

# WTO and National Cultural Policy: Rethinking China Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products

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## Résumé

Cet article discute de la possibilité pour les États de faire valoir leurs politiques culturelles nationales portant sur des publications et des produits audiovisuels dans le cadre des accords de l'OMC. Il s'intéresse plus particulièrement à l'analyse des décisions rendues par les organes arbitraux de l'OMC à cet égard dans un litige opposant la Chine aux États-Unis.

## Abstract

This article is discussing the possibilities for States to adopt national cultural policies norms to certain publications and audiovisual entertainment products subject to WTO rules. It is dealing more particularly with the analysis and effects of the reports adopted by arbitral bodies of WTO in a conflict between China and USA.

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For decades, China has maintained State import control and content review in cultural products, in 2004; China revised its domestic Foreign Trade Law in accordance with its accession commitments<sup>1</sup>. Since then, operating import and export businesses in China no longer requires government approval. Instead, any person wishing to engage in foreign trade may do so simply by completing a registration procedure with the Ministry of Commerce<sup>2</sup>. However, State import control and content review in cultural products has not been changed. According to China's cultural regulations<sup>3</sup>, only selected State-owned entities (SOEs) are authorized to import cultural and information products and they are entrusted with the task of conducting censorship in the process.

According to China's view, cultural goods, as vectors of identity, values and meaning, play an essential role in the evolution and definition of elements such as societal features, values, ways of living together, ethics and behaviors. Thus, its restrictions on the right to import cultural products are necessary to protect public morals, because such restrictions can ensure an effective and efficient content review mechanism.

<sup>1</sup> As part of its accession commitments, China agreed that, within three years after accession, "all enterprises in China", and "all foreign individuals and enterprises, including those not invested or registered in China", would have the right to import and export all goods throughout its customs territory, except for a list of products reserved for trading by designated SOEs. The list of products reserved for State trading is set out in Annex 2A of the Accession Protocol, which includes 84 products for importation and 134 products for exportation. The 84 products subject to State trading for importation fall under the categories of grain, vegetable oil, sugar, tobacco, processed oil, chemical fertilizer and cotton. No cultural or information product is mentioned in Annex 2A. See WTO, *Protocol on the Accession of the People's Republic of China* (Decision of 10 November 2001), WT/L/432 (23 November 2001) (hereinafter, "Accession Protocol" or "Protocol").

<sup>2</sup> Documents required for registration are mostly for identification purposes. The Ministry of Commerce must complete the registration within five days of receipt of the required documents. *Foreign Trade Law of the People's Republic of China*, as amended, effective 1 July 2004, art. 8 and 9.

<sup>3</sup> The related rules and regulations are China's Foreign Investment Regulations (Foreign Investment Regulation, Catalogue and Several Opinions), Publications Regulation, Imported Publications Subscription Rule, Imported Publications Subscription, Rule Publications (Sub-)Distribution Rule, Publications (Sub-)Distribution Rule, Publications Market Rule, 2001 Audiovisual Products Regulation, Audiovisual Products Importation Rule, Audiovisual (Sub-)Distribution Rule, Film Regulation, Film Enterprise Rule.

China's cultural regulations that either limit to wholly State-owned enterprises importation rights regarding, or prohibit foreign-invested enterprises in China from importing, reading materials, AVHE products, sound recordings, and films incurred strong opposition from other WTO members with the United States as the forefront. On April 10, 2007, the United States formally presented a series of Chinese measures regulating activities related to the importation and distribution of certain publications and audiovisual entertainment products<sup>4</sup> to the dispute settlement processes in the WTO. On January 19, 2010, the Dispute Settlement Body (DSB) of the World Trade Organization adopted the Appellate Body report in *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China – Audiovisual Services)*<sup>5</sup>, and the Panel report<sup>6</sup> as modified by the Appellate Body report. Although this dispute has entered into the implementation procedure, with China being given 14 months, or until March 19, 2011, to comply with the WTO rulings, the arguments over the rights of WTO members to pursue the objects of the cultural policies<sup>7</sup>, such as China in this dispute, have just begun to rage inside and outside the GATT/WTO trade system.

Are cultural products goods or services, and therefore should they be considered by the WTO under the provisions of the *General Agreement on Tariffs and Trade* or under the *General Agreement on Trade in Services*? Will the content-based claims of cultural specificity or national identity carry much weight before dispute settlement panels or the Appellate Body? Will the treaty interpretation of the WTO rules by panels or the Appellate Body take into consideration the UNESCO cultural convention, thus making the pursuit of the trade liberalization and cultural protection in harmony

<sup>4</sup> Products at issue: Reading materials (for example, books, newspapers, periodicals, electronic publications), audiovisual home entertainment (“AVHE”) products (for example, videocassettes, video compact discs, digital video discs), sound recordings (for example, recorded audio tapes), and films for theatrical release.

<sup>5</sup> Report of the Panel, WT/DS363/R (12 August 2009).

<sup>6</sup> *Id.*

<sup>7</sup> “Cultural policies” is given a broad definition: those policies or measures related to culture, whether at the local, national, regional or international level that are either focused on culture as such or are designed to have a direct effect on cultural expressions of individuals, groups or societies, including on the creation, production, dissemination, distribution of and access to cultural activities, goods and services. See The Director-General, *Preliminary Report*, Annex V.

with each other? The answers to these questions not only highlight the reports of the Panel or the Appellate Body in the *China – Audiovisual Services* case, but also present important implication for the potential conflicts between the trade liberalization and cultural protection.

### **I. The Dual Nature of the Cultural Products and its Impact on the WTO Law**

Many reasons have been given as to why cultural products are different from other products. For example, cultural products allegedly “communicate ideas and emotions” while other products typically serve “utilitarian purposes”; the value of a cultural product comes from its “symbolic or representational content” rather than from any physical quality or practical usefulness; cultural products are non-rival goods (goods in which one person’s use does not limit another’s use). In other words, cultural products can be conveyed to many consumers at little additional cost<sup>8</sup>.

Cultural products embody the value, identity and meaning related content, which make them different from other products. However, as for whether the cultural products should be given special treatments under the GATT/WTO trade system with regard to its special content, different nations have their own views, typically with the main antagonists being pro-culture nations and pro-trade nations.

Pro-culture nations, such as France, argue for a view of national culture which recognizes it as a part of the member’s inherent identity. Furthermore, cultural products, as vectors of identity, values and meaning, are distinguished from the conventional merchandise in ways that make them highly vulnerable to a variety of market effects that act to limit the “diversity of choices”. When the liberal market for cultural products experiences market failures, market interventions are justifiable to pursue the cultural diversity<sup>9</sup>.

<sup>8</sup> Peter S. GRANT and Chris WOOD, *Blockbusters and Trade Wars: Popular Culture in a Globalized World*, Vancouver, Douglas & McIntyre, 2004, p. 45-52.

<sup>9</sup> Trevor KNIGHT, “The Dual Nature of Cultural Products: An Analysis of the World Trade Organization’s Decisions Regarding Canadian Periodicals”, (1999) 57 *U.T. Fac. L. Rev.* 165.

The United States, on the other hand, emphasizes the economic nature of the cultural product. From its perspective, cultural products, like all other traditional tradable products and services, are fundamentally economic products and, as such, should be subject to market forces. Besides the trade liberalization requirement of the GATT/WTO system, even from the consumers' perspective, offering consumers as wide a choice as possible in such goods and subjecting domestic products to competition from foreign cultural goods is in the interest of both consumers and, ultimately, the cultural industry itself. Therefore, trade in cultural goods should be subject to the obligation of non-discriminatory market access and conditions of competition<sup>10</sup>.

Both the pro-culture nations and pro-trade nations' attitude towards the cultural product were reflected in the GATT/WTO negotiations. In the original GATT negotiations, pro-culture nations, with the France in the forefront, began to want a "cultural exclusion" clause to shield cultural industries from the GATT's general liberalizing trade provisions<sup>11</sup>. While this proposal incurred the American negotiators' strong opposition, whom insisted that cultural products were in fact "entertainment products" and should be treated the same as other goods<sup>12</sup>. In the end, the GATT 1947 only had an added provision that specifically permitted countries to reserve screen time for their domestic films<sup>13</sup>, and there was ultimately no general cultural exception clause. The general provisions of the GATT still applied to most cultural goods. During the negotiation procedure of the WTO, the insert of "cultural exception" doctrine into the WTO was put to the negotiation agenda again; nations such as Canada and the European Communities (still with France at the forefront) had written "exception culturelle" on their flags when they fought in 1993 against the inclusion of audiovisual media into the regime of the new WTO. Although the "cultural exception" doctrine proved to be a very effective public relations slogan, its precise meaning has not been clarified. Proponents of the culture

<sup>10</sup> Edmund H. CHIANG, "The UNESCO Convention on The Protection and Promotion of the Diversity Of Cultural Expression: A Look at The Convention And Its Potential Impact On the American Movie Industry", (2007) 6 *Wash. U. Global Stud. L. Rev.* 379.

