintain a suitable organization and qualified personnel (the “organization and personnel condition”), which the Panel found to be inconsistent with paragraph 5.1 of the Accession Protocol and paragraphs 83(d) and 84(a) of the Working Party Report;<sup>54</sup> and
- The condition that publication import entities can be approved only in conformity with the undisclosed State plan for the number, structure, and distribution of publication import entities (the “State plan condition” or “State plan requirement”), which the Panel found to be inconsistent with paragraph 5.1 of the Accession Protocol and paragraphs 83(d) and 84(a) of the Working Party Report.<sup>55</sup>

46. The Panel then turned to China’s attempt to justify these requirements under Article XX(a) of the GATT 1994, which the Panel considered on an *arguendo* basis pending a possible subsequent determination of whether that defense was even available to China with respect to the Accession Protocol and Working Party Report inconsistencies that the Panel had identified.<sup>56</sup>

---

<sup>54</sup> Panel Report, paras. 7.411 and 7.706.

<sup>55</sup> Panel Report, paras. 7.411 and 7.706.

<sup>56</sup> Paragraph 8 of this submission describes the Panel’s “*arguendo*” approach in more

(continued...)

The Panel made intermediate findings that both of these requirements were, in the absence of reasonably available alternatives, “necessary” (within the meaning of Article XX(a) of the GATT 1994) to protect public morals in China.<sup>57</sup>

47. The Panel then considered whether there were WTO-consistent alternatives to the two inconsistent requirements that would change its intermediate conclusion that those requirements were “necessary” within the meaning of Article XX(a), and that would be reasonably available to China.<sup>58</sup> The United States had proposed several possible WTO-consistent alternatives.<sup>59</sup> The Panel focused on one: the U.S. proposal that the Chinese Government – rather than wholly state-owned publication import entities – could conduct the review of relevant products imported into China.<sup>60</sup>

**2. The Panel Correctly Found that Having the Chinese Government Conduct Content Review is an WTO-Consistent Alternative that is Reasonably Available to China**

---

<sup>56</sup> (...continued)  
detail.

<sup>57</sup> Panel Report, paras. 7.828 and 7.836. The United States has appealed the Panel’s finding with respect to the State plan condition.

<sup>58</sup> Panel Report, 7.900. As China notes, the Panel drew on the approaches followed by the Appellate Body in its reports on *U.S. – Gambling* and *Brazil – Retreaded Tyres* in pursuing this examination. Panel Report, paras. 7.870-7.872.

<sup>59</sup> The United States proposed several alternatives in addition to the one that the Panel examined: 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, whom importers would engage to conduct content review before, during or after importation. Panel Report, paras. 7.873 to 7.875; *see also* U.S. Second Oral Statement, para. 25. Each of these alternatives would achieve China’s objectives of protecting public morals, and each is reasonably available to China.

<sup>60</sup> Panel Report, para. 7.887.

48. China does not argue on appeal that the proposed alternative would not allow China to achieve its objectives with respect to content review. Indeed, the Panel’s analysis of how this alternative would do so is compelling:

We first consider the contribution made by the US proposal to the realization of the objective pursued by China, i.e., the protection of public morals in China. More specifically, we consider whether a requirement that relevant products must be submitted to the Chinese Government for content review before they may be imported into China would make an equivalent contribution to the one made by the relevant provisions. In this respect, it is clear to us that such a requirement would make a material contribution to the protection of public morals in China. By requiring that products to be imported must be submitted to the Chinese Government for review, and specifically to qualified governmental content reviewers, China could have adequate confidence that the content review is carried out in accordance with the applicable rules. The Government could also easily ensure the consistent application of the rules on content review. Thus, if the Chinese Government had sole responsibility for content review, this would, in our view, ensure that no products with prohibited content are imported into China. It is therefore not apparent that this particular US proposal would not allow China to achieve its desired level of protection of public morals. In other words, we are not convinced that the US proposal does not constitute a ‘genuine alternative’, in the sense that it is an alternative which China could not reasonably be expected to employ, taking into account China’s desired level of protection.<sup>61</sup>

49. Instead, China focuses its appeal on whether the proposed alternative was “reasonably available” to China.<sup>62</sup> China’s principal argument is that adopting the Panel’s proposal would impose an undue burden on China, in that China does not have either the capacity or the resources required to perform the full range of functions associated with the content review of reading materials.<sup>63</sup> China’s argument does not, however, withstand scrutiny.

---

<sup>61</sup> Panel Report, para. 7.888.

<sup>62</sup> China Appellant Submission, paras. 54, 70.

<sup>63</sup> In connection with this statement and other similar ones by China, we note that they are mere assertions; China did not submit evidence to support them. The United States recalls that the Appellate Body has found that “[i]f . . . the complaining party raises a WTO-consistent

50. In fact, the evidence before the Panel established that the Chinese Government does have the capacity to carry out content review. As the United States explained and the Panel noted, Chinese authorities already carry out the content review of films imported for theatrical release and the content review of electronic publications and audiovisual products (including sound recordings).<sup>64</sup> These facts establish that China is entirely capable of having its authorities conduct content review.<sup>65</sup>

51. Furthermore, with respect to reading materials in particular (to which Article 42 of the Publications Regulation applies), GAPP also performs several functions that establish its capacity to conduct content review. First, pursuant to Article 45 of the Publications Regulation, publication import entities submit to GAPP catalogues of all the publications they plan to import; GAPP reviews the catalogues and advises whether any of those publications are prohibited. Second, pursuant to Article 44 of the Publications Regulation, GAPP may directly examine the

---

<sup>63</sup> (...continued)

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, in fact, “reasonably available”. Appellate Body Report, *U.S. – Gambling*, para. 311 (emphasis added).

<sup>64</sup> Panel Report, para. 7.901.

<sup>65</sup> In this connection, the United States also recalls the reasoning of the Appellate Body in paragraph 172 of its report on *Korea – Various Measures Affecting Beef*:

The application by a Member of WTO-compatible enforcement measures to the same kind of illegal behavior . . . for like or at least similar products, provides a suggestive indication that an alternative measure which could “reasonably be expected” to be employed may well be available. The application of such measures for the control of the same illegal behavior for like, or at least similar, products raises doubts with respect to the objective necessity of a different, much stricter, and WTO-inconsistent enforcement measure.



contents of any publication imported by a publication importing entity. While China suggests that this possibility of direct examination is secondary to the content review role played by the importing entity, the possibility of this review by GAPP means that GAPP must have the capacity to perform it. Third, again pursuant to Article 44 of the Publications Regulation, a publication import entity can request GAPP to examine the contents of any publication to determine whether the contents are permitted or prohibited. Once again, the possibility of this review by GAPP means that GAPP must have the capacity to perform it.

52. As for China’s assertions about resources, the evidence before the Panel does not support them either. First, as the Panel noted, 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, nor why the burden of content review would be undue when compared to the burden of such things as conducting health and safety inspections or other similar measures at the border.<sup>66</sup>

53. Second, China also does not respond to, or rebut, the Panel’s assessment that China could, if necessary, charge fees to defray any additional expense incurred if it assumed responsibility for conducting content review of reading materials.<sup>67</sup> Indeed, as the Panel noted,<sup>68</sup> under Article 44 of the Publications Regulations, GAPP already has the legal authority to charge fees. Given that this legal authority exists already, it cannot be “unreasonable” for China to use it, if necessary.

---

<sup>66</sup> Panel Report, para. 7.905. See also paragraph 13, *supra*.

<sup>67</sup> Panel Report, para. 7.905.

<sup>68</sup> Panel Report, para. 7.905.

54. Third, China does not respond to – let alone rebut – the Panel’s point that China’s cost argument is at least partially refuted by the link that China itself draws between the cost of content review and the fact that the Government of China owns 100% of the equity in the entities conducting content review. As the Panel noted, China argues that the costs of content review are “substantial” and a “burden,” and therefore China believes it can impose them only on enterprises in which it owns all of the equity, but not on private investors.<sup>69</sup> It therefore appears that China is arguing that the costs of content review are ultimately borne by the providers of capital; and that while private capital should not bear those costs, state-owned capital is doing so. In that case, as the Panel noted, the Government of China is in effect already financing the content review of imported publications.<sup>70</sup> Thus, implementation of the proposed alternative, which would transfer the content review from state-owned importing entities to Chinese Government officials, would relieve a burden that, according to China, state-owned capital bears – and that relief in turn could offset any financial burden that the Government would be assuming by conducting content review. As the Panel noted, “[t]o that extent, it is not apparent to us that the cost to the Chinese Government would be any higher if the US proposal were implemented. To recall, the main difference would be that content review would be conducted, not by incorporated wholly state-owned enterprises, but by non-incorporated offices comprising the Government of China.”<sup>71</sup>

---

<sup>69</sup> Panel Report, para. 7.904 (citing China Answers to Panel Questions 46(a) and 188(b)).

<sup>70</sup> Panel Report, para. 7.904.

<sup>71</sup> Panel Report, para. 7.904.

55. China also appears to argue that the proposed alternative would impose an undue burden, because it would require creation of a new structure within its government to replace contributions made by first-level content reviewers in the current publication import entities. The fact that the proposed alternative would require a different structure from China’s current structure does not, however, make the proposed alternative infeasible. For example, as the Appellate Body reasoned in its report on *Korea – Various Measures Affecting Beef*: “We are not persuaded that Korea could not achieve its desired level of enforcement of the *Unfair Competition Act* with respect to the origin of beef sold by retailers by using conventional WTO-consistent enforcement measures, *if Korea would devote more resources to its enforcement efforts on the beef sector.*”<sup>72</sup> In this connection, it bears recalling that the proposed alternative must be *reasonably* available. The mere fact that a proposed alternative requires a change does not disqualify the alternative. Indeed, by definition, any reasonably available alternative will be different in some respect from the existing situation.

56. China also argues, without any factual support, that if government agencies took on content review, an undue burden would stem from the training and assignment of qualified content reviewers in numerous locations with a wide geographic coverage. First, it is not all apparent why the Chinese Government should have difficulty operating in multiple locations, and China provides no basis to accept the proposition that this would be the case for content review. In any event, it is important to note that each of the reviews under Articles 44 and 45 of the

---

<sup>72</sup> Appellate Body Report, *Korea – Various Measures Affecting Beef*, para. 180 (emphasis added) (replacement of a dual retail system with enhanced enforcement measures was found to constitute a reasonably available alternative).

Publications Regulation (described in paragraph 51 above) may be conducted “at the provincial level or above.” Similarly, paragraph V(1) of the *Notice on Approving and Issuing License for Importing Publications and Carrying Out Annual Inspection System* provides that the annual inspections of publications import entities’ compliance with content review are conducted, in the first instance, by authorities at the provincial level.<sup>73</sup> The requisite capacity to conduct content review of reading materials, including the personnel and expertise, is thus already present across China, and is not limited to a single, central location within the Chinese Government. This fact alone means that there is no basis to suggest that it would be unreasonable for China to have content review offices in multiple locations.

57. Second, in this connection the Panel also considered the possibility that for some reading materials, content review could be done electronically in a central location, if that were thought desirable or efficient. The Panel recalled that China informed the Panel that content review of books, newspapers and periodicals is based on “samples and other information” and that their content is double-checked on customs clearance.<sup>74</sup> On appeal, China criticizes the Panel for allegedly failing to take into account that a double check would be impossible if the content review were carried out centrally.

58. It is not clear, however, why Chinese customs officials could not coordinate with Chinese content review officials in this situation. But in any case, China has overlooked the fact that the model described by the Panel is essentially the same as the one described by the wholly state-owned China National Publications Import & Export Corporation (CNPIEC) in its 2006 report

---

<sup>73</sup> Exhibit CN-22.

<sup>74</sup> Panel Report, para. 7.891 (quoting China Answer to Panel Question 191).

on operations: “In the CNPIEC, the parent company and every branch communicate with each other smoothly, and the result of the review can be forwarded to the distribution personnel in the front line by phone or mail as soon as the review is finished so as to ensure imported newspapers and periodicals of the day can be delivered to market in time. . . . The full time censor reads and reviews the internet version of the publication everyday to get a general idea about the publication, which greatly shortens the duration of content review.”<sup>75</sup> The fact that the state-owned CNPIEC has implemented such a system also rebuts China’s assertion that implementing it would raise substantial technical difficulties for the Chinese Government.

59. China also suggests that it cannot devote the resources to conduct content review of the large number of imported publications. Again, it is not clear why this would be so for content review but not for other kinds of inspection (such as health and safety inspections) conducted at the border. In any case, the information that it supplied to the Panel belies that contention.

China told the Panel that “[f]or periodicals, 36032 titles were imported in 2002 and 45178 in 2006. For audiovisual products, 11464 titles were imported in 2002 and 31123 in 2006.”<sup>76</sup>

Under Article 28 of the 2001 Audiovisual Products Regulation, the Chinese authorities conduct the content review of audiovisual products.<sup>77</sup> China’s import statistics thus make clear that the Chinese authorities are able to perform content review of large numbers of audiovisual imports – including, in 2006, approximately two-thirds of the number of publications that entered China.

---

<sup>75</sup> Exhibit CN-26, page 5.

<sup>76</sup> China First Written Submission, para. 226.

<sup>77</sup> China Answer to Panel Question 191, footnote 21.

While the numbers would increase if China took over content review of publications as well, this information demonstrates that China has the ability to manage content review on a large scale.

60. Separately, China also argues that the Panel “failed to establish” that a proposed alternative would be less trade-restrictive than the measure at issue (in this case, the State plan condition and the organization and personnel condition).<sup>78</sup> The premise of China’s argument (that it was necessary for the Panel to establish that a proposed alternative would be less trade-restrictive than the measures at issue) is mistaken, however. The Panel followed the approaches taken in *U.S. – Gambling* and *Brazil – Retreaded Tyres* and engaged in a weighing and balancing of various factors. On that basis, the Panel concluded that its WTO-consistent proposed alternative, which materially contributes to the policy objective sought, demonstrated that the measures at issue were not necessary within the meaning of Article XX(a).<sup>79</sup> The Panel’s conclusion was sound.

61. In conclusion, the Panel conducted a thorough and thoughtful analysis of whether its proposed alternative was “reasonably available” to China; contrary to China’s allegations on appeal, that analysis more than met the Panel’s obligation to conduct an objective assessment in accordance with Article 11 of the DSU. The Panel’s conclusion was correct, and should be upheld.

