

# Liberalization of Trade and Domestic Control on Cultural Products.

The Application of Public Morals Exception  
in *China* – *Audiovisual Services*

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## Résumé

Cet article discute de la validité des mesures prises par le gouvernement chinois, au nom de la sauvegarde de la moralité publique, en vue de réglementer les droits de commercialisation et les services de distribution pour des publications et des produits de divertissement audiovisuels dans le cadre de litiges opposant les États-Unis et la Chine.

## Abstract

In light of recent disputes opposing USA and China, this article discusses the validity of measures taken by China, based on the public morals exception, to regulate the importation of publications and audiovisual products.

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On 19 January 2010, the WTO Dispute Settlement Body (DSB) adopted the Appellate Body's report on *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (hereinafter referred to as *China – Audiovisual Services*). In the report, the Appellate Body ruled against a number of trade restrictions introduced by China related to the importation and distribution of certain products, consisting of reading materials, audiovisual products, sound recordings and films for theatrical release. China, as the importing country, has classified the aforementioned products as “cultural goods” and imposed relatively tougher regulation on the importation of these kinds of goods; the United States, on the other hand, insisted that certain trade control measures of China on “cultural goods” constituted unjustifiable discrimination among countries. Among all the issues raised in this case, the application of “public morals exception” might be one of the most controversial points and thus will be the major concern of this paper.

## I. The Meaning of “Public Morals Exception” under the WTO rules: what is “Public Morals”?

In order to apply the “public morals exception”, it is necessary to clarify the definition of “public morals” primarily. The meaning of the “public morals” remains unsettled as of today<sup>1</sup>. There are basically two views about this term. One is the interpretation according to Natural Law, which takes the definition of public morals as self-evident, while all the authority needs to do is to find the prior definition existing within this world<sup>2</sup>. From the standpoint of Positive Law, the exact scope of public morals is undetermined, and the term has to be defined in specific circumstances. In fact, Article 3.2 of DSU<sup>3</sup> explicitly stipulates that “recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements”. Hence, despite the

<sup>1</sup> Steve CHARNOVITZ, “The Moral Exception in Trade Policy”, (1998) 38 *Va. J. Int'l L.* 689, 690.

<sup>2</sup> Miguel A. GONZALEZ, “Trade and Morality: Preserving ‘Public Morals’ Without Sacrificing the Global Economy”, (2006) 39 *Vanderbilt Journal of Transnational Law* 939, 944.

<sup>3</sup> As stated in this text, the “Understanding on Rules and Procedures Governing the Settlement of Disputes” of WTO generally is hereinafter referred to as “DSU”.

soundness of the Natural Law, the DSB is authorized to define neither the specific meanings nor the appropriate level of protection of the “public morals” in each Member. Yet, as provided in the Article 3.2 of DSU, the DSB is entitled to “clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law”, including expounding on the methods for determining the specific meaning of “public morals” under Article XX (a) of GATT1994.

### A. The Meaning of “Public Morals”: General Rule of Interpretation

Although there is no specific method presented in the text of DSU, the DSB has explicated the meaning of “customary rules of interpretation of public international law” through several cases. In *United States – Standards for Reformulated and Conventional Gasoline*, the Appellate Body has made it clear that “the general rule of interpretation”, provided in the Article 31 of the *Vienna Convention on the Law of Treaties* (hereinafter the “Vienna Convention”), has attained the status of a rule of customary or general international law<sup>4</sup>. Moreover, in *Japan – Taxes on Alcoholic Beverages*, the Appellate Body affirmed that Article 32 of the Vienna Convention, dealing with the role of supplementary means of interpretation, has also attained the same status<sup>5</sup>. Subsequently, the status of Article 31 and 32 of the Vienna Convention is reiterated in the WTO cases, while the general rule of interpretation is recognized as the most significant way to interpret provisions of WTO agreements.

In accordance with Article 31 of the Vienna Convention, the ordinary meaning of “public morals” should be the first consideration in interpreting the provision of “public morals exception”. However, the specific meaning of “public morals” was ascertained neither in Article XX of GATT 1994, Article XIV of GATS nor any other WTO agreements. In general, the public morals are reckoned as a series of rules and principles, which reflect the standards of right and wrong that belongs to a nation or community<sup>6</sup>.

<sup>4</sup> *United States – Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body, WT/DS2/AB/R (29 April 1996), p. 12.

<sup>5</sup> *Japan – Taxes on Alcoholic Beverages*, Report of the Appellate Body, WT/DS11/AB/R (4 October 1996), p. 7.

<sup>6</sup> *Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden)*, [1958] I.C.J. Rep. 55, 90 ((28 November 1958) (separate opinion of Judge Lauterpacht).