<sup>11</sup> P. S. GRANT and C. WOOD, *supra*, note 8, p. 356.

<sup>12</sup> *Id.*

<sup>13</sup> The end result of the negotiations was the addition of article IV, which allowed countries to use screen quotas "for films of national origin". In addition, a paragraph was added to article III to ensure that the article's "national treatment" provisions did not apply to the screen quotas of article IV.



invoked it in order to argue that culture must not be subject to the laws of free trade. Opponents, especially the US, however, suspected that the “cultural exception” doctrine was no more than disguised protectionism<sup>14</sup>. In the end, in response to the apparent lack of progress on the “cultural exception” in the WTO legal system, pro-culture nation embarked on an alternative movement to highlight the importance of cultural value<sup>15</sup>. This alternative movement is the introduction of the new concept “cultural diversity” in the international law.

It is not until the end of the 1990s that the concept of “cultural diversity” entered the scene of international economic law<sup>16</sup>. In autumn 1999, during the run-up to the WTO Ministerial Conference in Seattle, the Member States of the European Communities chose the safeguard of ‘cultural diversity’ to be the new official guiding policy goal in negotiations regarding trade in audiovisual media<sup>17</sup>. In contrast to the negativism and the latent ‘anti-Americanism’ of the ‘cultural exception’ rhetoric, the new concept has the advantage of being conceptually neutral.

The shift from the “cultural exception” to “the cultural diversity” not only took place in the realm of international economic law, but also was promoted in the realm of international public law. In November 2001, one year after the Council of Europe had adopted a declaration on cultural diversity<sup>18</sup>, UNESCO adopted the *Universal Declaration on Cultural Diversity*, which is essentially an internationally non-binding instrument<sup>19</sup>.

<sup>14</sup> Christoph BEAT GRABER, “The New UNESCO Convention on Cultural Diversity: A Counterbalance to The WTO? ”, (2006) 9-3 *Journal of International Economic Law* 553.

<sup>15</sup> P. S. GRANT and C. WOOD, *supra*, note 8, p. 380; Ivan BERNIER, “A UNESCO International Convention on Cultural Diversity ”, in Christoph BEAT GRABER, Michael GIRSBERGER and Mira NENOVA (eds), *Free Trade versus Cultural Diversity: WTO Negotiations in the Field of Audiovisual Services*, Zurich, Schulthess, 2004, p. 65, à la page 71.

<sup>16</sup> C. BEAT GRABER, *supra*, note 14.

<sup>17</sup> *Id.*

<sup>18</sup> Adopted by the Committee of Ministers of the Council of Europe on December 7, 2000.

<sup>19</sup> Adopted unanimously by the 185 Member States represented at the 31<sup>st</sup> session of the General Conference (November 2, 2001). The Declaration proclaimed 12 principles to be respected by the Member States in the context of questions regarding cultural diversity. Most importantly, Article 1 holds: “Culture takes diverse forms across time and space. This diversity is embodied in the uniqueness and plurality of the identities of the groups and societies making up humankind”. According to Article 2, governmental policies of cultural pluralism may further the inclusion and participation of all

On October 20, 2005, at UNESCO's 33rd session, the General Conference voted 148-2 to approve the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (hereinafter the "CCD").

As an important convention to fill an existing lacuna for cultural objectives in public international law, the major objectives of the CCD are the recognition of the dual nature of cultural expressions as objects of trade and artefacts of cultural value; and the recognition of the sovereign right of governments to formulate and implement cultural policies and measures for the protection and promotion of cultural diversity.

However, given the fact that most contentious "trade and culture" disputes will be presented before the WTO Dispute Settlement Body, whether the CCD can serve as a cultural counterbalance to the WTO in potential conflicts between trade and culture, mainly depends on the judicial development of the WTO Dispute Settlement Body.

The *China – Audiovisual Services* is the first case concerning the conflicts between the trade liberalization and the cultural protection after the adoption of the CCD. Thus, the finding in this case presents significant implications for the links between "trade and culture" under the WTO system.

In this case, one of the key issues for China is to justify a series of measures that establish a content review mechanism and a system for the selection of import entities for specific types of goods that China considers to be "cultural goods". First, China pointed out that the service nature of cultural goods, i.e. audiovisual products and films for theatrical release in this dispute, can affect whether the China Accession Protocol applies or not; second, China emphasizes the impact of the cultural products, including the impact they can have on societal and individual morals<sup>20</sup>. It is for this reason, according to China, that it has adopted a regulatory regime

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citizens and guarantee social cohesion, which is a precondition for any democratic society.

<sup>20</sup> China referred, in this regard, to Article 8 of the UNESCO *Universal Declaration on Cultural Diversity*, which states that cultural goods are "vectors of identity, values and meaning" and that they "must not be treated as mere commodities or consumer goods"; *China – Audiovisual Services*, Report of the Panel, *supra*, note 5, para. 7.751. China also referred to the UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*; Report of the Panel, *supra*, note 5, para. 4.207.

under which the importation of reading materials, audiovisual products, and films for theatrical release containing specific types of prohibited content is not permitted<sup>21</sup>. To this end, China explained, its existing regulatory regime defines the content that China considers to have a negative impact on public morals and, in order to ensure that such content is not imported into China, establishes a mechanism for content review of relevant products that is based upon the selection of import entities<sup>22</sup>.

China submitted that, because these import entities play an essential role in the content review process<sup>23</sup>, and because, in the case of imported products, it is critical that content review be carried out at the border<sup>24</sup>, only “approved” and/or “designated” import entities are authorized to import the relevant products. The extent of the participation of an import entity in the content review process and the means by which an entity is “approved” or “designated” to engage in importation vary depending upon the particular product involved. China further explained that its prohibition on the dissemination of certain types of content is enforced through dissuasive sanctions, including fines, the revocation of operating licenses, and criminal sanctions<sup>25</sup>, and that domestic publishers of cultural goods also face limitations on the publication of prohibited content, and content review requirements<sup>26</sup>.

<sup>21</sup> China explained that content that is prohibited ranges “from the depiction or condoning of violence or pornography, to other important values, including the protection of Chinese culture and traditional values”. *China – Audiovisual Services*, Report of the Panel, *supra*, note 5, para. 7.714. The Panel set out the list of content that may not be included in publications and noted that the United States did not specifically contest that the dissemination of materials containing the types of content listed as prohibited by China could have a negative impact on public morals in China. *Id.*, paras. 7.760-7.762.

<sup>22</sup> *Id.*, paras 7.753-7.755.

<sup>23</sup> *Id.*, para. 7.713. China further explained that, due to the limited resources of its administrative authorities and the risk of delay, import entities must be given a substantial role in the content review process in order to ensure effective and efficient content review. On this basis, China argued that “the importance of the input by the import entities in the content review process justifies the appropriate selection of those entities by the competent Chinese authorities, even if it may result in restrictions of the right to import.” *Id.*, para. 7.754.

<sup>24</sup> *Id.*, para. 7.754.

<sup>25</sup> *Id.*, para. 7.752.

<sup>26</sup> *Id.*, paras 7.716 and 7.752.

In general, whether the specificity of the cultural products should carry much weight before the WTO dispute settlement body highlights the defense of China in this dispute.

## II. The Key Issues in the Dispute: the Specificity of Cultural Products in the WTO

### A. The Classification of Cultural Products: Cultural Goods or Cultural Services

As we all know, the WTO members' trade liberalization obligations under the GATT 1994 and GATS are different from each other in many aspects. Take most important "non-discrimination treatment" (reflected by the MFN and NT) for example. If the challenged cultural products fit into the category of the goods, the WTO members under the obligations of the GATT 1994 which governs exclusively trade in goods, would generally be required to accord immediately and unconditionally "any advantage, favours, privilege or immunity" granted by any contracting party to any cultural product originating in or destined for any other country to the like cultural product originating in or destined for the territories of all other contracting parties. At the same time, WTO members would respectively make "products of the territory of any contracting party imported into the territory of any other contracting party not be subject... to internal taxes or other internal charges of any kind in excess of those applied... to like domestic products". Thus, the "non-discrimination treatment" requirement of the GATT 1994 is a general obligation. The WTO members cannot make any reservation to the GATT 1994 rules in regard with their domestic consideration, besides taking reference for some exceptions for the cultural product, such as Article IV (explicitly permits "screen quotas" favoring domestic films)<sup>27</sup> and Article XX(a) and Article XX(f)<sup>28</sup>.