---

<sup>78</sup> China Appellant Submission, paras. 71-75.

<sup>79</sup> We note that China does not contest the proposition that the Panel’s proposed alternative would be WTO-consistent. China also does not contest the Panel’s conclusion that the proposed alternative would contribute to China’s policy objectives at least as well as the Chinese measures at issue. As the Panel stated, “[w]e see 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.” Panel Report, para. 7.907. The United States agrees.

**E. The Appellate Body Should Reject China’s Request for Completion of the Analysis**

62. In paragraphs 76 and 77 of its appellant submission, China conditionally requests the Appellate Body to complete its analysis on three issues: whether the other alternatives proposed by the United States are “genuine” and “reasonably available”; whether China’s measures at issue comply with the requirements of the chapeau to Article XX of the GATT 1994; and whether Article XX(a) is available to China as a defense with respect to the inconsistency of China’s measures with China’s trading rights commitments. All three of these issues are ones on which China bears the burden of proof.

63. China conditions this request on the Appellate Body’s finding that China’s measures are “necessary” within the meaning of Article XX(a) of the GATT 1994. For the reasons given in the foregoing subparts of this submission, the Appellate Body should not make that finding. Consequently, the condition is not fulfilled, and the Appellate Body should not complete the analysis on any of the issues identified by China.

64. The Appellate Body should also reject China’s request for another reason. China has failed, for each of those three issues, to identify the “factual findings by the Panel [or] undisputed facts in the Panel record”<sup>80</sup> that would enable the Appellate Body to complete the analysis with regard to any of these issues. Although China cites to various paragraphs in its first and second written submissions to the Panel, none of those paragraphs establishes that any of the allegations in them was “undisputed” by the United States. Moreover, because these submissions were made before the Panel issued its report, they obviously do not identify any factual findings by the

---

<sup>80</sup> Appellate Body Report, *U.S. – Softwood Lumber CVD Final*, para. 118.

Panel. China has thus left to the Appellate Body the entire burden of identifying the means by which the Appellate Body could complete the analysis. Moreover, China has potentially put the United States in the position of having to respond for the first time at the oral hearing to China's asserted factual basis for completion of the analysis of these issues; an oral hearing is not well suited to addressing such an assertion for the first time.<sup>81</sup>

65. Thus, because China has failed to identify factual findings or undisputed facts that could serve as the basis for the completion of the analysis, the Appellate Body should not complete the analysis on any of the three issues that China has specified.<sup>82</sup>

---

<sup>81</sup> Similar situations have arisen in the past. For example, in the *U.S. – Countervailing Duty Investigation on DRAMS* dispute, in which Korea requested the Appellate Body to complete the analysis during the oral hearing, the Appellate Body reasoned as follows:

Furthermore, we do not consider that the participants have addressed sufficiently, in their submissions, those issues that we might need to examine if we were to complete the analysis in this case, including, for example: (i) whether the probative value of certain pieces of evidence is affected by our modification of the Panel's interpretation of the terms "entrusts" and "directs"; (ii) the probative value of the United States evidence improperly excluded by the Panel; (iii) the relevance of certain factual disagreements that the Panel considered unnecessary to resolve in the light of its legal analysis; and (iv) the inferences that may reasonably be drawn from an analysis of the evidence in its totality. In these circumstances, we believe it is more appropriate to limit our examination to a review of the issues of law covered in the Panel Report and the legal interpretations developed by the Panel.

Appellate Body Report, *U.S. – Countervailing Duty Investigation on DRAMS*, para. 197.

<sup>82</sup> Should the Appellate Body nevertheless seek to complete the analysis, we note here some of the submissions in which the United States responded to the allegations that China refers to in the footnotes to paragraph 77 of its appellant submission, without prejudice to additional arguments that the United States might make in response to questions or discussion at the oral hearing:

- The United States responded to the arguments mentioned in footnote 58 in, *e.g.*, paragraphs 25-37 of its Second Oral Statement. *See also* Panel Report, para. 7.909.

(continued...)



66. For all of these reasons, the Appellate Body should reject China’s request to complete the analysis.

**III. The Panel Correctly Found that the Electronic Distribution of Sound Recordings is Within the Scope of China’s Commitments on Sound Recording Distribution Services**

**A. Factual Background**

67. Under market access for mode 3 (commercial presence) in Sector 2.D of its Services Schedule, China scheduled a commitment covering Chinese-foreign contractual joint ventures engaging in sound recording distribution. China scheduled no national treatment limitations with respect to this mode 3 commitment.

68. In light of this commitment, the United States challenged certain provisions of, *inter alia*, the Circular on Internet Culture<sup>83</sup>, Network Music Opinions, Several Opinions, Foreign Investment Regulation, and Catalogue as inconsistent with Article XVII of the GATS.

69. Article XVII of the GATS provides that “[i]n the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of

---

<sup>82</sup> (...continued)

- The United States responded to the arguments mentioned in footnote 59 in, *e.g.*, paragraphs 36-39 of its First Oral Statement, paragraphs 50-57 of its Second Written Submission, and paragraph 38 of its Second Oral Statement.
- The United States responded to the arguments mentioned in footnote 60 in, *e.g.*, paragraphs 27-31 of the U.S. First Oral Statement; paragraphs 57-59, 68-71, and 83-86 of its Answers to Panel Questions 19, 50(a), 50(b), and 52; and paragraph. 39-42 of the U.S. Second Written Submission, paragraphs 16-22 of its Second Oral Statement, paragraphs 49-51 of its Answer to Panel Question 160(a), and paragraph 83 of its Comments on China’s Answer to the Second Set of Questions from the Panel.

<sup>83</sup> Before the Panel, the United States referred to this measure as the Internet Culture Notice.

services, treatment no less favourable than that it accords to its own like services and service suppliers.”

70. The relevant measures, individually and taken together, prohibit foreign investment in the electronic distribution of sound recordings (*e.g.*, the distribution of sound recordings over the Internet and other electromagnetic networks). First, the Circular on Internet Culture, promulgated by the Ministry of Culture (“MOC”), imposes limitations on which enterprises can engage in Internet culture activities, which include the electronic distribution of sound recordings.<sup>84</sup> Specifically, Article II of the Circular on Internet Culture provides, in relevant part, “[p]resently, all areas shall not accept applications to engage in Internet cultural activities from Internet information service providers with foreign investment.”<sup>85</sup> Second, the Network Music Opinions also prohibits foreign-invested enterprises from engaging in the electronic distribution of sound recordings, providing in Article (8) that “it is prohibited to establish network cultural entities with foreign investments.”<sup>86</sup> Third, Article 4 of the Several Opinions prohibits foreign investors from “setting up and operating a business dealing in internet culture,” which includes the electronic distribution of sound recordings.<sup>87</sup> Fourth, Article X:7 of the Catalogue, in conjunction with Articles 3 and 4 of the Foreign Investment Regulation, provides that foreign investment is prohibited in enterprises engaging in “news websites, network audiovisual program services, internet on-line service operation sites, and Internet culture operations.”<sup>88</sup>

---

<sup>84</sup> Panel Report, para. 7.1306.

<sup>85</sup> Panel Report, para. 7.1306.

<sup>86</sup> Panel Report, para. 7.1307.

<sup>87</sup> Panel Report, para. 7.1308.

<sup>88</sup> Panel Report, para. 7.1309.

71. The Panel correctly found that China’s commitments in Sector 2.D of its Services Schedule include the electronic distribution of sound recordings.<sup>89</sup> The Panel then found that each of the measures listed above is 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.”<sup>90</sup>

72. For the reasons set forth below, the Panel’s reasoning and conclusions were correct, and China’s appeal should be rejected.

**B. The Panel Correctly Applied the Rules Reflected in Article 31 of the Vienna Convention in Interpreting China’s Services Commitment for Sound Recording Distribution Services**

73. China has not appealed the Panel’s finding that China’s measures addressing the electronic distribution of sound recordings accord less favorable treatment to foreign-invested entities in violation of Article XVII of the GATS. Instead, China relies solely on the assertion it made before the Panel that it did not undertake a services commitment with respect to the electronic distribution of sound recordings. According to China, the proper interpretation of China’s commitments regarding “sound recording distribution services” leads to the conclusion that this commitment covers only the distribution of sound recordings on physical media (*e.g.*, on compact discs (CD)), and does not include within its scope the distribution of sound recordings through electronic means (*e.g.*, over the Internet). For the reasons set forth below, China’s

---

<sup>89</sup> Panel Report, paras. 7.1168-1265.

<sup>90</sup> Panel Report, para. 7.1311. The Panel found that the Catalogue, in conjunction with the Foreign Investment Regulation, is inconsistent with Article XVII of the GATS.

analysis is not supported by the customary rules of treaty interpretation, and the Panel correctly rejected these arguments.

74. The customary rules of treaty interpretation are reflected in Articles 31 and 32 of the Vienna Convention. Article 31(1) of the Vienna Convention provides that “[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.” Article 32 of the Vienna Convention provides that “[r]ecourse 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...”.

75. While China asserts that the Panel’s interpretation of China’s Services Schedule does not comport with the standard of treaty interpretation set forth in the Vienna Convention, China presents virtually no argumentation to explain why this is the case or why China’s preferred interpretation should be accepted. Instead, China repeatedly argues that in each step of the Panel’s analysis where the Panel determined that “sound recording distribution services” is not limited to the distribution of sound recordings embedded on physical media, the Panel should have found that element of its analysis to be “inconclusive.”<sup>91</sup> China’s criticism in this regard misses the mark. It ignores the fact that the Panel conducted a comprehensive examination of all of the relevant elements of an analysis pursuant to Articles 31 and 32 of the Vienna Convention to ensure that it arrived at the correct interpretation, rather than determine that any single element of its analysis in isolation was conclusive. The Panel’s analysis should be upheld.

---

<sup>91</sup> China Appellant Submission, paras. 109, 118, 130, 134, 142, 152-153, 163, 185.

**1. The Panel Correctly Found that the Ordinary Meaning of “Sound Recording Distribution Services” Included the Electronic Distribution of Sound Recordings**

76. Consistent with Article 31 of the Vienna Convention, the Panel began with an analysis of the ordinary meaning of the relevant terms of the commitments on “sound recording distribution services” in Sector 2.D of China’s Services Schedule.

**(a) Ordinary Meaning of “Sound Recording”**

77. The Panel analyzed the ordinary meaning of “recording” and correctly found that the ordinary meaning of “recording” is “recorded material.”<sup>92</sup> This finding was consistent with a definition of “recording” offered by both the United States and China, as China admits on appeal.<sup>93</sup> Furthermore, the Panel reasoned that “recorded material” must refer to the content that is recorded, rather than the medium containing the recorded sound, as China had argued.<sup>94</sup> According to the Panel, this reading is confirmed by the two examples of “recorded material” – provided as part of the same dictionary definition – “recorded broadcast” and “recorded performance,” which refer to content rather than its medium.<sup>95</sup> On this basis, the Panel concluded that the ordinary meaning of the term “sound recording” is “not limited to sound embedded or transferred on physical media.”<sup>96</sup> The Panel went on to conclude that “the ordinary

---

<sup>92</sup> Panel Report, para. 7.1773 citing *Shorter Oxford English Dictionary*, 6<sup>th</sup> ed. (Clarendon Press 2007), Vol. II, p. 2927. *See also*, U.S. First Oral Statement, para. 53.

<sup>93</sup> China Appellant Submission, para. 100.

<sup>94</sup> Panel Report, paras. 7.1174-7.1175.

<sup>95</sup> Panel Report, para. 7.1175.

<sup>96</sup> Panel Report, para. 7.1176.

meaning of ‘sound recording’ depends not on the technology of storage or distribution of the sound, but rather on its nature as ‘content’.”<sup>97</sup>

78. China’s challenge to the Panel’s ordinary meaning analysis rests primarily on the assertion that the Panel disregarded one of the two definitions for “recording” that China provided.<sup>98</sup> China’s argument does not withstand scrutiny. As a threshold matter, China’s apparent attempt to rely on Article 11 of the DSU to buttress this argument<sup>99</sup> should not be considered by the Appellate Body. China failed to raise Article 11 of the DSU in its Notice of Appeal and therefore any such claim is beyond the scope of this appeal.<sup>100</sup>

79. With respect to the substance of its challenge, China’s assertion that the Panel erred because it did not consider an alternative definition of “recording” supplied by China – *i.e.*, “something on which sound or visual images have been recorded” – is flawed.<sup>101</sup> The Panel explicitly took note of all of the definitions offered by the parties,<sup>102</sup> and explains the reasons for its conclusion that “recording” is not limited to recorded content that is embedded on physical media.<sup>103</sup>

#### **(b) Ordinary Meaning of “Distribution”**

---

<sup>97</sup> Panel Report, para. 7.1176.

<sup>98</sup> China Appellant Submission, para. 101-03.

<sup>99</sup> China Appellant Submission, para. 104.

<sup>100</sup> Appellate Body Report, *Japan – Apples*, paras. 120-128 (where the appellant did not raise Article 11 in its notice of appeal, the Appellate Body found that such a claim was “not properly before us in this appeal”).

<sup>101</sup> China Appellant Submission, para. 102.

<sup>102</sup> Panel Report, paras. 7.1154-67.

<sup>103</sup> Panel Report, paras. 7.1173-76.

80. China also argues that the term “distribution” encompasses only the distribution of goods, which according to China are limited to physical objects, and does not include the distribution of anything other than goods. This assertion too lacks merit. The term “distribution” can and does encompass the distribution of intangible items.

81. One immediate difficulty with China’s position, which the Panel also discussed, arises from the fact that in the text of the GATS, the term “distribution” is plainly not limited to the distribution of goods or tangible objects. As the Panel noted, Article XXVIII(b) of the GATS defines the “supply of a service” as including its “distribution.”<sup>104</sup> Services are not tangible objects. On that basis alone, China’s argument about the ordinary meaning of “distribution” fails.

82. The Panel also examined the dictionary definition of “distribution” in the *Shorter Oxford English Dictionary*, defined as “dispersal of commodities among consumers affected by commerce.”<sup>105</sup> The Panel found that based on this definition, the term “distribution” is not limited to the distribution of physical goods.<sup>106</sup> In making this finding, the Panel specifically examined China’s arguments that the meaning of distribution should be limited to the distribution of physical goods, and properly concluded that none of them supported China’s position. For example, the Panel took note of the fact that given the development of technology, many intangible items may also be “distributed in a commercial sense.”<sup>107</sup> The Panel also

---

<sup>104</sup> Panel Report, para. 7.1180. *See also* U.S. First Oral Statement, para. 49.