Yet, even if this definition is accepted by all the WTO Members, what rules and principles fall within the exact boundaries of “public morals”? In the light of Article 31 of the Vienna Convention, on this occasion, the next consideration for interpretation should be the context of relevant treaties, that is, the specific meaning of “public morals” should be interpreted in the context of WTO agreements. Actually, there are many other general exceptions besides the “public morals exception”, either under Article XX of the GATT1994 or under Article XIV of the GATS. All the neighbouring general exceptions in Article XX or Article XIV address conditions generally understood as concerning matters within a country. By association, public morals would take on similar meaning as referring primarily to domestic morals. Then the thing is, whether the particular public morals of a Member, with little recognition among other Members, could fall within the boundaries of “public morals exception”? Thus, it turns to the third consideration contained in Article 31, namely, the object and purpose of the treaty. Literally, the general exceptions do empower the WTO Members to violate certain commitments on grounds of public morals. Yet, on the other hand, it may give rise to the evasion of WTO laws in case the interpretation of “public morals” is left to the discretion of each Member. Consequently, it will be quite difficult to resolve the contradiction between the literal meaning of “public morals exception” and the object of WTO as a consensus agreement of Members. As Article 32 of the Vienna Convention provides, the treaty’s legislative history should be considered in further interpretation where the meaning that is ascertained by using the above methods would lead to absurd results. In summary, the drafting history shows that the language for Article XX (a), proposed by the U.S. government in 1945, was the result of the lack of debate among other participants. Moreover, the negotiating history from 1945 to 1948 does not provide a clear answer on what is covered by public morals. The simplest explanation for why Article XX (a) was not discussed is that the negotiators knew that it was an amorphous term covering a wide range of activities that provoked moral concerns by particular governments<sup>7</sup>.

## **B. “Public Morals” in Cases Settled by the DSB**

As stated above, the general rules of interpretation have offered little meaningful clues to define “public morals” within WTO agreements. However, the DSB has to give specific meaning to this term in the cases

<sup>7</sup> S. CHARNOVITZ, *supra*, note 1, 703-705.

involving the public morals exception. To this end, the determination of DSB in relevant cases will be conducive to ascertain the meaning of “public morals”.

So far, there are two settled cases concerning the public morals exception, namely, the case of *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (hereinafter referred to as *US—Gambling*) and the case of *China—Audiovisual Services*. In *US—Gambling*, the Panel analyzed Article XIV (a) and found that:

“The term ‘public morals’ denotes standards of right and wrong conduct maintained by or on behalf of a community or nation<sup>8</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....Members 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>9</sup>

In *China – Audiovisual Services*, the Panel stated that, the meaning of “public morals” had been examined by the Panel and Appellate Body in *US – Gambling* as it is used in Article XIV (a) of the GATS, which is the GATS provision corresponding to Article XX (a) of the GATT 1994. Thus, the definition of “public morals”, in line with the interpretation developed by the Panel in *US – Gambling*<sup>10</sup>, should be ascertained by China according to its own specific conditions<sup>11</sup>.

The aforementioned cases indicate that the specific meaning of public morals claimed by the dispute parties would normally be fully respected in defining this term under WTO laws. Hence, the appropriate level of protection on public morals is left to the discretion of each Member. In other words, the Members are entitled, subject to WTO laws, to determine the particular methods and level of protection on public morals. In prac-

<sup>8</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; *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Report of the Appellate Body, WT/DS285/AB/R (7 April 2005), para. 299.

<sup>9</sup> Report of the Panel, WT/DS285/R (10 November 2004), *supra*, note 8, para. 6.461.

<sup>10</sup> *Id.*

<sup>11</sup> *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, Report of the Panel, WT/DS363/R (12 August 2009), (hereinafter as “Panel Report”), para. 7.759.

tice, the WTO laws have no intention of forming the universal interpretation of public morals in the world. Likewise, the Panel and the Appellate Body have not spent much time defining the meaning and the scope of application of “public morals”. As a result, the key issue would be the relationship between certain measures and public morals protection, rather than the detailed content of public morals claimed by the dispute parties. That is to say, the Member has to prove the relation between the controversial measures and public morals protection is sufficient, necessary and legitimate prior to the application of the public morals exception.

## II. The Application of “Public Morals Exception”: Conditions and Requirements

As mentioned above, Members are not at liberty to justify certain measures contrary to WTO rules on the ground of public morals exception. In summary, there are two conditions when applying the public morals exception under WTO laws. The first condition is the “necessity” test, in other words, a Member relying on the public morals exception should satisfy the “necessity” test embedded in the exception<sup>12</sup>. As an important qualifier to the public morals exceptions, the term “necessary” has been well defined in the cases settled by DSB. In fact, the “necessity” test is exactly the main point of contention between the US and China in *China—Audiovisual Services*. Furthermore, the other condition is the requirement of “introductory or chapeau paragraph”. Article XX of GATT 1994 premises the application of public morals exception on the requirement that “such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade”. This condition, emanating from Article XX of GATT 1947, is incorporated into each general exception of the major WTO agreements, such as Article XX of GATT 1994, Article XIV of GATS and Article XXIII of Agreement on Government Procurement. As a matter of fact, the chapeau language embodies the WTO Members’ worry about the application of public moral exception. That is, the abuse of public moral exception would undermine the general principles of WTO (like the prin-