<sup>27</sup> This provision reflects the fact that the film industry in Europe, decimated by World War II, had just witnessed the post-war release of years of pent-up Hollywood supply – literally thousands of American films – that had not been previously released in Europe due to the war. See Hernan GALPERIN, "Cultural Industries in the Age of Free-Trade Agreements", (1999) 24 *Can. J. Comm.* 49, 68.

<sup>28</sup> Article XX also includes broadly worded language creating a general exception for measures "necessary to protect public morals" and those "imposed for the protection of national treasures of artistic, historic or archaeological value". See *General Agree-*

On the contrary, if the challenged cultural products fit into the category of the services, the obligations under the GATS would be more modest in scope than those under the GATT<sup>29</sup>. Article XVII of the GATS requires that national treatment be extended by a country only to service sectors “inscribed in its Schedule, and subject to any conditions and qualifications set out therein”.

Article XIX, then, requires that “Members shall enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO Agreement and periodically thereafter, with a view to achieving a progressively higher level of liberalization”. Crucially, however, Article XIX also includes a limiting principle, providing that this “process of liberalization shall take place with due respect for national policy objectives”. This limiting principle is essential to understand the purpose and practical significance of UNESCO’s Culture Convention, which above all else speaks of a national policy objective of great importance to the countries that adopted it. Indeed, the Culture Convention explicitly requires that the principles it embodies be taken into account in negotiations in other fora, including the WTO.

The substantial differences of the trade liberalization obligations under the GATT 1994 and the GATS make the classification of challenged cultural products become meaningful for the disputed parties. Thus, the clas-

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*ment on Tariffs and Trade 1994*, Annex 1A of the Agreement Establishing the World Trade Organization, *The Results of the Uruguay Round. Legal Instruments*, 1867 U.N.T.S. 187, 33 *I.L.M.* 1153 (1994) (hereinafter “GATT 1994”).

<sup>29</sup> This difference reflects in large part the influence of pro-culture members such as France in the GATS negotiation. In the face of failure of the inserting of the general “cultural industry” exception provisions in the GATT1994, pro-culture members pushed for the opposite extreme – complete ‘exclusion of the audiovisual sector from GATS talks’. Ultimately the parties settled on an uneasy “agreement to disagree”, under which the audiovisual sector would not be formally excluded, but countries could decline to make commitments in the area with the understanding that negotiations would resume within five years. Perhaps predictably, very few commitments affecting popular culture have been made. For purposes of on-going negotiations, however, the WTO has described audiovisual services as including “motion picture and video tape production and distribution services, motion picture projection services, radio and television services, radio and television transmission services, [and] sound recording”. As digital technologies advance, however, the substantive distinction between goods and services of this sort appears increasingly arbitrary. See E. H. CHANG, *supra*, note 10.

sification issue becomes one of the key disputed issues in the WTO disputes.

The *Canada – Certain Measures Concerning Periodicals*<sup>30</sup> is the first case concerning the classification of the cultural products. In this case, Canada argued that because Part V.1 of the Excise Tax Act placed a tax on advertising of the periodical, it was within the purview of the General Agreement on Trade in Services, and therefore the GATT did not apply<sup>31</sup>.

The Appellate Body in this case side-stepped the thorny question of whether periodicals were a good or service. On the contrary, it recognized the dual nature of the periodicals, i.e. both being services and goods. More precisely, 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>32</sup>. Moreover, the tax was applied on a per issue basis and the person liable to pay the tax is not the advertiser, but the publisher or printer of the magazine<sup>33</sup>. Based on the finding that the challenged tax regulated both a good and a service, the Appellate Body furthermore examined the key issue of whether the GATT or the GATS should apply. Finally, the Appellate upheld the Panel's finding that GATT and GATS can co-exist and one does not override the other<sup>34</sup>; and the entry into force of the GATS does not diminish the scope of application of the GATT 1994<sup>35</sup>.

The approach of the Panel and the Appellate Body in *Canada – Periodicals* was reinforced in the *China – Audiovisual Services*. In this case, according to China, its measures pertaining to films for theatrical release do not regulate the importation of goods but, rather, regulate the content of films and the services associated with the importation of such content. Yet, China's trading rights commitments in its Accession Protocol and Working Party Report apply solely in respect of trade in goods. In other

<sup>30</sup> *Canada – Certain Measures Concerning Periodicals*, Report of the Panel, WT/DS31/R (14 March 1997), and corrigendum of 17 March 1997, WT/DS31/R/Corr.1 (17 March 1997); Report of the Appellate Body, WT/DS31/AB/R (30 June 1997) (hereinafter "*Canada – Periodicals*").

<sup>31</sup> Report of the Panel, *supra*, note 30, para. 5.13.

<sup>32</sup> Report of the Appellate Body, *supra*, note 30, p. 17.

<sup>33</sup> *Id.*, p. 21.

<sup>34</sup> Report of the Panel, *supra*, note 30, para. 5.17.

<sup>35</sup> Report of the Appellate Body, *supra*, note 30, p. 19.

words, in claiming that the trading rights commitments do not apply to the measures, China does not contest that these measures restrict who may import films, but rather contends that what is imported by the enterprises designated/approved by the SARFT under these measures is not a good<sup>36</sup>.

Similar to the finding in the *Canada – Periodicals*, the Appellate Body in *China – Audiovisual Services* also did not see the clear distinction drawn by China between “content” and “goods”. Neither do they consider that content and goods, nor the regulation therefore, are mutually exclusive. Content can be embodied in a physical carrier, and the content and carrier together can form a good<sup>37</sup>.

Just as mentioned above, the Appellate Body in *Canada – Periodicals* has found that a measure could be simultaneously subject to obligations related to trade in goods under the GATT 1994 and trade in services under the GATS. Also, in *EC – Bananas III*, the Appellate Body observed that, although the subject matter of the GATT 1994 and that of the GATS are different, particular measures “could be found to fall within the scope of both the GATT 1994 and the GATS”, and that such measures include those “that involve a service relating to a particular good or a service supplied in conjunction with a particular good”<sup>38</sup>. However, these findings specifically concerned the relationship between the GATS and the GATT 1994, and thus did not directly address the relationship between China’s trading rights commitments and its commitments on trade in services. Yet, these findings provide assistance in analyzing the issue of whether a measure can be simultaneously subject to obligations related to trade in goods and those related to trade in services. Given that China’s trading rights commitments apply to trade in goods, the Appellate Body findings in these earlier disputes are also relevant to resolve the issue of whether measures regulating services may be subject to China’s trading rights commitments.

Clearly, in some cases, cultural products have both significant service and good components and each category of the cultural products (goods

<sup>36</sup> *China – Audiovisual Services*, Appellate Body Report, WT/DS363/AB/R (21 December 2009), para.169.

<sup>37</sup> *Id.*, para.195.

<sup>38</sup> *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Appellate Body Report, WT/DS27/AB/R (25 September 97), para. 221 (“*EC – Bananas III*”).

or service) can found their foundation from some aspects<sup>39</sup>. In regard to the dual nature of the cultural products, i.e. the “service content” often relating to the “the good carrier”, the Appellate Body’s approach in the above cases implied that they didn’t prepare to distinguish content from the carrier. Thus, a measure can regulate both goods and services and, as a result, the same measure can be subject to obligations affecting trade in goods and obligations affecting trade in services.

## B. The Availability of Article XX (a) of the GATT 1994

Although there are no general cultural exception provisions in the GATT 1994, some terms in the WTO exception provisions may have some relationships with the cultural products, of which the idea of “public moral” embodied in the Article XX (a) of the GATT 1994 and GATS is regarded as most closely related to the concept of culture. Till now, the relationships between a society’s culture and its morals are complex, inter-related, and possibly viewed as dependent<sup>40</sup>. However, in most cases, the WTO members are prone to resort to the Article XX (a) of the GATT 1994 and GATS to justify their measures. In the *China – Audiovisual Services*, China invoked GATT Article XX(a) to justify their measures inconsistent with the Accession Protocol. China’s defense raised two major interpretive questions: (1) whether GATT 1994 Article XX is applicable to the Acces-

<sup>39</sup> Services seem to be more labour-intensive and less tangible than goods, so cultural performances more closely resemble services. As well, things such as legal and financial services involve the dissemination of information, or skill and knowledge; this dissemination appears analogous to the role played by books, periodicals and even audiovisual products, all of which are clearly physical products. Many cultural products must exist in physical form in order to be distributed to potential audiences. A legal opinion may be contained within a written memo, but this would not transform it from a service into a good. Technological advances have blurred the distinction further, as satellites and the Internet now allow cultural products to reach wide audiences without being packaged and shipped across borders. For these reasons, it is difficult to fit culture neatly into either category of good or service. H. ENDELMAN, “Regulating Culture: Controversy in the GATT Accord”, (1995) 18 *B.C. Int’l & Comp. L.R.* 443, 452; M. BRAUN and L. PARKER, “Trade in Culture: Consumable Product or Cherished Articulation of a Nation’s Soul?”, (1993) 22 *Denv. J. Int’l L. & Pol’y* 155, 175.