<sup>105</sup> Panel Report, para. 7.1178 n. 652.

<sup>106</sup> Panel Report, paras. 7.1177-7.1181.

<sup>107</sup> Panel Report, para. 7.1180.

examined the meaning of “commodity,” which includes “a thing of use or value.”<sup>108</sup> A commodity is not necessarily limited to a physical object since intangible items can also qualify as “things of use or value.”<sup>109</sup> For all these reasons, the Panel properly found that “distribution can be understood as referring to a transaction whereby anything of value, tangible or intangible, is dispersed among consumers, with or without intermediaries.”<sup>110</sup>

**(c) The Panel’s Ordinary Meaning Analysis is Supported by the Appellate Body’s Guidance in *U.S. – Gambling***

83. China’s reliance on the Appellate Body report in *U.S. – Gambling* is also unavailing. In *U.S. – Gambling*, the question presented was whether the U.S. Services Schedule’s explicit exclusion of a commitment with respect to “sporting” services also resulted in an exclusion of a commitment with respect to “gambling and betting” services. The panel began its Vienna Convention analysis by analyzing the ordinary meaning of the term “sporting” in order to determine whether that term encompassed “gambling and betting.”<sup>111</sup> The panel found that the term “sporting” did not include “gambling and betting.”<sup>112</sup>

84. The Appellate Body found that the panel erred in reaching this conclusion on the ground that the panel did not take sufficient note of the fact that some dictionary definitions of “sporting” did relate to gambling or betting and others did not.<sup>113</sup> Specifically, the Appellate Body stated, “the Panel should have taken note that, in the abstract, the range of possible

---

<sup>108</sup> Panel Report, para. 7.1179 (citing *Shorter Oxford English Dictionary* 5<sup>th</sup> ed. (Clarendon Press 2007), Vol. I, p. 461).

<sup>109</sup> Panel Report, para. 7.1180.

<sup>110</sup> Panel Report, para. 7.1180.

<sup>111</sup> Panel Report, *U.S. – Gambling*, paras. 6.47, 6.54-61.

<sup>112</sup> Panel Report, *U.S. – Gambling*, para. 6.61.

<sup>113</sup> Appellate Body Report, *U.S. – Gambling*, para. 165.



meanings of the word ‘sporting’ includes *both* the meaning claimed by Antigua and the meaning claimed by the United States, and then continued its inquiry into *which* of those meanings was to be attributed to the word as used in the United States’ GATS Schedule.”<sup>114</sup>

85. China’s contention that this criticism by the Appellate Body applies to the Panel’s analysis of the ordinary meaning of “recording” and “distribution” in China’s Services Schedule is without merit.<sup>115</sup> In fact, the Panel in the present dispute did precisely what the Appellate Body advised. As described above, rather than merely content itself with an analysis of the meaning of the relevant terms in the abstract, the Panel examined which of the meanings was to be attributed to the relevant terms in China’s Schedule.<sup>116</sup>

86. Thus, China has presented no basis to find that the Panel’s analysis of the ordinary meaning of the relevant terms was in error. To the contrary, the record fully supports the Panel’s conclusion that based on an analysis of the ordinary meaning of the relevant terms in China’s Services Schedule, “sound recording distribution services” encompasses the distribution of sound recordings through both physical and non-physical media.<sup>117</sup>

---

<sup>114</sup> Appellate Body Report, *U.S. – Gambling*, para. 167.

<sup>115</sup> China Appellant Submission, para. 123.

<sup>116</sup> Panel Report, paras. 7.1173-7.1176; 7.1177-7.1181.

<sup>117</sup> China also asserts that getting music to a consumer by electronic means (which China refers to as “network music services”) is a distinct service from sound recording distribution services, rather than a new means of supplying the service. China Appellant Submission, paras. 86-87. China’s argument is flawed in several respects. First, merely attaching a new name to an existing service does not create a new service. Second, as the United States discussed in more detail below, and as discussed in great detail before the Panel, China failed to establish that the distribution of music by electronic means was new (either as a service or as a means of supplying a service) in 2001, when China’s Services Schedule was concluded. Panel Report, paras. 7.1237-47; U.S. First Oral Statement, paras. 58-67; U.S. Second Written Submission, para. 154 footnote 232. Third, before the Panel, China articulated certain criteria, which were not rooted in any

(continued...)

**2. The Panel Correctly Concluded that the Relevant Context Supported the Panel’s Interpretation of the Ordinary Meaning of “Sound Recording Distribution Services” as Encompassing the Distribution of Sound Recordings Stored on both Physical and Non-Physical Media**

87. The Panel continued its analysis of China’s Schedule by examining the relevant context for China’s commitment for sound recording distribution services in Sector 2.D. The Panel correctly concluded that the relevant context supported the Panel’s interpretation of the ordinary meaning of “sound recording distribution services” as encompassing the distribution of sound recordings stored or transferred on either physical or non-physical media. China contends that the Panel erred in its examination of the relevant context in two respects. First, China contends that the Panel should have engaged in a contextual analysis with respect to two alternative meanings of “recording” and “distribution.” As set forth above, China has failed to establish that

---

<sup>117</sup> (...continued)

relevant legal text or other authority, which it claimed assisted in distinguishing among services. On the basis of these criteria, China asserted that the electronic distribution of sound recordings (which China termed “network music services”) was different from the distribution of sound recordings in physical form. China’s Answer to Panel Question 97. However, as the Panel found, these criteria:

are of limited value in arriving at, or confirming a proper interpretation of, the relevant commitment in China’s Schedule. Importantly, we also observe that China has offered no textual basis for these four factors.

Even when China seeks to apply these factors to the practical differences between the distribution of sound recordings on non-physical and physical media, in order to show that these activities are different services, the resulting analysis is far from clear . . . the analysis of certain elements in China’s factor analysis does not lead to an unambiguous result.

Panel Report, paras. 7.1260-61. Thus, China’s contention that the electronic distribution of sound recordings is different from distribution of sound recordings in physical form, and therefore should be referred to as “network music services”, does not withstand scrutiny.

the Panel’s examination of the ordinary meaning of the relevant terms was erroneous or that there was any basis on which the Panel should have concluded that the ordinary meaning of the term “sound recording distribution services” should be limited to the distribution of sound recordings stored or transmitted on physical media. Thus, China’s criticism of the Panel in this regard is unfounded. Second, China maintains that the Panel erred in concluding that the contextual analysis supported the Panel’s analysis of the ordinary meaning of the relevant terms, because according to China, the contextual analysis was inconclusive.<sup>118</sup> As set forth below, China’s challenge to the Panel’s contextual analysis in this regard does not accurately reflect the record.<sup>119</sup>

**(a) Contextual Analysis of Sector 2.D (Audiovisual Services) as a Whole in China’s Services Schedule**

---

<sup>118</sup> China Appellant Submission, paras. 129-30.

<sup>119</sup> China states, “the Panel’s finding that the relevant sector may extend to services relating to contents not embedded in physical products does not rule out the possibility that China could have scheduled commitments concerning services related only to physical products.” China Appellant Submission, para. 134. Thus, China acknowledges that an examination of the context does not lead to its preferred conclusion, namely that “sound recording distribution services” in China’s Schedule should be construed as limited to the distribution of sound recordings embedded on physical media. Indeed, each element of the relevant context that China addresses in its appellant submission supports the Panel’s interpretation of the relevant services commitment. China attempts to minimize these contextual elements by pointing to a “possibility” that China “could have” intended to schedule a commitment related only to physical products. However, such assertions do not provide a reason to reject the Panel’s overall weighing of the arguments and its ultimate assessment that the context supports the Panel’s reading of China’s Schedule. Moreover, contrary to China’s assertions, the Panel did not rely on any element of the context as “conclusive,” nor did the Panel “rule out” the possibility that China could have scheduled commitments covering only physical products. The Panel’s comprehensive analysis of the relevant terms in China’s Services Schedule ensured that the Panel did not rule out any interpretation that could be supported by an examination of the ordinary meaning of the relevant terms in their context and in light of the object and purpose of the GATS.

88. The Panel began its analysis of the relevant context by examining Sector 2.D of China’s Schedule as a whole. With respect to the heading “Audiovisual Services,” the Panel observed that the meaning of “audiovisual”:

suggests that the scope of ‘Audiovisual Services’ extends to activities in which content is sensed by the user through the faculties of hearing or vision. It would not appear to exclude any service from its scope on the basis of the medium on which the content may be coded, stored or transferred. This suggests that a service in China’s Schedule which appears under the heading ‘Audiovisual Services’, unless it is specifically modified in the wording of the sectoral entry, relates to such core services as producing, distributing, projecting or broadcasting content (‘hearing or vision’).<sup>120</sup>

89. Thus, the Panel analyzed the meaning of the sector heading and determined that it did not limit any entries under this heading to services relating only to physical products.

90. In an effort to argue the contrary, China notes that since audiovisual products can be in physical form, “it is not illogical to consider that one could have intended to commit services relating to audiovisual products in physical form only under such a heading.”<sup>121</sup> Whether or not a Member could limit a commitment in that way however, the Panel correctly found that China did not do so.

**(b) Contextual Analysis of China’s Sector 2.D Commitment on  
“Videos, including entertainment software and (CPC 83202),  
distribution services”**

91. China then challenges, again without merit, the Panel’s examination of the entry in Sector 2.D of China’s Services Schedule for “[v]ideos, including entertainment software and (CPC 83202), distribution services,” arguing that this entry does not support the Panel’s interpretation

---

<sup>120</sup> Panel Report, para. 7.1186.

<sup>121</sup> China Appellant Submission, para. 135.

of “sound recording distribution services.” China makes two principal arguments in this regard. First, with respect to the ordinary meaning of the term “video,” China contends that “the Panel should have retained the dictionary definition offered by dictionaries edited at the time of the conclusion of China’s accession negotiations.”<sup>122</sup> The United States considers that such an approach is untenable for the purpose of determining whether a particular technological means for supplying a service is covered by a Member’s services commitment. In fact, the problems with this approach become obvious when considering the term “videos.” The Panel noted that a definition for “video” adduced by the United States provides that “film etc. recorded on videotape: colloquial = video cassette.”<sup>123</sup> In that case, the cited dictionary was published in 2002, when DVDs had already overtaken videotapes as the primary medium for distributing films, and therefore the dictionary at issue – as of the date of its publication – did not even refer to the most relevant technological means for providing the service.<sup>124</sup> Nevertheless, under China’s theory, a Member’s commitment for distribution of “videos” taken in 2002 would not encompass the distribution of DVDs. 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 is lagging behind (as is inevitable) evolutions in the “ordinary meaning” of a term.<sup>125</sup>

---

<sup>122</sup> China Appellant Submission, para. 138.

<sup>123</sup> Panel Report, para. 7.1327 (citing *Shorter Oxford Dictionary* 5<sup>th</sup> ed. (Clarendon Press 2002), Vol. II., p. 3534 (Exhibit US-42)).

<sup>124</sup> The Panel noted that “with recent technological developments, [this definition] would presumably include VCDs and DVDs.” Panel Report, para. 7.1327.

<sup>125</sup> See Appellate Body Report, *EC – Chicken Cuts*, para. 175 (“[t]he Appellate Body has observed that dictionaries are a ‘useful starting point’ for the analysis of ‘ordinary meaning’ of a  
(continued...)”)

92. As the United States argued before the Panel, the GATS is technologically neutral in the sense that it does not contain any provisions that distinguish between the different technological means through which a service may be supplied.<sup>126</sup> In *U.S. – Gambling*, the panel stated that “a market access commitment . . . implies the right of other Members’ service suppliers to supply a service through *all* means of delivery, whether by mail, telephone, Internet etc., unless otherwise specified in a Member’s Schedule.”<sup>127</sup> Thus, to the extent that China wanted to exclude the distribution of sound recordings through electronic means from China’s commitment for sound recording distribution services, China could have done so explicitly in its Schedule.<sup>128</sup> Having not done so, China fails to provide any other evidence of an intent to exclude the supply of sound recording distribution services through electronic means. As the Panel explained, a “panel cannot read into a schedule qualifications that do not arise from an interpretation carried out in accordance with the rules set out in Article 31 of the Vienna Convention. It is on this foundation

---

<sup>125</sup> (...continued)

treaty term, but they are not necessarily dispositive. The ordinary meaning of a treaty term must be ascertained according to the particular circumstances of each case. Importantly, the ordinary meaning of a treaty term must be seen in the light of the intention of the parties ‘as expressed in the words used by them against the light of the surrounding circumstances’.”)

<sup>126</sup> See U.S. First Written Submission, paras. 346-47 (citing Panel Report, *U.S. – Gambling*, paras. 6.281, 6.286). The panel also cites the *Work Programme on Electronic Commerce, Progress Report to the General Council, S/L/74*, adopted by the Council for the Trade in Services on 19 July 1999, para. 4 (Exhibit US-51). With respect to the principle of technological neutrality, the Panel in this dispute ultimately determined that it was unnecessary to invoke the principle of technological neutrality, because it was clear based on its preceding analysis that China’s commitment covered the electronic distribution of sound recordings.

<sup>127</sup> Panel Report, *U.S. – Gambling*, para. 6.285.

<sup>128</sup> Panel Report, paras. 7.1254-55. See also Appellate Body Report, *U.S. – Gambling*, para. 180; Panel Report, *U.S. – Gambling*, para. 6.286; U.S. First Oral Statement, para. 68.

that we have interpreted the core meaning of China’s commitment on ‘sound recording distribution services’ to cover the distribution of audio content in non-physical form.”<sup>129</sup>

93. China next argues that an examination of the sub-sectors in Sector 2.D of the Services Sector Classification List in document MTN.GNS/W/120 (“W/120”)<sup>130</sup>, would lead to the conclusion that the sector entry for “videos . . . distribution services” is limited to physical products.<sup>131</sup> China’s argument is based on the erroneous premise that the W/120 list refers to

---

<sup>129</sup> Panel Report, para. 7.1255. We also note that in *Greek Increase in Bound Duty*, Germany argued that Greece had raised its tariff on long-playing gramophone records above the bound rate for “gramophone records” in Greece’s schedule. Greece contended that the introduction of later-developed, long-playing gramophone records constituted a new item not subject to the earlier binding. The reviewing Group agreed with Germany that the disputed records were covered by the description of “gramophone records” in the bound item and found that Greece had violated its obligations under Article II of the GATT 1994. It noted that “when this item was negotiated the parties concerned did not place any qualification upon the words ‘gramophone record.’” GATT Group of Experts Report, *Greek Increase in Bound Duty*, L/580, 9 November 1956, unadopted. Similarly, there are no qualifications on the entry for “sound recording distribution services” in China’s Schedule; therefore, developments in the technology related to sound recordings are not a basis for excluding such sound recordings from the scope of the commitment (even apart from the fact that the electronic distribution of sound recordings existed at the time of China’s WTO accession).