<sup>40</sup> The complex relationships perhaps due to the two elements’ contribution to the group identity of the particular society, but also often highly debated within the society when the precise content of either is up to discussion.



sion Protocol; and (2) if so, whether China's measures meet the requirements of GATT 1994 Article XX (a).

### 1. Paragraph 5.1 of China's Accession Protocol and Article XX (a) of the GATT 1994

Although, under the WTO legal system, China's Accession Protocol<sup>41</sup> is also made an "integral part" of the *Agreement Establishing the World Trade Organization* (the WTO Agreement), the umbrella agreement to which all other multilateral WTO agreements are annexed<sup>42</sup>, the China's Accession Protocol, which is concluded at the time China entered into the WTO in 2001, is different from or independent of the WTO multilateral agreements concluded at the same time of the establishment of the WTO in 1995. Besides the technical difference that the Accession Protocol is an agreement concluded between China and the WTO, The Accession Protocol's unique lies in that it prescribes a large number of substantive obligations of China that exceed the general requirements of the multilateral WTO agreements. Moreover, these obligations are only oriented towards China or, in other words, undertaken by China itself. While, on the contrary, the general obligations under the multilateral WTO agreements should be equally taken by all the WTO members without any reservation. Therefore, the integration of China's specific obligations prescribed by the

<sup>41</sup> Countries applying to join the WTO system after the Cold War have been typically required to take on additional obligations with respect to their domestic policies and regulatory system. The additional obligations are prescribed in the countries' Accession Protocol. The scope and types of additional obligations vary from country to country, with those for China being most extensive and far-reaching. For summary of the special commitments of acceding members, see WTO, *Technical Note on the Accession Process – Note by the Secretariat*, WT/ACC/10/Rev.4/Add.1 (25 May 2010). See also Steve CHARNOVITZ, "Mapping the Law of WTO Accession", in: Merit E. JANOW, Victoria DONALDSON and Alan YANOVICH (eds.), *The WTO: Governance, Dispute Settlement and Developing Countries*, Huntington, Juris Publishing, 2008, ch. 46; Julia YA QIN, "WTO-Plus' Obligations and Their Implications for the WTO Legal System – An Appraisal of the China Accession Protocol", (2003) 37 *Journal of World Trade* 483.

<sup>42</sup> Paragraph 1.2 of Part I of China's Accession Protocol provides: "The WTO Agreement to which China accedes shall be the WTO Agreement as rectified, amended or otherwise modified by such legal instruments as may have entered into force before the date of accession. This Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement." For discussion on the legal nature of the Protocol and its relationship with other WTO agreements, see J. YA QIN, *supra*, note 41.

China's Accession Protocol with the generally applicable obligations under the multilateral WTO agreements presented a big interpretation challenge for the WTO. In recent years, with the rise of the trade clashes between China and other WTO members, such issue becomes more and more urgent in the China related WTO disputes.

China's invocation of Article XX (a) presents complex legal issues. The question therefore arises whether Article XX can be directly invoked as a defence to a breach of China's trading rights commitments under the Accession Protocol, which appears to be China's position, or whether Article XX could be invoked only as a defence to a breach of a GATT 1994 obligation<sup>43</sup>.

In previous cases, when faced with a similar situation, such as in *US – Shrimp (Thailand) / US – Customs Bond Directive*, the Appellate Body examined the measure at issue on an *arguendo* basis, and after finding this measure did not satisfy the requirements of Article XX, concluded that it did not need to express a view on the question of whether Article XX is available as an affirmative defence for a measure found to be inconsistent with the Anti-Dumping Agreement<sup>44</sup>. In this case, the Appellate Body rejected the Panel's *arguendo* basis approach. According to the Appellate Body, while the *arguendo* technique may enhance simplicity and efficiency in decision-making, it may also detract from a clear enunciation of the relevant WTO law and create difficulties for implementation. Therefore, the use of the technique in this case "risks creating uncertainty with respect to China's implementation obligations"<sup>45</sup>.

In assessing whether Article XX is available, the Appellate Body did not directly analyse the systemic relationship between provisions of China's Accession Protocol and those of the GATT 1994 within the WTO legal system. It followed its traditional textual interpretation to focus on the text of the relevant provisions of the Protocol, including an examination of the meaning of the particular terms at issue, as well as the surrounding context and overall structure of the Accession Protocol<sup>46</sup>.

<sup>43</sup> *China – Audiovisual Services*, Report of the Panel, *supra*, note 5, para. 7.743.

<sup>44</sup> *United States – Measures Relating to Shrimp from Thailand, United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, Report of the Appellate Body, WT/DS343/AB/R, WT/DS345/AB/R (16 July 2008), para. 4.317.

<sup>45</sup> *China – Audiovisual Services*, Appellate Body Report, *supra*, note 36, paras 213-215.

<sup>46</sup> *Id.*, para. 217.

According to its interpretation, the language contained in the introductory clause of Paragraph 5.1 of China's Accession Protocol – “without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement” – mean that the justifications of Article XX of the GATT 1994 were incorporated, by way of reference, into the Protocol and this formed a constituent part of this specific accession commitment. Consequently, China could rely on this incorporation to invoke Article XX as a defence for a violation of Article 5.1 of its Accession Protocol<sup>47</sup>.

Just before the release of the Panel report in *China – Measures Related to The Exportation of Various Raw Materials*<sup>48</sup>, the Appellate Body's finding on the availability of GATT Article XX(a) to the Accession Protocol was regarded as a welcome development in WTO jurisprudence. Its legal reasoning was potentially capable of a broader application. Specially, its reasoning may have opened the door for applying GATT/GATS general exceptions to other WTO agreements that are silent about such policy exceptions. Similarly, this reasoning could be used to find the availability of GATT/GATS exceptions to other agreements – e.g. *China – Specific Provisions under the Accession Protocol* – that do not contain a similar qualifying clause as that of paragraph 5.1. In short, the AB's analysis has paved the way for interpreting the various agreements within the WTO as an integrated whole based on coherent policy considerations<sup>49</sup>.

However, in the *China – Measures Related to The Exportation of Various Raw Materials*, Panel noted that in contrast to the language of Paragraph 5.1 of the Accession Protocol before the Appellate Body in *China – Audiovisual Services*, Paragraph 11.3 of China's Accession Protocol<sup>50</sup> does not include any express reference to Article XX of the GATT 1994, or to provisions of the GATT 1994 more generally. Moreover, Paragraph 11.3 does not include an introductory clause such as that found in Para-

<sup>47</sup> *Id.*, para. 230.

<sup>48</sup> *China – Measures Related to The Exportation of Various Raw Materials*, Reports of the Panel, WT/DS394/R, WT/DS395/R, WT/DS398/R (5 July 2011).

<sup>49</sup> Julia YA QIN, “Pushing the Limits of Global Governance: Trading Rights, Censorship and WTO Jurisprudence – A Commentary on the *China-Publications Case*”, (2011) 10-2 *Chinese J. Int'l L.* 271.

<sup>50</sup> Paragraph 11.3 of China's Accession Protocol provides: “China shall eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT 1994.”

graph 5.1, which refers generally to “without prejudice to China’s rights to regulate trade in a manner consistent with the WTO Agreement”. Based on above strict textual interpretation of the Protocol, the Panel inferred that while it would have been possible to include a reference to the GATT 1994 or to Article XX, WTO Members evidently decided not to do so. Therefore, the deliberate choice of language providing for exceptions in Paragraph 11.3, together with the omission of general references to the WTO Agreement or to the GATT 1994, suggest that the WTO Members and China did not intend to incorporate into Paragraph 11.3 the defences set out in Article XX of the GATT 1994<sup>51</sup>. In addition, China and the WTO Members could have agreed that China’s export duty commitments were an integral part of China’s commitments under the GATT 1994. For instance, WTO Members could have done this by incorporating China’s export duties commitments into China’s GATT 1994 Schedule. If China’s export duties commitments were part of China’s GATT 1994 Schedule, the general defences of Article XX of the GATT 1994 would be available to justify potential violations. However, this is not what China and WTO Members chose to do. Based on these analyses, the panel made the conclusion that the Article XX of the GATT 1994 was not available.

It seems that as for whether the Article XX of the GATT 1994 can be invoked as a defence to a breach of China Accession protocol, the recent Panel’s finding in the *China – Measures Related to the Exportation of Various Raw Materials* wholly reverses the previous finding in the *China – Audiovisual Services*. However, if we make a deep analysis of the panels’ and Appellate Body’s legal reasoning in the two cases, we can find that both the panels and Appellate Body address the systemic issue consistently with the strict textual approach adopted in treaty interpretation. It is this strict textual interpretation approach that makes the finding of the availability of the GATT XX in the two disputes different from each other. Under this approach, the WTO judges followed the interpretive rules set out in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* (VCLT) in a rigid and mechanical manner. Rather than placing a treaty term in its systemic context, the WTO judges preferred to derive the meaning of the term from its dictionary definitions, in narrow textual confines. Therefore, there was no mention of the object and purpose of the Proto-

<sup>51</sup> The same inference can be seen that if China and WTO Members wanted the defences of GATT Article XX to be available to violations of China’s export duty commitments, they could have said so in Paragraph 11.3 or elsewhere in China’s Accession Protocol.

col's provisions; nor was there any reference to the supplementary means of interpretation, such as the preparatory work and the circumstances of the Protocol's conclusion.

Unlike the WTO multilateral agreements, each of which contains a coherent set of generally applicable disciplines, the Accession Protocol prescribes China-specific rules that address subject matters across various WTO agreements. Yet, the Accession Protocol, which forms part of the WTO Agreement, does not always specify how the China-specific rules relate to the generally applicable WTO provisions. Consequently, it can be difficult to identify the relevant "context" of a particular provision of the Protocol only by referring to the meaning of the term in the dictionary, analysing it in narrow textual confines. Furthermore, the Protocol does not provide explanations on why the many China-specific rules are needed, which makes it harder to identify the object and purpose of such provisions<sup>52</sup>. Therefore, it is unfair and even incorrect to infer the common intention of China and other WTO members by just comparing and analyzing the narrow text of the Protocol. Thus, the interpretation of these provisions coherently and consistently within the WTO treaty framework poses a major challenge to panels and the Appellate Body. While it might be prudent to decide each case on narrow grounds, it would be a mistake, as a matter of WTO judicial policy, to view each of the China specific provisions in isolation, rather than in the light of the historical context in which the Accession Protocol was negotiated<sup>53</sup>.

## 2. Requirements of the GATT Article XX(a)

The interpretation and application of GATT article XX involves a two-tier test. First, the challenged measure must meet the criteria of one of the article XX exceptions, i.e. the article XX(a)-(g). More precisely, the chal-

<sup>52</sup> Although Article 31 of the VCLT refers to the "object and purpose" of a treaty as a whole, WTO adjudicators have routinely examined the "object and purpose" of particular treaty provisions. According to the AB, Article 31 does not exclude taking into account the object and purpose of particular treaty terms, "if doing so assists the interpreter in determining the treaty's object and purpose as a whole". It also cautioned against considering the object and purpose of particular treaty terms in isolation from the object and purpose of the treaty on the whole. *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, Appellate Body Report, WT/DS269/AB/R, WT/DS286/AB/R (12 September 2005), paras 238-239.

<sup>53</sup> J. YA QIN, *supra*, note 49.

lenged measure must address a particular interest specified in the paragraph, e.g. “public morals”, and sufficient nexus must be found between the measure and that interest; the nexus is established when the measure is “necessary” to protect the interest. Moreover, the measure must pass the requirements of the introductory clause of article XX, which basically provides a means of ensuring that the general exceptions are not used for protectionist purposes.

**a. Links Between Import Entities, Content Review and the Protection of Public Morals**

As for the first requirement whether the link exists between import entities, the content review mechanism for imports of reading materials and finished audiovisual products, and the protection of public morals within China’s territory, the Panel referred to the finding of the Panel and Appellate Body in *US – Gambling*. Since GATT1994 Article XX(a) uses the same concept as GATS Article XIV(a), and since there are no reasons to depart from the interpretation of “public morals” developed by the Panel in *US – Gambling*, the Appellate Body adopted the same interpretation for purposes of GATT1994 Article XX(a) analysis.

According to the finding of the Panel and the Appellate Body in *US – Gambling*, the term “public morals” denotes conduct standards of right and wrong maintained by or on behalf of a community or nation<sup>54</sup>. The content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values<sup>55</sup>. Moreover, when the WTO members apply this and other similar societal concepts, they should be given some scope to define and apply for themselves the concepts of “public morals” in their respective territories, according to their own systems and scales of values<sup>56</sup>.

Thus, the term “public moral” in the GATT XX (a) is so flexible that it can embody so many conduct standards of right and wrong maintained

<sup>54</sup> *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Report of the Panel, WT/DS285/R (10 November 2004), para. 6.465; *US – Gambling*, Report of the Appellate Body, WT/DS285/AB/R (7 April 2005), para. 299 (hereinafter “*US – Gambling*”).

<sup>55</sup> *Id.*, Report of the Panel, para. 6.461.

<sup>56</sup> *Id.*

by or on behalf of a community or nation<sup>57</sup>. In this case, China claimed that, as vectors of identity, values and meaning, cultural goods play an essential role in the evolution and definition of elements such as societal features, values, ways of living together, ethics and behaviours. In addition, China referred to the UNESCO Universal Declaration on Cultural Diversity<sup>58</sup>, which China says was adopted by all UNESCO Members, including the United States. In China's view, it is clear, therefore that, depending on their content, cultural goods can have a major impact on public morals. However, different from plaintiff in the *US – Gambling*, the plaintiff in this case did not specifically argue that China's measures were not measures to protect public morals, but rather challenged the means China chose to achieve the objective of protecting public morals. The Panel therefore had no difficulty in establishing the link between content review and public morals, finding that the protection of public morals is a highly important value and that China has adopted a high level of protection within its territory<sup>59</sup>.

#### b. “Necessary” to Protect the Public Morals

The requirement that a cultural measure must be “necessary” to protect “public morals” raises the question of the interpretation of what is “necessary”. The standard of “necessity” is an objective standard. A panel may examine a WTO member's characterization of the measure's objectives and the effectiveness of its regulatory approach, but is not necessarily

<sup>57</sup> Indeed, the widest possible interpretation of public morals would lead to the unacceptable situation where WTO member States could derogate from international trade rules whenever they felt the inclination to do so, using the outward justification of human rights norms and standards. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, *The Human Rights and World Trade Agreements, Using General Exception Clauses to Protect Human Rights*, New York and Geneva, United Nations, 2005, p. 13.

<sup>58</sup> In the Article 8 of UNESCO *Universal Declaration on Cultural Diversity*, the Declaration states that cultural goods are “vectors of identity, values and meaning” and that they “must not be treated as mere commodities or consumer goods”.

<sup>59</sup> Report of the Panel, WT/DS363/R (12 August 2009), *supra*, note 5, paras 7.816-7.819. The lack of scrutiny on what constitute “public morals” in this case was criticized by Pauwelyn, see: Joost PAUWELYN, “Squaring Free Trade in Culture with Chinese Censorship: The WTO Appellate Body Report in ‘China-Audiovisuals’”, (2008) 11 *Melbourne Journal of International Law* 119.

bound by this, and may therefore also find guidance in the structure and operation of the standard<sup>60</sup>.

To determine the necessity of a measure, the panel should assess it through “a process of weighing and balancing a series of factors”<sup>61</sup>. This process begins with an assessment of the relative importance of the particular interests at stake and should then turn to other factors to be “weighed and balanced”. In most cases, two factors will be relevant: the contribution of the measure to the realization of the ends pursued by it and the restrictive impact of the measure on international commerce<sup>62</sup>. One of the key factors in the decision-making process is that the more vital or important the values pursued are, the easier it is for the Appellate Body to accept that the measures taken were “necessary” to achieve the specified policy objective<sup>63</sup>. If the panel reaches the preliminary finding that the measures are “necessary” to protect public morals, the next thing the panel shall do is to compare the challenged measures and possible alternatives, and consider the results of this comparison in the light of the importance of the interests at stake.

**The contribution of China’s measures to the protection of public morals in China.** Whether the State-ownership requirement of import entities, the exclusive of Foreign-Invested Enterprise and State Plan would make a “material contribution” to the protection of domestic public morals? As to this question, China relied on the balance reached between the performance of a public policy function<sup>64</sup> and the cost<sup>65</sup> associated

<sup>60</sup> *US – Gambling*, Report of the Appellate Body, *supra*, note 54, para. 304.

<sup>61</sup> *Korea – Measures affecting the import of fresh, chilled and frozen beef*, Report of the Appellate Body, WT/DS161/AB/R, WT/DS169/AB/R (11 December 2000), para. 164, cited in *US – Gambling*, Report of the Appellate Body, *supra*, note 54, para. 305.

<sup>62</sup> OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, *supra*, note 57, p. 15.

<sup>63</sup> Report of the Appellate Body, *supra*, note 61, para. 162.

<sup>64</sup> According to China, the content review mechanism is the expression of a public policy activity. It is, therefore, necessary that the administrative authority be certain that the selected entity to whom such a public activity has been attributed will act in accordance with all the requirements of Chinese laws and regulations that apply to such a public activity. In China’s view, the organizational structure of the selected import entities must, therefore, be such that there is enough confidence on the part of the administrative authority that the content review will be conducted both efficiently and effectively.