<sup>130</sup> *Note by the Secretariat on the Services Sectoral Classification List*, MTN.GNS/W/120, dated 10 July 1991. As the Panel stated, this document “contains a list of 12 service sectoral headings, each . . . further divided into subsectors. . . . The categories in document W/120 . . . are exhaustive and mutually exclusive.” Panel Report, para. 7.1223. China makes this argument in spite of the fact that before the Panel, China attempted to marginalize the importance of the W/120 stating that “Sector 2D and Sector 4 of China’s GATS Schedule appear to deviate significantly from W/120 in terms of the services covered.” China’s Answer to Question 116 from the Panel. In addition, the Appellate Body has made clear that the W/120 forms part of the “supplementary means of interpretation” to be consulted under Article 32 of the Vienna Convention, rather than context. *U.S. – Gambling*, para. 197. Consistent with this guidance, the Panel did analyze the implications of the treatment of Sector 2.D in W/120 in its discussion of the supplementary means of interpretation. Panel Report, paras. 7.1223-1234.

<sup>131</sup> China Appellant Submission, para. 139.

“video tapes production and distribution services.”<sup>132</sup> China then states that, in this case, the Panel “did not analyze why ‘videos’ in the plural form, instead of ‘video’, is used in Sector 2.D of China’s Schedule. China submits that when a plural form is used for a noun, it must refer to something countable, such as, in the present case, physical copies of content recorded on video tape.”<sup>133</sup>

94. The relationship that China is attempting to draw between the document W/120 and its own Schedule is unclear, and China does not provide any support for its proposition regarding the implications of the singular or plural use of a noun. China appears to be arguing that the use of the plural form of a noun implies that the concept to which the noun refers is countable, and therefore, must be a “physical item.”<sup>134</sup> However, China’s argument regarding the use of singular versus plural forms of nouns sheds little light on the scope of the services commitment at issue.

95. There are many nouns that refer to concepts that are countable, whether they are singular or plural, and yet that says nothing about whether such items are physical or intangible. For example, the noun “idea,” which refers to something intangible, is also countable. The plural form (*i.e.*, “ideas”) similarly refers to something countable. Yet, regardless of whether the term is used in its singular or plural form, the term always refers to something intangible. To apply this reasoning to a noun that is central to this case, a “sound recording” that may be distributed

---

<sup>132</sup> China Appellant Submission, para. 139. In fact, the relevant W/120 entry is actually “video tape production and distribution services.” In addition, the word “video” is used as an adjective – not as a noun – in the W/120 entry and modifies the noun “tape,” whereas “videos” in China’s Schedule is used as a noun. Thus, China’s flawed analysis appears to flow from a flawed premise.

<sup>133</sup> China Appellant Submission, para. 139.

<sup>134</sup> For purposes of responding to China’s argument, the United States uses China’s terminology of a “physical item” as distinct from an intangible item.



electronically is both countable and intangible when transmitted.<sup>135</sup> Thus, simply referring to a noun in its plural form does not transform an otherwise intangible concept into something physical.<sup>136</sup>

**(c) Contextual Analysis of Sector 4 in China’s Services Schedule:  
Distribution Services**

96. The Panel also correctly found that the relationship between Sector 4 and Sector 2.D in China’s Services Schedule supports the conclusion that Sector 2.D includes the distribution of audiovisual products in non-physical form. Sector 4 of China’s Schedule, “Distribution Services,” generally covers the distribution of goods.<sup>137</sup> However, Sector 2.D of China’s Services Schedule, “Audiovisual Services,” contains entries for distribution services *e.g.*, sound recording distribution services. The Panel notes that the distribution of certain audiovisual

---

<sup>135</sup> For instance, a consumer who purchases music through the Internet, may download an electronic file containing music onto a personal computer. In this transaction, the seller typically transmits to the consumer a copy of the digital file containing the sound recording that resides on its server. The consumer, in turn, can save the downloaded copy of the sound recording onto a personal computer or other device. A second consumer could purchase the same music from the same seller, in which case, the seller would transmit an additional copy of the sound recording to the second consumer. As with the other transaction, the second consumer can save this downloaded copy to a personal computer or other device. Regardless of the number of copies that exist of that sound recording, the concept – of a sound recording that may be distributed electronically – remains intangible.

<sup>136</sup> China notes that the Panel’s examination of “Cinema Theatre Services” in Sector 2.D of China’s Services Schedule should not have been found to support the Panel’s analysis of the scope of China’s commitment for “sound recording distribution services.” China Appellant Submission, paras. 142-46. The United States agrees with China that the entry for “Cinema Theatre Services” sheds little light on the scope of the services commitment for sound recording distribution in Sector 2.D. In any event, the Panel appears to place little emphasis on this aspect of its reasoning, and as set forth throughout this submission, the Panel’s conclusion regarding the scope of China’s commitment is buttressed by the other elements of its analysis pursuant to the customary rules of treaty interpretation.

<sup>137</sup> Panel Report, para. 7.1341.

products, such as sound recordings or videos in physical form, could be covered by Sector 4, but are instead covered under Sector 2.D.<sup>138</sup> Based on this observation, the Panel concludes that “had China’s relevant entries under Audiovisual Services . . . been intended to cover exclusively audiovisual products in physical form, there would have been no need to insert these entries under a sector other than Distribution Services, where the distribution of physical goods are generally covered in China’s Schedule.”<sup>139</sup>

97. China argues that the Panel’s conclusion does not reflect the “logic” of China’s Services Schedule, which, according to China, was to include services related to audiovisual products under Sector 2.D because of their audiovisual content.<sup>140</sup> However, this argument actually supports the rationale underlying the Panel’s conclusion that audiovisual products are of a different kind than those items whose distribution is covered by Sector 4. This difference derives in part from the fact that, as China concedes, audiovisual products contain audiovisual content. The Panel also relates the uniqueness of audiovisual products to the fact that they may be distributed in a non-physical form.<sup>141</sup> Thus, the Panel’s conclusion – that the relationship between Sector 4 and Sector 2.D supports its understanding that the distribution services in Sector 2.D are not limited to the distribution of physical items – is consistent with the logic of China’s Schedule.<sup>142</sup>

---

<sup>138</sup> Panel Report, para. 7.1204.

<sup>139</sup> Panel Report, para. 7.1205.

<sup>140</sup> China Appellant Submission, para. 149.

<sup>141</sup> Panel Report, para. 7.1205.

<sup>142</sup> As further support for the Panel’s analysis, Sector 2, under which Audiovisual Services is a sub-sector, is titled “Communication Services.” This serves to highlight the problems with China’s view of the phrase “sound recording distribution” as limited to the

(continued...)

98. China’s only rebuttal to this conclusion is to assert that the Panel should have found its analysis of the context provided by Sector 4 to be “inconclusive” as to the scope of “sound recording distribution services in Sector 2.D.”<sup>143</sup> However, China provides no alternative analysis of the context provided by Sector 4 to contradict the Panel’s analysis. Nor does China provide evidence that the Panel relied on any single element of its analysis as conclusive. In fact, the Panel did not rely on its analysis of Sector 4 of China’s Schedule as “conclusive” of the scope of China’s commitment for sound recording distribution services. Instead, having examined Sector 4, the Panel stated that it would “now examine whether provisions of the GATS itself can shed light on this matter.”<sup>144</sup> Thus, the Panel examined Sector 4 of China’s Schedule and other elements of the context to determine whether they, taken as a whole<sup>145</sup>, support the Panel’s analysis regarding the meaning of the terms in China’s Services Schedule.

**(d) Contextual Analysis of Article XXVIII(b) of the GATS**

---

<sup>142</sup> (...continued)

distribution of physical items. “Communication” is also primarily aimed at the transmission of a range of items including intangible items (*e.g.*, ideas, information) between entities, rather than the movement of physical items. Thus, the placement of “Audiovisual Services” and “sound recording distribution services” in the Sector for Communication Services is another element of the relevant context that supports the Panel’s reading of China’s Schedule. *See* U.S. Answer to Question 112 from the Panel.

<sup>143</sup> China Appellant Submission, para. 152.

<sup>144</sup> Panel Report, para. 7.1208.

<sup>145</sup> *See* Appellate Body Report, *EC – Chicken Cuts*, para. 176 (“[i]nterpretation pursuant to the customary rules codified in Article 31 of the Vienna Convention is ultimately a holistic exercise that should not be mechanically subdivided into rigid components”). *See also* Panel Report, *Canada – Autos*, para. 10.12 (“[t]he three elements referred to in Article 31 – text, context and object and purpose – are to be viewed as one integrated rule of interpretation rather than a sequence of separate tests to be applied in a hierarchical order”).

99. China’s attempt to call into question the Panel’s analysis of Article XXVIII(b) of the GATS as relevant context also fails. China argued before the Panel that the term “distribution” only encompasses distribution of goods.<sup>146</sup> As the Panel noted, Article XXVIII(b) defines the “supply of a service” as including its “distribution.” This provision of the GATS disproves China’s assertion that the term “distribution” is limited to the distribution of physical goods. In other words, non-physical items such as services, can also be “distributed.”

100. On appeal, China argues that “even admitting that the term ‘distribution’ in the abstract can relate indistinctly to both distribution of physical products and to the distribution of intangibles, this does not indicate whether ‘sound recording’ in China’s relevant entry refers to physical products or extends to intangible products.”<sup>147</sup> This argument misses the point. China argued that the meaning of the term “distribution” is limited to the distribution of physical goods, and that on that basis, “sound recordings” must only refer to physical goods.<sup>148</sup> The analysis of the text of Article XXVIII(b) more than sufficiently rebuts China’s argument regarding the meaning of “distribution” and demonstrates that “distribution” can and does refer to the distribution of non-physical items. Thus, the Panel’s analysis of Article XXVIII(b) illustrates that China cannot rely on the meaning of “distribution” as support for its assertion that “sound recording” must refer to a physical object.

---

<sup>146</sup> China’s First Written Submission, para. 458-63.

<sup>147</sup> China Appellant Submission, para. 161.

<sup>148</sup> China’s First Written Submission, paras. 458-63 (“when read together, ‘*sound recording distribution services*’ would appear to refer to the marketing and supply of a specific category of goods, i.e., goods containing recorded music, such as CDs or other physical supports”) (emphasis original).

101. China similarly argues that “there does not seem to be any link between the distribution of services, which is the concept referred to in Article XXVIII of the GATS . . . and the definition of products in the context of a distribution activity, which is the issue at stake concerning China’s GATS Schedule.”<sup>149</sup> In this statement, China again conflates the analysis of the meaning of “distribution” and the meaning of the products (*i.e.*, “sound recordings) that are being distributed. The fact that Article XXVIII of the GATS establishes that the term “distribution” can refer to the distribution of physical and non-physical items rebuts China’s assertions that the meaning of “distribution” effectively limits the term “sound recordings” to physical items.

**3. The Panel’s Analysis of the Scope of China’s Commitment Accords with the “Object and Purpose” of the GATS**

102. China sets forth a few factors intended to describe the nature of the GATS, ostensibly in support of the conclusion that China should not be held to its commitment regarding the electronic distribution of sound recordings. None of these factors provides any guidance regarding whether China took the services commitment at issue. China points to the principle of “progressive liberalization” in the Preamble to the GATS, and asserts that this principle “should have required the Panel to consider” that “WTO Members exercise sovereignty in deciding about the pace and the extent of liberalization of their services markets.”<sup>150</sup>

103. First, to the extent that China is suggesting that the Preamble authorized or required the Panel to depart from the customary rules of interpretation reflected in the Vienna Convention, China’s argument is incompatible with Article 3.2 of the DSU. As the Panel correctly explained,

---

<sup>149</sup> China Appellant Submission, para. 159.

<sup>150</sup> China Appellant Submission, para. 167.

“the Preamble of the GATS indicates that the Agreement is aimed, *inter alia*, at 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’.”<sup>151</sup> Furthermore, the GATS Preamble also provides that “commitments negotiated under the Agreement should aim at ‘securing an overall balance of rights and obligations between the Members’.”<sup>152</sup> Thus, the GATS ensures that, while WTO Members may decide about the pace and extent of liberalization of their services markets, they must also comply with the services commitments that they have undertaken.

104. In addition, China misconceives “progressive liberalization.” If current commitments cannot be enforced, the value of future commitments by all Members will be nullified, eliminating the basis for “successive rounds of negotiations . . . with a view to achieving a progressively higher level of liberalization” contemplated in Article XIX:1 of the GATS. Each Member exercises its prerogatives by entering into specific commitments and by complying with those commitments; compliance with current commitments is essential to the credibility and success of progressive liberalization in the future.

105. China also notes that because of the “positive list” basis for scheduling services commitments, “absent a specific commitment explicitly inscribed in the GATS Schedule, a particular service should not be considered as being subject to any commitment.”<sup>153</sup> However, this statement merely restates the question presented by this dispute, namely the scope of China’s

---

<sup>151</sup> Panel Report, para. 7.1219.

<sup>152</sup> Panel Report, para. 7.1219.

<sup>153</sup> China Appellant Submission, para. 167.

commitment with respect to sound recording distribution services. As explained above, the Panel correctly interpreted that commitment and found that China’s commitment encompasses the distribution of all sound recordings, including distribution through the Internet and other electromagnetic networks.

106. Finally, China argues that based on the object and purpose of the GATS, the Panel should have conducted its ordinary meaning analysis by examining the meaning of the relevant terms in Sector 2.D at the time of China’s WTO accession.<sup>154</sup> China submits that this approach is consistent with the “principle of progressive liberalization,” which “does not allow for the extension of the scope of the commitments of a WTO Member based on temporal variations in language.”<sup>155</sup> However, China has not provided evidence that resorting to a dictionary published in December 2001 – when China’s Services Schedule was concluded – would lead to a different interpretation. Indeed, it is not at all clear that this would be the case. For example, China points to the Panel’s interpretation of “distribution,” which the Panel found may historically have been understood to refer to tangible goods, but in light of new technology can now encompass intangible products as well.<sup>156</sup> The Panel’s finding was equally valid in 2001 when China’s Services Schedule was concluded. Similarly, nothing in the Panel’s finding that “product” refers to goods and services depends on developments in technology after 2001, nor does China present any evidence suggesting that in 2001 the understanding of the term “product” was necessarily limited to physical items. Moreover, it is unclear how China’s approach to an ordinary meaning

---

<sup>154</sup> China Appellant Submission, paras. 170-73.

<sup>155</sup> China Appellant Submission, para. 173.

<sup>156</sup> Panel Report, para. 7.1180.

analysis relates to the object and purpose of the GATS. As explained above, under China’s approach, a Member’s commitment related to “video . . . distribution services” could exclude the distribution of DVDs, if a dictionary published at the time of the conclusion of the Member’s Schedule only defined “videos” as referring to videotapes and did not mention DVDs, notwithstanding that a full analysis under the customary rules of interpretation would lead to the opposite conclusion. Thus, China’s interpretive approach would impose a limitation on a Member’s commitment that does not exist. Indeed, as noted above, the reference to “progressive liberalization” in the GATS preamble does not permit a departure from the rules of interpretation reflected in the Vienna Convention.

107. In short, the Panel’s analysis of the ordinary meaning of the relevant terms in China’s Services Schedule in their context, and in light of the object and purpose, was sound. The Panel’s finding, based on this analysis, that China’s commitment regarding sound recording distribution services encompasses the electronic distribution of sound recordings was correct, and China’s appeal should be rejected.

**C. The Panel Correctly Applied Article 32 of the Vienna Convention and Found that the Supplementary Means of Interpretation Confirmed its Analysis Under Article 31**

108. The Panel correctly determined that consistent with Article 32 of the Vienna Convention, resort to supplementary means of interpretation was only for the purpose of confirming the Panel’s conclusion based on an application of Article 31.<sup>157</sup> China fails to provide any basis for calling into question the Panel’s analysis of the supplementary means of interpretation. As a

---

<sup>157</sup> Panel Report, para. 7.1221.



threshold matter, to the extent that China seeks to have the Appellate Body reopen the facts related to the conclusion of China’s Services Schedule, there is no basis to do so. In its Notice of Appeal, China did not include a claim under Article 11 of the DSU in relation to the Panel’s analysis of the supplementary means of interpretation.<sup>158</sup> Even if China had raised such a claim, it would have no merit.

109. During the panel proceedings, China relied exclusively on the argument that the electronic distribution of sound recordings was not a “commercial reality” at the time of China’s accession to the WTO, that Members were unaware of such distribution, and that therefore Members could not have intended to include the electronic distribution of sound recordings within the scope of China’s commitment for sound recording distribution services.<sup>159</sup> However, the Panel correctly rejected these arguments and concluded that the electronic distribution of sound recordings was a commercial practice well known to China and other Members in 2001 when China concluded the terms of its WTO accession.<sup>160</sup> Indeed, in its appellant submission, China acknowledges this point, stating that in China “internal discussions concerning the possible implementation of a legal framework concerning the services at issue may have been ongoing since 1999.”<sup>161</sup> Thus, China concedes that it was well aware of the electronic distribution of sound recordings before the conclusion of its Services Schedule.

---

<sup>158</sup> Appellate Body Report, *Japan – Apples*, paras. 120-128 (where the appellant did not raise Article 11 in its notice of appeal, the Appellate Body found that such a claim was “not properly before us in this appeal”).

<sup>159</sup> China First Written Submission, paras. 476-482.

<sup>160</sup> Panel Report, paras. 7.1237-47.

<sup>161</sup> China Appellant Submission, para. 191.

110. In response to the Panel’s finding that Members (including China) were in fact aware of the technical and commercial viability of this form of distribution, China now has shifted its argument to state that “this fact alone does not establish that they intended to make a commitment on such services.”<sup>162</sup>

111. Indeed, China’s entire argument on appeal seems to rest on a single assertion that China did not adopt measures addressing the electronic distribution of sound recordings until 2003.<sup>163</sup> China states that the fact that the electronic distribution of sound recordings “was not allowed within China at the time of the negotiations constitutes relevant evidence that China did not intend to make a commitment on such a service, and this evidence should not have been ignored by the Panel.”<sup>164</sup> However, the Panel did not ignore such evidence; the Panel effectively responded to this argument and rejected it. As the Panel cogently explained, a “Member’s service commitments need not reflect its existing legal framework. A number of Members, including China itself, have undertaken specific commitments whereby they have committed to guarantee a market access level higher than their regulatory regimes at the time the commitments were made.”<sup>165</sup> Indeed, it is useful to recall in this context that the GATS aims at “progressively higher levels of *liberalization*.”

---

<sup>162</sup> China Appellant Submission, para. 184.

<sup>163</sup> China Appellant Submission, para. 191.

<sup>164</sup> China Appellant Submission, para. 190.

<sup>165</sup> Panel Report, para. 7.1245. Indeed, in *U.S. – Gambling*, where the United States had in place a long-standing, domestic ban on gambling, the panel found that the United States had nonetheless undertaken a commitment with respect to the cross-border supply of gambling and betting services. Panel Report, *U.S. – Gambling*, paras. 6.135-6.138.

112. It is noteworthy that China argues here that the Panel erred merely because it did not place greater weight on a single fact relating to a law adopted in 2003, while China also argues in this appeal that to the extent that the Panel relied on any single element of its analysis as conclusive, the Panel erred in its application of the customary rules of treaty interpretation.<sup>166</sup> China thus takes two contradictory positions. China cannot argue that the Panel should have interpreted the common intentions of the parties solely based on China's adoption of a law in 2003, and that the Panel should have ignored the overwhelming evidence demonstrating that China and other WTO Members were aware of the commercial reality of the electronic distribution of sound recordings well before 2001.<sup>167</sup> As the Panel explained:

In sum, the record indicates that the electronic distribution of sound recordings had become a commercial reality in many markets before China's accession to the WTO. China was aware of this fact. The domestic legal framework for the electronic distribution of sound recordings in China, to the extent that this is relevant for our interpretation, was under consideration in China from as far back as 1998, although put in place only in 2001. China had clearly taken note of, and was altering its domestic law to take into account the commercial reality of electronic distribution of sound recordings before its accession to the WTO in 2001.<sup>168</sup>

113. As the service at issue was being supplied in China at the time of the conclusion of the negotiations of China's Schedule, there is no basis for China to assert that it could not have intended to take a commitment with respect to the service merely because it did not enact formal regulations until two years later.<sup>169</sup>

---

<sup>166</sup> As set forth above, the Panel did not consider any single element as conclusive.

<sup>167</sup> Panel Report, paras. 7.1237-7.1247. *See also* U.S. First Oral Statement, paras. 58-67; U.S. Second Written Submission, para. 154 n. 232.

<sup>168</sup> Panel Report, para. 7.1246.

<sup>169</sup> Panel Report, paras. 7.1238-47.

114. China refers to *EC – Chicken Cuts*, but the Appellate Body’s report in that dispute does not support China’s position.<sup>170</sup> China recalls the Appellate Body’s reasoning in that dispute that the interpreter has “flexibility” in considering relevant supplementary means of interpretation to discern the common intentions of the parties to a treaty, and that relevant “circumstances” include any event or instrument “when it helps to discern what the common intentions of the parties were at the time of the conclusion with respect to a specific provision.”<sup>171</sup> However, China presents no argumentation explaining how the Panel’s approach in this dispute was incompatible with that guidance. In fact, there is no basis for such an argument. The Panel analyzed the supplementary means of interpretation and correctly determined that the circumstances surrounding the conclusion of the negotiation of China’s Services Schedule support the finding that China undertook a services commitment with respect to the electronic distribution of sound recordings.

115. China’s argument that the Panel should have applied the principle of *in dubio mitius* to conclude that China did not take a services commitment with respect to the electronic distribution of sound recordings is also without merit. There is no basis for the application of an *in dubio mitius* principle in this dispute. The Panel found – correctly – that its interpretation of the relevant terms resulted from a proper application of the rules reflected in Article 31 of the Vienna Convention. The Panel looked to supplementary means of interpretation purely to

---

<sup>170</sup> China Appellant Submission, para. 189.

<sup>171</sup> Appellate Body Report, *EC – Chicken Cuts*, para. 283. China Appellant Submission, para. 189.

confirm its interpretation (not because the meaning of the relevant terms was ambiguous).<sup>172</sup> In short, the Panel’s analysis of China’s commitment followed well-accepted principles of treaty interpretation that have been applied in previous disputes to the interpretation of WTO Members’ schedules, including their schedules of services commitments.

116. In sum, despite China’s assertions to the contrary, the Panel’s conclusion that China’s sound recording distribution services commitments encompass the electronic distribution of sound recordings is fully supported by the facts and argumentation on the record. China’s appeal should therefore be rejected.

#### **IV. The Panel Correctly Found that China’s Measures Restricting the Right to Import Films for Theatrical Release are Inconsistent with China’s Trading Rights Commitments**

##### **A. Factual Background**

117. Another of the U.S. claims before the Panel was that several Chinese measures related to films for theatrical release are inconsistent with China’s obligations under paragraphs 5.1 and 5.2 of the Accession Protocol, as well as China’s obligations under paragraph 1.2 of the Accession Protocol, which incorporates, *inter alia*, the commitments given by China in paragraphs 83 and 84 of the Working Party Report.<sup>173</sup>

118. In addition to challenging the Catalogue (in conjunction with the Foreign Investment Regulation)<sup>174</sup>, and Several Opinions<sup>175</sup>, the U.S. claim challenged the Film Regulation and Film

---

<sup>172</sup> Panel Report, para. 7.1221.

<sup>173</sup> These commitments are summarized in paragraph 5 above.

<sup>174</sup> Panel Report, para. 7.351.

<sup>175</sup> Panel Report, para. 7.374.

Enterprise Rule<sup>176</sup> as inconsistent with China’s trading rights commitments. Article 30 of the Film Regulation provides that only enterprises designated by the State Administration of Radio, Film and Television (“SARFT”) may engage in the business of importing films.<sup>177</sup> Article 16 of the Film Enterprise Rule provides that the business of importing films is limited exclusively to firms that have been approved by SARFT.<sup>178</sup>

119. The Panel found that Article 30 of the Film Regulation and Article 16 of the Film Enterprise Rule are inconsistent with paragraph 5.1 of the Accession Protocol and paragraphs 83(d) and 84(a) of the Working Party Report.<sup>179</sup>

120. Before the Panel, China did not defend the consistency of these measures with China’s trading rights commitments. Instead, China’s defense to this claim rested on the argument that films for theatrical release are not goods, and therefore, measures regulating the importation of films for theatrical release are not subject to China’s trading rights commitments.<sup>180</sup>

121. However, the Panel found that all of the measures subject to the U.S. claim, including Article 30 of the Film Regulation and Article 16 of the Film Enterprise Rule, are subject to and inconsistent with China’s trading rights commitments.<sup>181</sup>

122. China contends that the Panel erred in making this finding. For the reasons set forth below, the Panel’s findings and reasoning were correct, and China’s appeal should be rejected.

---

<sup>176</sup> Before the Panel, the United States referred to this measure as the Provisional Film Rule.

<sup>177</sup> Exhibit US-20.

<sup>178</sup> Exhibit US-22.

<sup>179</sup> Panel Report, para. 7.576; Panel Report, paras. 7.598-99.

<sup>180</sup> China First Written Submission, paras. 38-107.

<sup>181</sup> Panel Report, para. 7.575-76, 7.598-99.

**B. The Panel Correctly Found that the Relevant Measures Are Subject to China’s Trading Rights Commitments**

**1. Introduction**

123. On appeal, China largely repeats many of the same arguments it made before the Panel despite the overwhelming evidence and reasoning exposing the fallacy of these arguments. Virtually all of these 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).<sup>182</sup> China argues that the measures at issue regulate the importation of content, rather than the importation of the carrier.<sup>183</sup> In fact, this dichotomy is not presented by this dispute. The U.S. claim challenges measures regulating the importation of a good, and that good – a film for theatrical release – is an integrated product that consists of a carrier medium containing content.<sup>184</sup> All of China’s attempts to dis-aggregate the elements of this single product to evade its trading rights commitments are of no avail. China’s measures necessarily restrict who may import goods.

124. Indeed, the Panel correctly concluded that the provisions at issue “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.”<sup>185</sup> As set forth below, China has presented no basis to conclude otherwise.

---

<sup>182</sup> China Appellant Submission, paras. 221, 232, 238, 244-245.

<sup>183</sup> China Appellant Submission, para. 238.

<sup>184</sup> U.S. Second Oral Statement, para. 5. *See also* Panel Report, para. 7.518; Panel Report, para. 7.523.

<sup>185</sup> Panel Report, para. 7.560.

## 2. China Treats Films for Theatrical Release as Goods

125. China’s argument that the plain language of its measures supports its position is unavailing. China has in fact effectively conceded that a measure regulating the importation of film is a regulation on the importation of a good, stating in its appellant submission that, “[i]t is clear from the above that the question of who may import the carrier has thus no distinct and independent existence from the question of who may import the content.”<sup>186</sup> Tellingly, before the Panel, China also stated that pursuant to the Film Regulation:

only entities designated by SARFT can import foreign films for public show, which include feature films, documentary films, science and educational films, cartoon and puppet films, and special subject films, etc. *If 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.*<sup>187</sup>

This statement proves both that the relevant Chinese measures affect the importation of a good, and that the measures are inconsistent with China’s trading rights restrictions because they impermissibly restrict who may import that good.

126. Despite these statements, China continues to argue on appeal that the measures at issue do not restrict trading rights in goods. The Panel correctly rejected these arguments. Rather than addressing the many points that the Panel considered during its examination of this issue (as described in greater detail in paragraphs 127 *et seq.* below), China places great weight on the following single statement from the Panel, “it is not implausible that Articles 5 and 30 are concerned with who may conduct the business of bringing into China content that can be

---

<sup>186</sup> China Appellant Submission, para. 245.