<sup>65</sup> According to China, the cost of content review consists of: (i) human resources cost; (ii) cost of equipment, facilities, and premises used for content review; and (iii) losses



with performing this public policy function. Thus, both the public policy function and the cost consideration were two components supporting why publication import entities needed to be wholly selected State-owned enterprises. However, this balance defence did not get the support from both the Panel and the Appellate Body. According to the Panel's finding, it was "not convinced" that the associated costs would be so high as to make it impossible, or not worthwhile, for private enterprises to attract qualified personnel or obtain the organizational know-how needed to conduct content review properly<sup>66</sup>. According to the Appellate Body's view, China did not explain how, in its view, the policy function of content review leads to the consequence that only wholly State-owned enterprises would be capable of satisfying the requirement that publication import entities have a suitable organization and qualified personnel<sup>67</sup>.

When we connect the Panel's finding with that of the Appellate Body, it seems that the failure of China's defence in this aspect can be mainly reduced to China's improper cost defence. Thus, it seems that if China would have taken aside the cost defence and effectively demonstrated that only State-owned enterprises were suitable for the public policy function of content review, the final finding would have been wholly different<sup>68</sup>. However, if we make a deep analysis of the approach taken by the Panel and the Appellate Body to the restrictive impact the measures and the available alternative measures had, we will find that the object of the Panel and Appellate Body is to change China's wholly SOEs' monopoly on trade rights on cultural products.

**The restrictive impact of the measures.** When it comes to the issue of the restrictive impact of the challenged measures, the panels and Appellate

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incurred from compensation for customers in case of failure of ordered publications to pass content review. See China's response to Panel Question 185.

<sup>66</sup> *China – Audiovisual Services*, *supra*, note 5, para. 7.858.

<sup>67</sup> *China – Audiovisual Services*, Report of the Appellate Body, *supra*, note 36, para. 267.

<sup>68</sup> In fact, China has referred to the public function reason for the Regarding the first two selection criteria, China recalls that the content review mechanism is the expression of a public policy activity. According to China, it is, therefore, necessary that the administrative authority be certain that the selected entity to whom such a public activity has been attributed will act in accordance with all the requirements of Chinese laws and regulations that apply to such a public activity. In China's view, the organizational structure of the selected import entities must, therefore, be such that there is enough confidence on the part of the administrative authority that the content review will be conducted both efficiently and effectively.

Body in the previous cases always weigh the restrictive impact of the challenged measures on the trade or commerce. However, in this case, the Panel received no clear evidence that the measures restricted imports; the challenged measures imposed a restriction on *who* can engage in importing the relevant products. The specific obligation in paragraph 5.1 of China's Accession Protocol is not only concerned with the question of *what* can be traded, but more directly with the question of *who* is entitled to engage in trading<sup>69</sup>. Therefore, the Panel decided to examine, additionally, the impact of the measures on those who may wish to engage in importing cultural products. Since the measures prohibit all private domestic and foreign entities from engaging in importation of cultural products, their restrictive impact on potential importers is complete. Weighing the high value of protecting public morals against the severe restrictive impact on potential importers and the lack of a material contribution of the measures to the goal, the Panel was able to conclude that the measures were not "necessary" to protect public morals. This finding was upheld by the Appellate Body.

The shift from the **trade** restrictive impact to the **trader** restrictive impact can be regarded as an ambitious endeavour made by the Panel and the Appellate Body, especially when there is no clear evidence on record to what extent, if any, the requirement in question limits imports of relevant products<sup>70</sup>. In fact, in this dispute, China has submitted data to the Panel to indicate that the volume of cultural imports grew considerably under the current system<sup>71</sup>. However, these data were not accepted by the Panel to demonstrate the trade effect, and the conclusion of the Panel was that there was no clear evidence on record to what extent, if any, the requirement in question limits imports of relevant products. Thus, the Panel's approach means that when applied to trading rights obligations, the "necessity" test may include an assessment of the measure's restrictive effect on importers, as opposed to imported products.

Notably, however, neither the Panel nor the Appellate Body provided a clear rationale for adopting this trader-based effect test. Just as mentioned above, the Panel simply stated that since Article XX was invoked to defend

<sup>69</sup> China's obligation in paragraph 5.1 of its Accession Protocol to grant the right to trade to all enterprises with respect to goods.

<sup>70</sup> *China – Audiovisual Services*, Report of the Panel, *supra*, note 5, para. 7.863.

<sup>71</sup> J. YA QIN, *supra*, note 49.

a breach of the trading rights commitments, “it makes sense” to consider how much the measures restricted the right to import. While the Panel is a pioneer in that it saw a parallel between the trading rights provisions of the Accession Protocol and the trade provisions of the GATT 1994, it did not explain why such a parallel should be assumed to exist, especially in regard with the object of the China’s Accession Protocol and the GATT 1994. On appeal, the Appellate Body merely deferred to the Panel’s finding by declaring that, “in appropriate cases”, the assessment of the restrictive effect of the measures may extend beyond that on imported products<sup>72</sup>.

It appears that, in seeing a parallel between the trading rights provisions and GATT Article XI, the WTO judges regarded the trading rights obligations as a new discipline of the WTO, instead of an extension of the GATT disciplines on State trading. Indeed, the trading rights provisions are qualitatively different from the GATT rules on State trading, as they prohibit State trading monopolies, rather than merely imposing conditions on them. This qualitative difference may well warrant a different effect test under Article XX. Given that the necessity test is a creation of GATT/WTO case law, adapting it to new situations would be well within the interpretive power of the WTO judiciary. However, as a matter of legal reasoning, why a different effect test is warranted in this particular context needs to be explained. Unfortunately, neither the Panel nor the AB engaged in this level of analysis<sup>73</sup>.

The failure of a clear rationale for their shift from the trade-based effect test to trader-based effect test presents a big challenge for the future implementation, especially when there are conflicts between the trade-based effect test and trader-based effect. It seems that if the Chinese government adopted the Available Alternative measures proposed by the United States, the WTO judges would then face a real problem in the

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* The text of Article XX(a), however, refers only to measures “necessary to protect public morals”. It does not, therefore, provide explicit guidance on the question of whether, in assessing “necessity”, a panel may take into account only the restrictive effect the measures have on imports of relevant products, or whether a panel may also consider the restrictive effect of the measures on importers or potential importers. The text of Article XX(a) does not specifically refer to “imports” or “importers” or, in different terms, “products” or “traders”. However, the chapeau of Article XX of the GATT 1994 refers in a somewhat different context to “restrictions on international trade”. *China – Audiovisual Services*, Report of the Panel, *supra*, note 5, para. 303.

implementation procedure. The question would be thornier to deal with because it involves more complex issues such as the relationships between the GATT 1994 and the Accession Protocol.

**The “reasonably available alternative”.** What constitutes a “reasonably available alternative”? An alternative measure may be found not to be “reasonably available” where it is merely theoretical in nature, for instance, where the responding party is not capable of taking it, or where the measure imposes an “undue burden” on that Member, such as “prohibitive costs or substantial technical difficulties”. Moreover, a “reasonably available” alternative measure must be a measure that would preserve the responding party’s right to achieve its desired level of protection with respect to the objective pursued under Article XX of the GATT 1994<sup>74</sup>.

At this stage, the Panel and the Appellate Body examined the US proposed “reasonably available alternative” measures, which suggest that the Chinese government can be given the sole responsibility for the conduct of the content review. Although both the Panel and the Appellate Body have recognized that the proposed alternative might involve *no* cost or burden to China, the Appellate Body pointed that an alternative measure should not be found not to be reasonably available merely because it involves *some* change or administrative cost<sup>75</sup>. Changing an existing measure may involve cost and a Member cannot demonstrate that no reasonably available alternative exists merely by showing that no cheaper alternative exists. Rather, in order to establish that an alternative measure is not “reasonably available”, the respondent must establish that the alternative measure would impose an *undue* burden, and must support such an assertion with sufficient evidence<sup>76</sup>. Finally, the alternative was

<sup>74</sup> *EC – Asbestos*, Report of the Appellate Body, WT/DS135/AB/R (12 March 2001), paras 172-174; *Korea – Various Measures on Beef*, Report of the Appellate Body, WT/DS161/AB/R, WT/DS169/AB/R (11 December 2000), para. 180; *Brazil – Retreaded Tyres*, Report of the Appellate Body, WT/DS332/AB/R (3 December 2007), para. 156.