<sup>187</sup> China Answer to Panel Question 179 (emphasis added). Panel Report, para. 7.538 n. 415.



commercially exploited by projection in theatres. Contrariwise, it seems somewhat less plausible that Articles 5 and 30 are about who may import content of the described kind on a physical carrier, that is to say, that they are about who may import hard-copy cinematographic film.”<sup>188</sup>

However, the Panel continued its reasoning as follows:

[I]n those cases where relevant content is to be imported on hard-copy cinematographic film, Articles 5 and 30 would necessarily affect who may engage in importing of hard-copy cinematographic films, because Articles 5 and 30 would then provide that only licensed and designated importers may engage in the import of content of cinematographic film. In the light of this, we think that under this translation Articles 5 and 30 would also appear to be subject, in principle, to China’s trading rights commitments.<sup>189</sup>

Thus, even if the relevant measures are primarily concerned with who may import content, it does not change the fact that the measures also restrict who may import goods containing such content. As a result, the relevant measures are subject to China’s trading rights commitments.

127. China also argues that the reference to specific types of films (*e.g.*, feature films, documentary films, science and education films) in Article 2 of the Film Regulation illustrates that this measure “is focused on content, and not on the importation of hard-copy cinematographic film.”<sup>190</sup> China further states that “films are defined in relation to their content,

---

<sup>188</sup> Panel Report, para. 7.535 (footnotes omitted).

<sup>189</sup> Panel Report, para. 7.543.

<sup>190</sup> China Appellant Submission, para. 223-24. In addition, the United States does not agree with China that the meaning of municipal law is a legal determination subject to *de novo* review by the Appellate Body. See China Appellant Submission, para. 234. The meaning and operation of the measure at issue is one of the facts to be assessed in the course of proceeding, just as any other relevant facts at issue. In *U.S. – Section 301*, the panel explained:

Our mandate is to examine Sections 301-310 solely for the purpose of determining whether the US meets its WTO obligations. In doing so, we do not, as noted by the Appellate Body in *India - Patents (US)*, interpret US law "as

(continued...)

and not in relation to the material used for their exploitation.”<sup>191</sup> China appears to be arguing that because one element of a good is content, the good is no longer a good. However, there is no basis for such an approach. Indeed, China’s argument would suggest that a Chinese measure regulating who may import certain types of books (such as science and educational books, mystery books, or science fiction books) is not subject to China’s trading rights commitments because the measure “is focused on content” rather than on the physical medium (*i.e.*, the binding and pages). And, yet, China does not – and cannot – argue that books are not goods.

128. The expressive content of a good – whether it is a t-shirt with a slogan, a book, or a film for theatrical release – is not separable from the rest of the good. In the case of a t-shirt, both the t-shirt slogan and the t-shirt fabric are all part of one good. There is no basis for the argument that because such goods carry content, they are no longer goods.<sup>192</sup>

129. China also makes much of the purported meaning of the Chinese term “*dian ying*,” as used in some of China’s measures. The Panel, however, correctly concluded that neither China’s argumentation nor the independent translator’s opinion supports China’s assertion that the

---

<sup>190</sup> (...continued)

such", the way we would, say, interpret provisions of the covered agreements. We are, instead, called upon to establish the meaning of Sections 301-310 as factual elements and to check whether these factual elements constitute conduct by the US contrary to its WTO obligations. The rules on burden of proof for the establishment of facts referred to above also apply in this respect.

Panel Report, *U.S. Section 301*, para. 7.18. *See also, e.g.*, Appellate Body Report, *U.S. – Corrosion-Resistant Steel Sunset Review*, paras. 189-91. Panel Report, *U.S. – Hot-Rolled Steel*, para 7.143 (“It is a well accepted principle of international law that for the purposes of international adjudication national law is to be considered as a fact.”); Panel Report, *U.S. – 1916 Act (Japan)*, para. 6.47.

<sup>191</sup> China Appellant Submission, para. 224.

<sup>192</sup> Panel Report, para. 7.503. *See also* U.S. Answer to Panel Question 22.

measures are exempt from China’s trading rights commitments. China asserts that the term “*dian ying*,” which means motion picture, refers to “film as an artistic work,” whereas “*dian ying jiao pian*” means “cinematographic film” and refers to “the physical film used to project motion pictures.”<sup>193</sup> The independent translator, the United Nations Office of Nairobi (UNON), did not accept China’s arguments in this regard. Instead, the UNON stated: “[f]rom the point of view of translation, there is no issue here: all the attested instances of the terms under consideration . . . are correctly and invariably translated as ‘film’ by both sides.”<sup>194</sup> As the United States has set forth above, the term “film” refers to a good that is an integrated product consisting of a carrier medium containing content.

130. China relies on the UNON’s hypothesis that it is possible that certain legal texts could be intended to refer to the content of a film (*i.e.*, artistic work) “and not to the material (*i.e.*, physical medium) on which the film is printed, or the film stock.”<sup>195</sup> The translator went on to opine that “even in vernacular usage it would be hard to imagine a context where the term ‘Dian Ying’ alone referred to the material on which the film is printed, the film stock, rather than the content.”<sup>196</sup> However, China’s reliance on these statements is misplaced. The 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.<sup>197</sup> The United States did not assert that the relevant Chinese measures only affect the material on which the film is printed (such as film

---

<sup>193</sup> China Appellant Submission, para. 230.

<sup>194</sup> UNON Translation, p. 22-23.

<sup>195</sup> UNON Translation, p. 25. China Appellant Submission, para. 231 (citing Panel Report, para. 7.533).

<sup>196</sup> China Appellant Submission, para. 231 (citing Panel Report, para. 7.533).

<sup>197</sup> U.S. Comments Concerning the UNON Translation, paras. 26-27.

stock), but rather claimed that they affect a good containing content. Accordingly, the UNON translator’s statements do not support China’s interpretation of the relevant measures. As the Panel found, “no matter which of the above-mentioned translations of [the relevant provisions] is considered to be the correct one, in cases where what is imported is hard-copy cinematographic film, Articles 5 and 30 would necessarily affect hard-copy cinematographic film and, therefore, a good.”<sup>198</sup> Indeed, as noted above, China made this clear when it stated that under the Film Regulation:

“only entities designated by SARFT can import foreign films for public show, which include feature films, documentary films, science and educational films, cartoon and puppet films, and special subject films, etc. *If 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.*”<sup>199</sup>

This statement also exposes the weakness of China’s argument on appeal that the Panel erred “because it failed to establish how the measures would affect importation of cinematographic film.”<sup>200</sup> In fact, China’s own statement here concedes that the measures at issue affect hard-copy cinematographic films by restricting who may import such goods.

131. Furthermore, as the Panel found, China conceded that films for theatrical release are treated as goods (regardless of the fact that they contain content) in a number of additional respects.<sup>201</sup> For example, heading 3706 of the Harmonized Commodity Description and Coding System (HS) defines as a separate good “cinematographic film, exposed and developed, whether

---

<sup>198</sup> Panel Report, para. 7.539.

<sup>199</sup> China Answer to Panel Question 179 (emphasis added). *See also* Panel Report, para. 7.538 n. 415.

<sup>200</sup> China Appellant Submission, para. 237.

<sup>201</sup> Panel Report, paras. 7.524-25.

or not incorporating sound track or consisting only of sound track.”<sup>202</sup> More significantly, China’s own Schedule of Concessions, i.e., its goods schedule, contains a heading with the same number and which covers the HS description for heading 3706.<sup>203</sup> As the Panel pointed out, “China confirmed that it charges customs duties on the importation of exposed and developed cinematographic film.”<sup>204</sup> Finally, the Panel examined the explanatory note accompanying HS heading 3706, which provides that “this heading covers developed standard or substandard width cinematographic film for the projection of motion pictures, negative or positive ...”.<sup>205</sup> According to the Panel, “[t]his indicates that, despite the fact that exposed and developed cinematographic films are used to provide a service, namely, the projection and exhibition of motion pictures in theatres, they are considered as goods. Furthermore, and as also pointed out by the United States, the explanatory note shows that a physical carrier containing content is treated as a good.”<sup>206</sup>

132. As further support for the Panel’s conclusion, Articles III:10 and IV of the GATT 1994 (which are the same text as the corresponding articles of the GATT 1947) make clear that films for theatrical release have been considered goods since at least 1947. Article III of the GATT, which only applies to trade in goods, sets forth Members’ national treatment obligations. Article III:10 provides for an exception to the national treatment obligation for films for theatrical

---

<sup>202</sup> Panel Report, para. 7.524.

<sup>203</sup> Panel Report, para. 7.524.

<sup>204</sup> Panel Report, para. 7.524 (citing China Answer to Panel Question 132).

<sup>205</sup> Panel Report, 7.525 (citing Exhibit US-53 (World Customs Organization, Explanatory Notes, VI-3706-1, (4<sup>th</sup> Ed. 2007))).

<sup>206</sup> Panel Report, para. 7.525.

release, which is elaborated upon further in Article IV. If China were correct that films are not goods, neither Article III:10 nor Article IV would have been necessary.<sup>207</sup>

133. Finally, China repeats an argument it made before the Panel that the United States shifted the focus of its claim from “film for theatrical release” to “hard-copy cinematographic film.”<sup>208</sup> In fact, no such shift occurred. The U.S. claim from the beginning of the dispute has related to films for theatrical release. In 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 U.S. claim is in fact a tangible good *i.e.*, hard-copy cinematographic film.<sup>209</sup> As the Panel found, the “United States has merely clarified the meaning of the expression ‘films for theatrical release’, by confirming that this expression is intended to describe goods – cinematographic films, whether negative or positive – that can be used for projecting motion pictures in theatres.”<sup>210</sup>

### **3. Goods Used to Provide a Service Are Still Goods**

134. China also presents a new, but equally unavailing, variation of its argument before the Panel that films are not subject to goods disciplines, because they are used to provide a service. Before the Panel, China argued that because films are commercially exploited through a series of associated services, they are mere accessories to services, and therefore not subject to goods disciplines, including China’s trading rights commitments.<sup>211</sup> As the Panel found, “[w]e are not

---

<sup>207</sup> U.S. First Oral Statement, para.10. *See also* Panel Report, para. 7.519.

<sup>208</sup> China Appellant Submission, paras. 203-210.

<sup>209</sup> U.S. First Oral Statement, para. 11.

<sup>210</sup> Panel Report, para. 7.523.

<sup>211</sup> China First Written Submission, paras. 58-70.

convinced that merely because the import transaction involving hard-copy cinematographic film may not be the ‘essential feature’ of the exploitation of the relevant film, China’s trading rights commitments should not be applied to [the relevant provisions], even though they would otherwise be applicable.”<sup>212</sup> In support of its analysis, the Panel referred to the example of a surgical tool, which is imported for the purpose of providing healthcare services. As the Panel found, despite the fact that a surgical tool, which is a good is used to provide a service,

we consider that a possible governmental ban on the importation of these surgical tools should be scrutinized under WTO disciplines on trade in goods. It is correct that, in the case of hard-copy cinematographic film, imports occur as a result of a contractual obligation under a licensing agreement. This element does not change our assessment, however. In our view, it merely serves to demonstrate the existence of a link between the hard-copy cinematographic film and the relevant service.<sup>213</sup>

135. China argues on appeal that a surgical tool is different because “it does not relate to a service which is embodied in a physical carrier.”<sup>214</sup> However, the distinction that China attempts to draw does not in fact exist. A surgical tool is a good whose value lies primarily in its utility in the supply of a service, namely healthcare services. Similarly, the commercial value of a film for theatrical release lies primarily in its utility in the supply of film projection services that are supplied subsequent to importation. In either case, a measure restricting who may import the good would be subject to China’s trading rights commitments. According to China, films are different from surgical tools, because “hard-copy cinematographic film is imported for the purpose of providing a service....but – more importantly – the good at issue is imported

---

<sup>212</sup> Panel Report, para. 7.555.

<sup>213</sup> Panel Report, para. 7.549. *See also* Panel Report, para. 7.525 n. 400.

<sup>214</sup> China Appellant Submission, para. 242.

simultaneously, physically in conjunction with the right to provide the service in question in China.”<sup>215</sup> Notably, China concedes in this statement that films for theatrical release are goods. In addition, as the Panel found, even without this specific concession, that China’s line of reasoning fails to exempt the relevant measures from China’s trading rights commitments. Specifically, the Panel stated: “[T]he mere fact that an import transaction involving hard-copy cinematographic film is carried out as part, and in fulfillment, of a services agreement cannot be sufficient to remove it from the scope of China’s trading rights commitments.”<sup>216</sup> Similarly, a textbook, which is a good whose commercial value lies primarily in its utility in supplying educational services, may be imported as part of an agreement relating to the supply of such educational services. Yet, the importation of that textbook is the importation of a good, and therefore measures restricting who may import that good would be subject to China’s trading rights commitments.

136. As the Panel also noted, the Appellate Body’s reasoning in *Canada – Periodicals* supports the Panel’s conclusion. In that dispute, Canada argued that since the supply of advertising services falls under the GATS, a tax based on the value of advertising in periodicals did not regulate trade in goods. The Appellate Body disagreed, concluding 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.”<sup>217</sup>

---

<sup>215</sup> China Appellant Submission, para. 242.

<sup>216</sup> Panel Report, para. 7.549.

<sup>217</sup> Appellate Body Report, *Canada – Periodicals*, p. 17 (footnotes omitted). *See also* (continued...)



137. In yet another attempt to salvage its argument that measures regulating films are exempt from its trading rights commitments, China argues that “the demand of service suppliers is with respect to the content which is the subject of the services, not with respect to any good.”<sup>218</sup> This is incorrect: service suppliers want the good (*i.e.*, the film) to carry out their services of projecting the film (and thus the film’s content) to the ultimate consumer *i.e.*, the audience watching the film. Similarly, in the case of the surgical tool, the demand of service suppliers derives from the utility of the surgical tool in providing health care services, not from the tool by itself and apart from those services. Thus, China’s argument offers no basis for exempting films from trading rights commitments.

#### **4. China’s Right to Conduct Content Review Is Not Being Challenged**

138. China next attempts on appeal to link its WTO-inconsistent trading rights restrictions to content review. This argument is without merit. As a threshold matter, to the extent that this argument is an attempt to introduce for the first time a defense under Article XX(a) of the GATT 1994 that its measures are “necessary to protect public morals,” or an attempt to invoke the “without prejudice” clause of paragraph 5.1 of the Accession Protocol, China failed to assert such a defense before the Panel with respect to the U.S. trading rights claim related to films for theatrical release. Therefore, there is no basis for the Appellate Body to consider any arguments to that effect in this appeal.<sup>219</sup> Even if China had asserted such a defense before the Panel, it

---

<sup>217</sup> (...continued)

Panel Report, para. 7.525 n. 400; U.S. First Oral Statement, para. 16.