<sup>75</sup> We observe, in this regard, that a Member’s right to secure a high level of protection with respect to one of the objectives listed in Article XX of the GATT 1994 has been recognized by the Appellate Body in *Korea – Various Measures on Beef*. However, the Appellate Body also noted that implementing such choice through a WTO-consistent measure may entail higher costs for its national budget; *Korea – Various Measures on Beef*, *supra*, note 74, para. 181.

<sup>76</sup> *US – Gambling*, Report of the Appellate Body, *supra*, note 54, para. 308.

found to be reasonably available because China had not demonstrated that it would impose “an undue burden”, financially or otherwise<sup>77</sup>.

Whether due to sensitive political and economic reasons or not, China did not provide sufficient evidence to the Panel substantiating the likely nature or magnitude of the costs that would be associated with the proposed alternative, as compared to the current system. For example, it was found that:

“Given that, at present, all import entities are wholly owned by the State, it was ‘not apparent’ that the cost to the Chinese Government of having non-incorporated offices of the Government of China conduct content review would necessarily be higher than the cost of having incorporated State-owned enterprises conduct such review.”<sup>78</sup>

China didn’t give any explanation on the financial relationships between the wholly SOEs and the Chinese government. However, the fact that China failed to present sufficient evidence before the Panel does not mean that in practice, implementing the United States’ proposal would not “impose an undue burden”, create the risk of “undue delays”, and demand “substantial resources” given the large quantities of imports involved and the time-sensitive nature of newspapers and periodicals<sup>79</sup>. In fact, there are substantial differences between the wholly SOEs and the Chinese government, and wholly SOEs undertake substantial content review, such as day-to-day content review of books, newspapers and periodicals; content review is performed by the import entities designated by the General Administration of Press and Publication (GAPP)<sup>80</sup>. If China

<sup>77</sup> *China – Audiovisual Services*, Report of the Appellate Body, *supra*, note 36, para. 138.

<sup>78</sup> *China – Audiovisual Services*, Report of the Panel, *supra*, note 5, para. 7.904.

<sup>79</sup> *Id.*, para. 7.902 (refer to China’s response to Panel Question 185).

<sup>80</sup> Under the existing system, content review of imports is conducted by different institutions. For books, newspapers and periodicals, day-to-day content review is performed by the import entities designated by the General Administration of Press and Publication (GAPP). As of 2008, 42 wholly State-owned entities were approved to import reading materials into China. The importing entities submit to the GAPP, prior to importation, a list of materials intended for importation. While the GAPP may intervene in day-to-day content review after receiving the list, it mainly exercises a supervisory role by conducting annual inspections of the import entities. For electronic publications, the GAPP performs final content review of samples brought into China through temporary import procedures. For audiovisual products, only one wholly State-owned entity has been approved to import finished products. Similar to electronic publications, the GAPP conducts final content review of samples of audiovisual

were to accept the central content review method proposed by the US, there would be “tremendous” government restructuring burden and cost burden.

Besides the issue whether the alternative measure is reasonably available or not, the Panel shall look for alternatives that are less trader-restrictive. Still adapting the test to trading rights in the previous stage, it found that since the government sets the review standards and has control over qualified reviewers, the proposed alternative would have a significantly less restrictive impact on potential importers, while making “an equivalent or better contribution to the realization of the objective of protecting public morals”<sup>81</sup>.

Although it is not evident to show that liberalization of trading rights would result in a significant increase in China’s cultural imports<sup>82</sup>, it is possible that the volume of imports will be negatively affected if all content review were to be tasked to a government agency independent of import entities. In the current system, the designated SOEs have financial incentives to import as much as possible in order to earn a profit. Data submitted to the WTO indicate that the volume of cultural imports grew considerably under the current system<sup>83</sup>. In contrast, if the content review were to be tasked to a central government agency, the natural tendency would be for the review process to be tightened. If this presumption becomes the real practice, which effect test should weight, trade or trader?

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products temporarily imported. As for films for theatrical release, China has an import quota of 20 motion pictures per year. Only one wholly State-owned entity is approved to import them, and the government agency responsible for reviewing imported samples is the State Administration on Radio, Film and Television. *China – Audiovisual Services*, Report of the Appellate Body, *supra*, note 36, paras 145, 153 and 251.

<sup>81</sup> *China – Audiovisual Services*, Report of the Panel, *supra*, note 5, para. 7.899.

<sup>82</sup> On the one hand, when Chinese consumers can buy from foreign producers directly, rather than going through State-designated importers, they should be able to get a better price, thus increasing the consumption of foreign content. And imports of certain types of products, such as religious titles, could grow significantly if no import ban or quotas are imposed. On the other hand, the government might decide to charge fees for performing content review externally, as suggested by the WTO decision, which could offset or reduce the pricing gains from direct purchases. *Id.*, para. 7.905.

<sup>83</sup> From 2002 to 2006, the number of newspaper titles imported into China increased from 586 to 767, the number of titles for periodicals increased from 36 032 to 45 178 and that for audiovisual products from 11 464 to 31 123. *Id.*, para. 7.807.

Therefore, although the Panel and the Appellate Body reach the overall conclusion that China's measures are inconsistent with its trading rights commitments and such inconsistency cannot be justified by Article XX (a), we can still find some unreasonable or improper analysis taken by the Panel and the Appellate Body, especially in regard with the trade restrictive effect and the available alternative measures in this dispute. Thus, all of these posed great risks for the implementation by the Chinese government.

### **III. The Availability of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions in the WTO**

In this dispute, China also referred to the UNESCO *Declaration on Cultural Diversity and Convention on the Protection and Promotion of the Diversity of Cultural Expressions*. However, due to the reason that China has not invoked the Declaration as a defence, the Panel and the Appellate body technically circumvented the complex question of the availability of the UNESCO *Declaration on Cultural Diversity and Convention on the Protection and Promotion of the Diversity of Cultural Expressions* in the WTO. According to their analysis, China has not invoked the Declaration as a defence to its breaches of trading rights commitments under the Accession Protocol. Rather, China has referred to the Declaration as support for the general proposition that the importation of products of the type at issue in this case could, depending on their content, have a negative impact on public morals in China. They observe, in this respect, that they have no difficulty accepting this general proposition, but note, as indicated, that they need to focus more specifically on the types of content that are actually prohibited under China's relevant measures.

Thus, the Panel and Appellate body in this dispute did not answer the systemic question of the relationships between the WTO and the CCD, just because China didn't take the convention as a defence. However, in regard with the sovereign right of governments to formulate and implement cultural policies and measures being reinforced in the international public law (the CCD), contentious issues regarding cultural protection and trade liberalization will evidently arise within the WTO framework in the future. Under such background, if the CCD is to provide a counterbalance for cultural purposes to the WTO, the vital question, in my view, is

how the provisions of the CCD can be interpreted in such a way that the Convention can do so efficiently<sup>84</sup>.

Article 20 CCD<sup>85</sup> states the Convention's relationships to other international treaties. It not only emphasizes that existing obligations must be respected, but also provides that the Convention and other international treaties must be applied in a manner fostering mutual supportiveness<sup>86</sup>. The principle of mutual supportiveness – albeit leaving room for interpretation – has been successfully introduced in certain new instruments of international law (for instance, the 2001 *International Treaty on Plant Genetic Resources for Food and Agriculture*)<sup>87</sup>.

As a compromise result, the inherent tension in Article 20<sup>88</sup> has triggered intense debate and countries' disagreements as to how the Convention would affect existing trade agreements and legal regimes like the WTO<sup>89</sup>. However, we can't deny the fact that Article 20 CCD indeed makes

<sup>84</sup> C. BEAT GRABER, *supra*, note 14.

<sup>85</sup> Article 20 – Relationship to other treaties; mutual supportiveness, complementarity and non-subordination

1. Parties recognize that they shall perform in good faith their obligations under this Convention and all other treaties to which they are parties. Accordingly, without subordinating this Convention to any other treaty, they: (a) shall foster mutual supportiveness between this Convention and the other treaties to which they are parties; and (b) when interpreting and applying the other treaties to which they are parties or when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention.

2. Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties.

<sup>86</sup> C. BEAT GRABER, *supra*, note 14.

<sup>87</sup> FAO, *International Treaty on Plant Genetic Resources for Food and Agriculture*, Resolution 3/2001, came into force on 29 June 2004.

<sup>88</sup> The intense debate over the Article 20 is partly due to the inherent tension in Article 20. On the one hand, Article 20 required member states to “perform in good faith their obligations under this Convention and all other treaties to which they are parties”. Paragraph 2 even emphasized that “nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties”. And yet, in the process of fostering “mutual supportiveness between this Convention and the other treaties”, states could not subordinate the Convention to any other treaty. The inherent tension in Article 20 left countries in disagreement as to how the Convention would affect existing trade agreements and legal regimes like the WTO. On that subject, see C. BEAT GRABER, *supra*, note 14.