<sup>218</sup> China Appellant Submission, para. 243.

<sup>219</sup> *See, e.g.*, Article 17.6 of the DSU (“An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel”).

would obviously fail as the content review of films is conducted by the government in China, not by importers<sup>220</sup>, and therefore, the restriction on trading rights does not contribute to the protection of public morals in China.

139. Furthermore, the issue of China’s right to conduct content review is not presented by the U.S. trading rights claim related to films for theatrical release. What is at issue is China’s restrictions on who may import such goods. China asserts that the Panel’s analysis “would lead to absurd results which in turn may seriously undermine the rights of WTO Members.”<sup>221</sup>

According to China, the “right” being undermined by the Panel’s finding appears to be China’s right to prevent goods that violate China’s standards of content from entering China.<sup>222</sup>

However, in this dispute the United States has not challenged China’s right to conduct content review, nor has the United States challenged the right to bar the importation of goods containing prohibited content. Granting trading rights to all enterprises would not prevent China from barring the importation of prohibited content. Thus, China’s argument is misplaced.

## **5. Conclusion**

140. In short, China has failed to demonstrate any error in the Panel’s 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 addition, as explained above, the Panel’s analysis was objective,

---

<sup>220</sup> U.S. First Oral Statement, para. 33 citing Article 31 of the Film Regulation (Exhibit US-20) (“[t]hose intending to import films for public screening shall, before importing, submit the film to the Film Censorship Board for review”).

<sup>221</sup> China Appellant Submission, para. 252.

<sup>222</sup> China Appellant Submission, paras. 250.

complete, and accurate; it therefore constituted an objective assessment of the matter and complied with Article 11 of the DSU. Accordingly, China’s appeal should be rejected.

**V. The Panel Correctly Found that China’s Measures Regulating Unfinished AVHE Products and Sound Recordings Are Inconsistent with China’s Trading Rights Commitments**

**A. Factual Background**

141. The United States also claimed before the Panel that several Chinese measures related to unfinished audiovisual home entertainment (“AVHE”) products and sound recordings<sup>223</sup> are inconsistent with China’s obligations under paragraphs 5.1 and 5.2 of the Accession Protocol, as well as China’s obligations under paragraph 1.2 of the Accession Protocol, which incorporates, *inter alia*, the commitments given by China in paragraphs 83 and 84 of the Working Party Report.<sup>224</sup>

142. In addition to the Catalogue (in conjunction with the Foreign Investment Regulation)<sup>225</sup> and Several Opinions<sup>226</sup>, the U.S. claim challenged the 2001 Audiovisual Products Regulation<sup>227</sup>

---

<sup>223</sup> The Audiovisual Products Regulation and the Audiovisual Products Import Rule regulate audiovisual products (which are defined as including AVHE products such as videocassettes, VCDs, and DVDs and sound recordings) according to whether they are finished or unfinished. Finished AVHE products and sound recordings are legitimately produced and replicated outside of China and require no additional production or replication in China before being made available to consumers. Unfinished AVHE products and sound recordings are to be used to publish and manufacture copies for sale in China. U.S. First Written Submission, paras. 49, 59. Panel Report, para. 7.608

<sup>224</sup> These commitments are summarized in paragraph 5 above.

<sup>225</sup> Panel Report, paras. 7.351-352.

<sup>226</sup> Panel Report, para. 7.374.

<sup>227</sup> Before the Panel, the United States referred to this measure as the Audiovisual Regulation.

and the Audiovisual Products Importation Rule<sup>228</sup> as inconsistent with China’s trading rights commitments.

143. Article 5 of the 2001 Audiovisual Products Regulation provides that no entity or individual may import *inter alia* unfinished AVHE products or sound recordings without a necessary license.<sup>229</sup> Article 7 of the Audiovisual Products Importation Rule provides that the State shall implement a licensing system for the importation of *inter alia* unfinished AVHE products and sound recordings.<sup>230</sup>

144. The Panel found that Article 5 of the 2001 Audiovisual Regulation and Article 7 of the Audiovisual Products Importation Rule are inconsistent with paragraph 84(b) of the Working Party Report.<sup>231</sup>

145. Before the Panel, China did not defend the consistency of these measures with China’s trading rights commitments. Instead, China’s defense to this claim rested on the argument that unfinished AVHE products and sound recordings are not goods, and therefore, measures regulating the importation of such products are not subject to China’s trading rights commitments.<sup>232</sup>

---

<sup>228</sup> Before the Panel, the United States referred to this measure as the Audiovisual Import Rule.

<sup>229</sup> Panel Report, para. 7.636.

<sup>230</sup> Panel Report, para. 7.671.

<sup>231</sup> Panel Report, para. 7.657; Panel Report, para. 7.680.

<sup>232</sup> China First Written Submission, paras. 109-26.

146. However, the Panel found that all of the measures subject to the U.S. claim, including Article 5 of the 2001 Audiovisual Products Regulation and Article 7 of the Products Audiovisual Import Rule, are subject to and inconsistent with China’s trading rights commitments.<sup>233</sup>

147. China contends that the Panel erred in making this finding.<sup>234</sup> For the reasons set forth below, the Panel’s reasoning was correct, and China’s appeal should be rejected.

### **B. Unfinished AVHE Products and Sound Recordings Are Goods**

148. China’s defense of its measures that restrict who may import unfinished AVHE products and sound recordings involved many of the same arguments used by China in the context of films for theatrical release. China argued that unfinished AVHE products and sound recordings are not subject to China’s trading rights commitments, because the measures at issue do not regulate trade in goods, but rather regulate services.<sup>235</sup> China does not present those arguments in its appellant submission. Instead, China merely asserts that the Panel’s analysis, to the extent it incorporates the analysis related to films, is in error. None of China’s arguments have merit.

#### **1. China Treats Unfinished AVHE products and Sound Recordings as Goods**

---

<sup>233</sup> Panel Report, paras. 7.636-657, 7.671-7.680.

<sup>234</sup> Paragraph 4 of China’s Notice of Appeal also makes reference to the portions of the Panel’s report containing the following findings: Article 27 of the 2001 Audiovisual Products Regulation and Article 8 of the Audiovisual Products Importation Rule are inconsistent with paragraph 84(b) of the Working Party Report, and paragraph 1.2 of the Accession Protocol; Article 21 of the Audiovisual (Sub-) Distribution Rule is inconsistent with paragraphs 1.2 and 5.1 of the Accession Protocol and paragraphs 83(d) and 84(a) of the Working Party Report. However, China does not specifically refer to these provisions in its Notice of Appeal or address them in its Appellant Submission. In any event, the Panel’s findings with respect to these provisions were correct and (assuming that China has in fact appealed them and has not abandoned that appeal) should be upheld for the same reasons that the findings discussed in section IV of this submission were correct.

<sup>235</sup> China First Written Submission, paras. 109-26.

149. As China notes on appeal, the Panel rejected these arguments on many of the same bases that it rejected China’s analogous arguments with respect to films for theatrical release.<sup>236</sup> To recall, the Panel concluded that China had, in fact, conceded that the relevant products (*i.e.*, hard-copy AVHE products and sound recordings such as CDs or DVDs) were goods.<sup>237</sup> The Panel also took note of the fact that such products are classified under the Harmonized Commodity Description and Coding System (HS), which is a classification system for goods. Moreover, China’s own tariff schedule, which applies only to goods, incorporates these HS headings for unfinished AVHE products and sound recordings.<sup>238</sup>

150. The Panel also correctly rejected China’s remaining arguments that such products should not be subject to trading rights disciplines. In response to China’s argument that the measures regulate content, rather than a good, the Panel stated, “in those cases where audiovisual content is imported on a hard-copy master copy, Article 5 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. Thus, even if the term ‘audiovisual products’ in Article 5 were understood as indicated, Article 5 would appear to be subject, in principle, to China’s trading rights commitments.”<sup>239</sup>

## **2. Goods Used to Provide a Service Are Still Goods**

---

<sup>236</sup> See Panel Report, paras. 7.639-7.652.

<sup>237</sup> Panel Report, para. 7.640 (citing China Comment on U.S. Answer to Panel Question 164).

<sup>238</sup> Panel Report, para. 7.640.

<sup>239</sup> Panel Report, para. 7.644.

151. The Panel also correctly rejected China’s argument that measures restricting who may import unfinished AVHE products and sound recordings should not be subject to goods disciplines because such products are mere accessories to services. In this connection, the Panel stated, “even if it is assumed that foreign right holders must, in all cases, enter into licensing agreements with licensed import entities, we are not convinced by China’s position that any effect Article 5 has on who may import hard-copy master copies should not be examined under China’s trading rights commitments. We thus conclude that Article 5 is subject to China’s trading rights commitments.”<sup>240</sup>

### **3. Conclusion**

152. For the reasons set forth above, the Panel’s reasoning and conclusions with respect to unfinished AVHE products and sound recordings were correct. In addition, as demonstrated above, the Panel’s analysis was objective, complete, and accurate; it therefore constituted an objective assessment of the matter and complied with Article 11 of the DSU. Accordingly, China’s appeal should be rejected.

## **VI. Conclusion**

153. For the reasons given in this submission, the United States respectfully requests the Appellate Body to reject China’s appeal in its entirety.

---

<sup>240</sup> Panel Report, para. 7.652.

## **VII. Executive Summary**

### **A. China’s Appeal with Respect to Article XX(a) of the GATT 1994**

#### **1. The State Ownership Requirement**

154. China argues that the Panel incorrectly found that the state-ownership requirement in Article 42 of the Publications Regulation does not make a material contribution to China’s content review objectives within the meaning of Article XX(a) of the GATT 1994. In fact, however, the Panel’s analysis of this issue was sound, and its conclusion correct.

155. China had the burden of proof with respect to any defense based on Article XX(a) of the GATT 1994. China’s defense would fail if it could not prove that state ownership of the equity of importing entities was necessary to achieve its content review objectives. China did not, however, meet this burden. China never explained what impact state equity ownership might have on content review.

156. The Panel found that there was no basis on which the Panel could conclude that non-state-owned enterprises would be unable to achieve China’s content review policy goals, given that they could be expected to face the cost-based incentives of China’s measures and to respond to China’s regime of dissuasive sanctions just like state-owned enterprises. Second, the Panel concluded that the very limited evidence that China provided did not support China’s assertion that only state-owned enterprises would be able to comply with China’s content review requirements or to contribute to the protection of public morals in China. Finally, the Panel also noted that non-state-owned enterprises routinely are required to bear the costs associated with complying with laws and regulations that serve a public policy function.



157. China also provided no factual or other basis for believing that having wholly state-owned equity was a prerequisite for obtaining qualified personnel or necessary know-how.

## **2. The Foreign-Invested Enterprise Exclusion**

158. On appeal, China first argues that the Panel’s allegedly erroneous analysis of the state ownership requirement also makes the Panel’s analysis of the foreign-invested enterprise exclusion in various Chinese measures erroneous. However, the Panel’s analysis of the state ownership requirement was correct, and therefore this Chinese argument should be rejected. Second, China’s impression that foreign-invested enterprises “may not have” certain qualifications does not, as a logical matter, lead to the conclusion that such enterprises do not or could not have them. Third, China is wrong to argue that the Panel’s finding is inconsistent with an earlier Panel finding concerning Article 42 of the Publications Regulation.

## **3. The Impact of the Measures at Issue on Those Wishing to Engage in Importing**

159. China contends that the Panel’s Article XX(a) analysis should not have considered the restrictive impact of its measures on those wishing to engage in importation of the products at issue, and that therefore the Panel’s findings that the measures at issue are not “necessary” are flawed. First, China’s argument is fundamentally beside the point. For each of the measures that is the subject of this part of China’s appeal, the Panel reached the conclusion that the measure did not make a contribution to the achievement of China’s content review objectives. That conclusion alone supports the Panel’s ultimate conclusion that the measures were not “necessary” within the meaning of Article XX(a) of the GATT 1994.

160. Second, China fails to recognize that the Panel was adapting the “weighing and balancing” approaches taken by the Appellate Body in *U.S. – Gambling* and *Brazil – Retreaded Tyres* to a situation where the Panel had found an inconsistency with respect to China’s obligations concerning the treatment of enterprises (and in particular, enterprises wishing to engage in the importation of certain goods), rather than an inconsistency regarding China’s obligations concerning the treatment of goods. Consequently, to the extent that the Panel considered as one factor the restrictive effects of the measures being examined, it was logical for the Panel to consider the effects on enterprises.

**4. The WTO-Consistent Alternative of Having the Chinese Government Conduct Content Review**

161. China contends that the Panel incorrectly evaluated one of the proposed alternatives to certain WTO-inconsistent aspects of Article 42 of the Publications Regulation that the Panel had found were, in the absence of reasonably available alternatives, “necessary” to protect public morals in China. The Panel focused on the U.S. proposal that the Chinese Government – rather than wholly state-owned publication import entities – could conduct the content review of products imported into China.

162. China does not argue on appeal that the proposed alternative would not allow China to achieve its objectives with respect to content review. Instead, China focuses its appeal on whether the proposed alternative was “reasonably available” to China.

163. In fact, the evidence before the Panel established that the Chinese Government has the capacity to carry out content review. For instance, Chinese authorities already carry out the content review of films imported for theatrical release and the content review of electronic

publications and audiovisual products (including sound recordings). Furthermore, with respect to reading materials in particular (to which Article 42 of the Publications Regulation applies), the General Administration of Press and Publication (“GAPP”) also already performs several functions that establish its capacity to conduct content review.

164. As for China’s assertions about resources, the evidence before the Panel does not support them either. First, 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, nor why the burden of content review would be undue when compared to the burden of such things as conducting health and safety inspections or other similar measures at the border. Second, China could, if necessary, charge fees to defray any additional expense incurred if it assumed responsibility for conducting content review of reading materials. China already has the legal authority to do so, and thus it cannot be “unreasonable” for China to use this authority if needed. Third, China does not respond to the Panel’s point that implementation of the proposed alternative would relieve a burden that, according to China, state-owned capital bears – and that relief in turn could offset any financial burden that the Government would be assuming by conducting content review.

165. The fact that the proposed alternative would require a different structure from China’s current structure does not make the proposed alternative infeasible; by definition, any reasonably available alternative will be different in some respect from the existing situation. In addition, the Chinese Government should not have difficulty operating in multiple locations; in fact, the requisite capacity to conduct content review of reading materials, including the personnel and expertise, is already present across China. Moreover, the Panel also considered the possibility

that for some reading materials, content review could be done electronically in a central location, using an approach that is essentially the same as the one used by the wholly state-owned China National Publications Import & Export Corporation. China’s statistics also make clear that the Chinese authorities are able to manage content review on a large scale, because they already perform content review on large numbers of audiovisual imports.

166. It is also apparent that the proposed alternative would impose fewer restrictions on trading rights than the measure at issue. The State plan condition is intended to limit the number of publication import entities, thereby setting a quota on the number of such entities, and such quotas are inherently restrictive. By contrast, no such limitation would apply in the Panel’s proposed alternative.

### **5. The Request for Completion of the Analysis**

167. China conditions its request on the Appellate Body’s finding that China’s measures are “necessary” within the meaning of Article XX(a) of the GATT 1994. However, for the reasons given in this submission, the Appellate Body should not make that finding, and thus the condition is not fulfilled.

168. In addition, China has failed to identify the factual findings by the Panel and undisputed facts in the Panel record that would enable the Appellate Body to complete the analysis with regard to any of these issues. China has thus left to the Appellate Body the entire burden of identifying the means by which the Appellate Body could complete the analysis. Moreover, China has potentially put the United States in the position of having to respond for the first time at the oral hearing to China’s asserted factual basis for completion of the analysis of these issues. An oral hearing is not well suited to addressing such an assertion for the first time.

**B. China’s Appeal with Respect to Sound Recording Distribution Services**

169. In Sector 2.D of its Services Schedule, China scheduled a mode 3 commitment covering Chinese-foreign contractual joint ventures engaging in “sound recording distribution services.” Nevertheless, China maintains certain measures (the Circular on Internet Culture, the Network Music Opinions, the Several Opinions, the Foreign Investment Regulation, and the Catalogue) that prohibit foreign-invested entities from engaging in the electronic distribution of sound recordings. The United States challenged these measures as inconsistent with Article XVII of the GATS.

170. China did not address the claim that the relevant measures accord less favorable treatment to foreign service suppliers. Instead, China’s argument before the Panel, and now on appeal, rests on the assertion that its sound recording distribution services commitment does not encompass the distribution of sound recordings through electronic means, but rather only includes the distribution of sound recordings stored or transferred on physical media (*e.g.*, CDs).

171. The Panel correctly applied the customary rules of treaty interpretation reflected in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* (“Vienna Convention”) and found that China’s commitment for sound recording distribution services includes the electronic distribution of sound recordings. The Panel also correctly found that China’s measures are inconsistent with Article XVII of the GATS. As a threshold matter, China’s apparent attempt to rely on Article 11 of the DSU to buttress its argument should not be considered by the Appellate Body. China failed to raise Article 11 of the DSU in its Notice of Appeal and therefore any such claim is beyond the scope of this appeal.

**1. Analysis of the Ordinary Meaning of the Relevant Terms**

172. China’s challenge to the Panel’s analysis of the “ordinary meaning” of the relevant terms in China’s Services Schedule is without merit. The Panel took note of all the definitions offered by the Parties and explained the reason for its conclusions. With respect to “recording,” the Panel concluded that the term is not limited to recorded content embedded on physical media. In addition, the Panel found that the term “distribution” refers to both the distribution of tangible and non-tangible items. Indeed, China’s argument that the term “distribution” must be limited to tangible items fails for the simple reason that Article XXVIII(b) of the GATS defines the “supply of a service” as including its “distribution.” Since services are not tangible objects, the term “distribution” is not limited to the distribution of tangible objects.

173. The Panel’s ordinary meaning analysis was consistent with the Appellate Body’s guidance in *U.S. – Gambling*, because the Panel examined which of the available dictionary definitions should be attributed to the terms in China’s Schedule.

## **2. Analysis of Relevant Context**

174. Second, contrary to China’s assertions, the Panel’s analysis of the relevant context was sound. China asserts that the Panel should have found its analysis of the relevant context inconclusive, but China’s argument does not accurately reflect the record.

175. The Panel first examined Sector 2.D (Audiovisual Services) as a whole in China’s Schedule. Based on the meaning of “audiovisual,” the Panel concluded that the sector heading did not limit any entries under the sector heading to services relating only to physical products. China’s only argument in response is that, notwithstanding the Panel’s conclusion, it is not “illogical” that a Member could have intended to commit services relating to audiovisual products in physical form only under such a heading. However, whether a Member could do so,

the Panel correctly found that in this case China did not limit its commitment so as to exclude the distribution of sound recordings through electronic means.

176. The Panel also examined the entry for “videos, including entertainment software and (CPC 83202), distribution services” in Sector 2.D of China’s Schedule. The Panel properly concluded that this entry supports its interpretation of sound recording distribution services as not limited to the distribution of sound recordings on physical media. China’s argument that the Panel should have examined a dictionary definition for “video” available at the time of the conclusion of its WTO accession is an interpretive approach that the United States considers of little utility in determining whether a particular technological means of supplying a service is covered by a particular services commitment. Dictionaries may not reflect the evolution in the ordinary meaning of a term particularly where the editing of a technology lags behind technological developments. One of the dictionary definitions of “video” examined by the Panel in fact limits that term to “video tapes” or “video cassettes,” yet at the time of the publication of that dictionary in 2002, DVDs had already overtaken video tapes as the primary medium for distributing films. Furthermore, China’s argument is inconsistent with the principle of technological neutrality. China could have excluded the distribution of sound recordings through electronic means from the scope of its commitments, but it failed to do so.

177. China’s discussion of the Services Sector Classification List in document MTN.GNS/W/120 (“W/120) and its relationship to the meaning of “videos” is also flawed. China appears to contend that the use of the plural form of a noun (*i.e.*, videos) refers to a concept that is countable, and therefore must be tangible. However, there is no basis for this

argument, and in fact there are many nouns that refer to concepts that are both countable and intangible.

178. China also challenges the Panel’s analysis of the relationship between Sector 4 and Sector 2.D of China’s Services Schedule; however, China’s arguments have no merit. China argues that the Panel’s finding did not reflect the logic of China’s Schedule insofar as China sought to schedule services related to audiovisual products in Sector 2.D of its Schedule because of their audiovisual content. In fact, that is precisely the rationale underlying the Panel’s conclusion that the distribution services in Sector 2.D of China’s Schedule are not limited to the distribution of tangible items.

179. The last element of the Panel’s contextual analysis that China challenges relates to Article XXVIII(b) of the GATS; this argument also misses the mark. China argued before the Panel that because distribution is limited to the distribution of tangible goods, “sound recordings” must only refer to physical goods. However, the Panel’s analysis of Article XXVIII(b) makes clear that distribution includes the distribution of intangible items. Thus, China cannot rely on the meaning of “distribution” as support for its assertion that “sound recording” must refer to a physical object.

### **3. Object and Purpose**

180. The Panel’s analysis of the scope of China’s commitment also accords with the “object and purpose” of the GATS.

181. China points to the principle of “progressive liberalization,” and states that Members “exercise sovereignty in deciding about the pace and extent of liberalization of their services



markets.”<sup>241</sup> This argument is beside the point, because it ignores the fact that where Members have undertaken certain commitments, they must comply with those commitments. This argument also misses the point that compliance with current commitments is essential to the credibility and success of progressive liberalization in the future.

182. China also argues that the Panel should have conducted its ordinary meaning analysis based on the meaning of relevant terms at the time of its accession. However, China presents no basis on which to conclude that such an approach would have resulted in a different interpretation than the one reached by the Panel

183. Thus, the Panel’s analysis of the ordinary meaning of the relevant terms in China’s Services Schedule in their context, and in light of the object and purpose of the GATS, was correct, and China’s appeal should be rejected.

#### **4. Supplementary Means of Interpretation**

184. The Panel also examined supplementary means of interpretation to confirm its conclusions based on an application of Article 31 of the Vienna Convention. The Panel’s reasoning and conclusions were correct.

185. During the Panel proceedings, China relied exclusively on the argument that the electronic distribution of sound recordings was not a “commercial reality” at the time of China’s accession to the WTO, that Members were unaware of such distribution, and that therefore Members could not have intended to include the electronic distribution of sound recordings within the scope of China’s commitment for sound recording distribution services. In response

---

<sup>241</sup> China Appellant Submission, para. 167,

to the Panel’s finding that Members (including China) were in fact aware of the technical and commercial viability of this form of distribution, China now has shifted its argument to state that “this fact alone does not establish that they intended to make a commitment on such services.”<sup>242</sup>

186. China’s entire argument on appeal rests on the assertion that the Panel did not take sufficient note of the contention that because China did not adopt measures addressing the electronic distribution of sound recordings until 2003, it could not have had the intention to take a commitment for such service in 2001. First, the Panel did take note of this argument by China and cogently explained its reasons for rejecting the argument. Second, as the Panel explained, China is incorrect that the absence of a measure regulating a particular service at the time it scheduled its services commitments proves that the Member did not intend to undertake a commitment with respect to that service. China’s criticism of the Panel for not having placed greater weight on a single fact is also inconsistent with China’s argument elsewhere in this appeal that, to the extent that the Panel relied on any single element of its analysis as conclusive, the Panel erred in its application of the customary rules of treaty interpretation.

187. China’s suggestion that the Panel should have applied the principle of *in dubio mitius* is also without merit. There is no basis for the application of an *in dubio mitius* principle in this dispute, since the Panel did not find that the meaning of the relevant terms was ambiguous after a proper application of the rules reflected in Article 31 of the Vienna Convention.

**C. China’s Appeal with Respect to Trading Rights for Films for Theatrical Release**

---

<sup>242</sup> China Appellant Submission, para. 49.

188. The United States challenged Article 30 of the Film Regulation and Article 16 of the Film Enterprise Rule, which limit the entities that may import films for theatrical release, as inconsistent with China’s trading rights commitments. China’s only defense to this claim before the Panel was that films for theatrical release are not goods, and therefore, measures regulating the importation of films for theatrical release are not subject to China’s trading rights commitments. The Panel correctly rejected these arguments and found that the measures are subject to and inconsistent with China’s trading rights commitments.

189. On appeal, China repeats many of the same arguments it made before the Panel. Virtually all of these 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 is embedded (which China views as a good). In fact, this dichotomy is not presented by this dispute. The relevant Chinese measures restrict who may import a good – a film for theatrical release, which is an integrated product consisting of a carrier medium containing content.

190. China has in fact conceded, both on appeal and before the Panel, that its measures restricting who may import films for theatrical release are measures restricting who may import goods. In addition, China’s reliance on references to particular types of films in its measures is unavailing. China appears to be arguing that because films contain content, they are no longer goods. If China’s argument were accepted, books, which also contain content, would not be considered goods. Yet, China does not – and cannot – make such an argument.

191. In addition, China’s contention that the meaning of the Chinese term “*dian ying*” supports its position is erroneous. The Panel correctly found that no matter which translation is considered to be correct, in cases where what is imported is hard-copy cinematographic film,

China’s measures would necessarily affect hard-copy cinematographic film and, therefore, a good.

192. As the Panel found, the fact that films for theatrical release are treated as goods by China is also made clear by the definition of the product in heading 3706 of the Harmonized Commodity Description and Coding (HS) definition, and by the fact that China admitted that it charges customs duties on the importation of film. The explanatory note accompanying HS heading 3706 also made clear that films containing content are treated as a goods.

193. As further support for the Panel’s conclusion, Articles III:10 and IV of the GATT 1994 (which are the same text as the corresponding articles of the GATT 1947) make clear that films for theatrical release have been considered goods since at least 1947.

194. China’s argument that the United States shifted the focus of its claim from “films for theatrical release” to “hard-copy cinematographic film” is also without merit. As the Panel correctly found, in response to China’s contention that films for theatrical release are not goods because they are not tangible, the United States clarified that the product subject to the U.S. claim is a tangible good *i.e.*, hard-copy cinematographic film.

195. China also recycled arguments that it made before the Panel that goods used to provide a service are no longer goods. The Panel correctly rejected such arguments. China’s contention that the demand of service suppliers lies with the ability to provide a service, rather than with the good itself, in fact fails to distinguish films for theatrical release from other goods whose commercial value lies in their utility in the supply of a service.

196. Finally, China’s attempt to link its WTO-inconsistent trading rights restrictions to content review is without merit. To the extent that this argument is an attempt to introduce for the first

time a defense under Article XX(a) of the GATT 1994 or to invoke paragraph 5.1 of the Accession Protocol, China failed to assert such a defense before the Panel, and therefore, the Appellate Body should not consider arguments to that effect. Even if China had asserted such a defense, it would obviously fail as content review of films is conducted by the government in China, not by importers, and therefore, the restriction on trading rights does not contribute to the protection of public morals in China. Granting trading rights to all enterprises would not prevent China from barring the importation of prohibited content.

**D. China’s Appeal with Respect to Trading Rights for Unfinished Audiovisual Home Entertainment Products and Sound Recordings**

197. The United States challenged the Catalogue (in conjunction with the Foreign Investment Regulation), the Several Opinions, the 2001 Audiovisual Products Regulation, and the Audiovisual Products Importation Rule as inconsistent with China’s trading rights commitments. These provisions limit the entities that may import unfinished audiovisual home entertainment (AVHE) products and sound recordings. China’s only defense before the Panel was that unfinished AVHE products and sound recordings are not goods, and therefore, measures regulating the importation of such products are not subject to China’s trading rights commitments. The Panel correctly rejected these arguments and found that the relevant measures are subject to and inconsistent with China’s trading rights commitments.

198. First, the Panel concluded that China had, in fact, conceded that the relevant products were goods. The Panel took note of the fact that such products are classified under the HS, which is a classification system for goods. China’s own tariff schedule, which only applies to goods, incorporates these HS headings for unfinished AVHE products and sound recordings. In

response to China’s arguments that the measures only regulate content, and not a good, the Panel correctly rejected that argument and concluded that, irregardless, the relevant measures necessarily affect who may import the relevant goods.

199. As with films for theatrical release, the Panel also correctly rejected China’s arguments that because unfinished AVHE products and sound recordings are used to provide a service, the measures restricting who may import such goods should not be subject to China’s trading rights commitments.