<sup>89</sup> The United States tried to alleviate the tension by submitting two options for consideration by the General Conference; however, the options failed to win support. Dis-



great endeavour to conciliate the potential conflicts between trade and culture in the WTO framework through treaty interpretation.

According to the Article 20(1) (b) CCD, Parties shall take into account the relevant provisions of this Convention, when they interpret and apply the other treaties to which they are parties. That means that the WTO members shall take into account the relevant provisions of this Convention, i.e. protect cultural diversity, when they interpret and apply the WTO rules. This raises an important question: whether this interpretation requirement will be implemented by the WTO dispute settlement system?

According to Article 3(2) DSU<sup>90</sup>, and in conjunction with Article 31(3) (c) VCLT<sup>91</sup>, the panels and the Appellate Body may take into account any relevant rules of international law applicable in the relations. The obligation to take into account “applicable rules of international law between the parties” has been adopted by the Appellate Body, which, in the *United States – Gasoline* case, held that WTO law cannot be read in “clinical isolation from public international law”.

In most cases, the panels and the Appellate Body referred to a wide range of RTAs and BTAs to interpret the relevant terms in the WTO rules. In the *US-FSC* (article 21.5-EC), the Appellate Body referred to a wide range of RTAs and BTAs. It found that they shared what it chose to call a “widely accepted common element” in their definition of the term “foreign-source income” that it then used in order to interpret that expression in the context of the SCM agreement<sup>92</sup>. In the *EC-Poultry* (1998), the Appellate Body explained its recourse to the 1994 Oilseeds Agreement as a “supplementary means of interpretation [of the relevant WTO commitment] pursuant to article 32 of the Vienna Convention, as it is part of the historical background of the concessions of the European Communities

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satisfied with the adopted language of Article 20, the United States ultimately made a formal objection to the text of the entire article.

<sup>90</sup> Dispute Settlement Understanding, article 3.2, which states that WTO agreements need to be interpreted in the light of “customary rules of interpretation”.

<sup>91</sup> Under article 31.3 (c), “any relevant rules of international law applicable in relations between the parties” shall be taken into account. Where the interpretative process under article 31 leaves the meaning of the terms ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable.

<sup>92</sup> *United States – Tax Treatment for “Foreign Sales Corporations”, Recourse to article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW (14 January 2002), paras. 141-145 (especially footnote 123).

...<sup>93</sup>. In the *Korea-Beef* case (2000), again the Panel made reference to various BTAs entered into by Korea “not with a view to ‘enforcing’ the content of those bilateral agreements but strictly for the purpose of interpreting an ambiguous WTO provision”<sup>94</sup>.

Furthermore, on a number of occasions, the Appellate Body has examined international treaties with different memberships than the WTO in order to interpret the meaning of a particular provision in a WTO agreement. For instance, in the landmark *Shrimp/Turtle* case, the Appellate Body used the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES) and other multilateral environmental agreements which did not have the same membership as WTO as a means of interpreting the term “exhaustible natural resources”.

Thus, it seems that the WTO panels and the Appellate Body have taken a broad approach in respect to the use or incorporation of non-WTO international law between the WTO parties, especially after the *Shrimp/Turtle* case. However, things were wholly changed in the recent *EC – Biotechnical Products* (2006). In this case, the European Community had argued that its ban on the importation of genetically modified organisms (GMOs) could be justified, *inter alia*, by certain non-WTO rules. It had argued, in particular, that account should be taken of the 1992 *Convention on Biological Diversity* and the related Biosafety Protocol of 2000. Having first determined that the two instruments indeed established “rules of international law”, the Panel then considered whether they were also “applicable in the relations between the parties”.

The Panel dismissed the view that the reference to “parties” in article 31 (3) (c) would have meant (merely) parties to the dispute. It found that the expression “party” there to mean “a State which has consented to be bound by the treaty and for which the treaty is in force”<sup>95</sup>. All the parties to the treaty to be interpreted needed to have become parties to that other treaty. The Panel, in other words, read the WTO treaty in a non-

<sup>93</sup> *EC – Measures Affecting the Importation of Certain Poultry Products*, Report of the Appellate Body, WT/DS69/AB/R (13 July 1998), para. 83, and generally paras 77-85.

<sup>94</sup> *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/R WT/DS161/AB/R (10 January 2000), para. 539.

<sup>95</sup> *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, Reports of the Panel, WT/DS291-293/INTERIM (7 February 2006), para. 7.68.

bilateral way so as to “ensure or enhance the consistency of the rules of international law applicable to these States and contribute to avoiding conflicts between the relevant rules”<sup>96</sup>. Because the United States had not become a party to either one of these treaties (although it had signed the Biodiversity Convention), they could not be “taken into account”.

The Panel also considered the argument by the EC that the precautionary principle might, since 1998 when the argument had been made in the *EC-Hormones* case, have been established as a general principle of international law (the Panel’s language here is slightly unclear, however, occasional reference being made to “general principles of law”). The Panel approved that would this be the case, it would then become relevant under article 31 (3) (c). It found, however, though in a somewhat obscure way, both that the “legal status of the precautionary principle remains unsettled” and it “need not take a position on whether or not the precautionary principle is a recognized principle of general or customary international law”<sup>97</sup>.

Two aspects of this case are important. First, the Panel accepted that article 31 (3) (c) applied to general international law and other treaties. Second, it interpreted article 31 (3) (c) so strictly that the treaty to be taken into account must be one to which all parties to the relevant WTO treaty are parties. This latter contention makes it practically impossible to ever find a multilateral context where reference to other multilateral treaties as aids to interpretation under article 31 (3) (c) would be allowed. The Panel buys what it calls the “consistency” of its interpretation of the WTO Treaty at the cost of the consistency of the multilateral treaty system.

In fact, in regard with the fact that no international treaty has identical membership and since WTO admits non-sovereign members, it cannot possibly have exactly the same membership as any other international treaty. Importantly, for the broad reading of this obligation, the phrase “between the parties” should not be interpreted so that rules of international law are relevant only when they apply to all WTO members, just as the finding in the above case. Otherwise, it would be impossible to refer to international rules to interpret the WTO rules. More specifically, given the fact that the CCD has incurred strong opposition from the United

<sup>96</sup> *Id.*, para. 7.70.

<sup>97</sup> *Id.*, para. 7.89.

States, the phrase “between the parties” should not be interpreted more broadly. If possible, it shall not only refer to international law of which both the dispute parties are members, but also international rules which concerns the common interests of the whole human beings and international community, just as the important human rights protection conventions, environmental protection conventions and cultural diversity convention.

However, due to the strong opposition of the United States, the most active nation in promoting the trade liberalization in the cultural industries, whether the WTO dispute body can successfully deal with the contentious conflicts between the trade liberalization and the cultural protection through treaty interpretation still wait for the future development of the international laws in the WTO and CCD.

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Within the WTO legal system, aspects of culture and its sensibilities are being raised as important non-trade considerations to be factored into trade law disciplines, such as Article XX of GATT 1994 and Article XIV of GATS. Outside the WTO, the trade-culture nexus appears in development in the emerging international law of cultural diversity as promoted within the UNESCO. With the coexistence of trade and the culture convention in the background, i.e. the WTO and the CCD, the *China – Audiovisual Services* dispute represents important implication for the harmonious relationships of trade and culture within and outside the WTO system. However, from the findings of the Panel and Appellate Body, what we have seen is that the WTO dispute settlement bodies still sticks to a traditionally strict least-trade limitation approach to apply and interpret the trade provisions, whether these provisions have a loose or close relation with the WTO members’ culture policy. Thus, under such an approach, it does not leave much hope that content-based claims of cultural specificity or national identity will carry much weight before dispute settlement panels or Appellate Body. Moreover, in some cases, the WTO members’ cultural policies are also closely related to their domestic political and economical system. Just as in the *China – Audiovisual Services*, the challenged measures related the wholly SOEs’ privilege in the import and distribution of the cultural products and the Chinese government’s sensitive to the cultural expression. Thus, we cannot expect the whole change of China’s cur-

rent cultural regulations over one night, if there are no corresponding changes taking place in China's current political and economical system. That is the important reason why China in this dispute hardly implements the suggestions of the Appellate Body, especially adopting an alternative measure proposed by the United States.

However, what we should keep in mind is that cultural goods, as vectors of identity, values and meaning, play an essential role in the evolution and definition of elements such as societal features, values, ways of living together, ethics and behaviours; and the sovereign right of governments to formulate and implement cultural policies and measures for the protection and promotion of cultural diversity has been recognized by the international public law. Taking into account the fact that the WTO is the leading forum for trade regulation and provides the most frequently used dispute settlement mechanism on a global level, the principal role of the CCD will be to act as a counterpart to the WTO. The regulation of the relationship between international trade law and cultural protection is one of the challenges that the WTO will face with greater intensity in the second decade of its existence.