<sup>12</sup> See e.g. Article XX (a) of GATT1994: “[...] nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) necessary to protect public morals.”

ciple of Most-Favoured-Nation Treatment and National Treatment) and the other Members' rights in trade liberalization<sup>13</sup>. Yet, too many constraints might harm Members' sovereignty and legitimate interests in protecting domestic public morals. Concerning such a contradiction, the WTO laws have introduced the "least trade-restrictive requirement" and the "non-discrimination requirement", that is, any Member excusing a trade-restrictive measure by the public morals exception is required to prove that the measure is the least trade-restrictive measure possible to protect its public morals and does not discriminate among goods and services from different countries<sup>14</sup>.

As the Appellate Body described in *US – Shrimp*, it would be better to consider Article XX as a balance between a Member's right to invoke general exceptions and the other Members' treaty rights under WTO rules:

"The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g. Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement."<sup>15</sup>

### **III. The Applicability of Public Morals Exception in China— *Audiovisual Services***

In section VI of the report, the Appellate Body expressed its opinion on whether China may excuse the measures at issue by applying Article XX (a) of GATT 1994. At the outset of this section, the Appellate Body affirmed that China may rely upon the introductory clause of paragraph 5.1 of its Accession Protocol and seek to justify the relevant provi-

<sup>13</sup> Claire WRIGHT, "Censoring the Censors in the WTO: Reconciling the Communitarian and human rights theories of international law", (2010) 3-1 *Journal of International Media and Entertainment Law* 17, 76.

<sup>14</sup> Jeremy C. MARWELL, "Trade and Morality: The WTO Public Morals Exception After Gambling", (2006) 81 *New York University Law Review* 802, 826 and 836.

<sup>15</sup> *United States – Standards for Reformulated and Conventional Gasoline*, *supra*, note 4; *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R (12 October 1998), para.159.

sions as necessary to protect public morals in China, within the meaning of Article XX (a)<sup>16</sup>. Yet, China was required to manifest that its regulation on the trade of the relevant products was consistent with requirements of Article XX of the GATT 1994. As stated above, there are two requirements encompassed in Article XX, while the Appellate Body merely shed light on the “necessity” test. Here are the main considerations of the Appellate Body.

### **A. The Premise: Whether Article xx (a) is Available to China as a Defence**

China asserted before the Panel that it has the right under paragraph 5.1 of its Accession Protocol<sup>17</sup> to impose restrictions and conditions on the right to import and export, provided that these measures are consistent with Article XX of the GATT1994. While on the other hand, the US argued that China’s “right to regulate trade” applies to measures addressing the goods being traded rather than the traders of those goods<sup>18</sup>. So the thing is, as the Panel stated, whether Article XX could be directly invoked to justify violations of China’s commitments under its Accession Protocol, or whether Article XX could be invoked only to justify violations of the GATT 1994 obligations<sup>19</sup>. The Panel did not make a decision on this issue. Instead, the Panel relied upon an assumption that Article XX could be invoked by China as a defence for its non-GATT commitment. As opposed to the approach adopted by the Panel, the Appellate Body resolved the issue in the way of legal interpretation. At the outset of its analysis, the Appellate Body recognized, in theory, that the “right to regulate” refers to an inherent power enjoyed by a Member’s government, rather than a right bestowed by international treaties<sup>20</sup>. Then, the phrase “consistent with the WTO Agreement” indicated the restrictions on the Member’s regulatory

<sup>16</sup> *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, Report of the Appellate Body, WT/DS363/AB/R (21 December 2009), para. 233 hereinafter as “AB Report”).

<sup>17</sup> The introductory clause is: “*Without prejudice to China’s right to regulate trade in a manner consistent with the WTO Agreement*”. China’s Accession Protocol is available at: <[http://www.wto.org/english/thewto\\_e/acc\\_e/completeacc\\_e.htm](http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm)>.

<sup>18</sup> AB Report, *supra*, note 16, para. 207.

<sup>19</sup> Panel Report, *supra*, note 11, para. 7.743.

<sup>20</sup> AB Report, *supra*, note 16, para. 222.

power, that is, the Member's regulatory measures must satisfy prescribed disciplines of WTO Agreements and Annexes<sup>21</sup>.

Subsequently, the Appellate Body analyzed paragraph 84(b) of China's Accession Working Party Report ("WTO-consistent requirements related to importing and exporting, *such as* those concerning import licensing, TBT and SPS"), and read the language as a reference to China's right to regulate trade in a WTO-consistent manner, which may not be impaired by its own trading right commitment<sup>22</sup>. Recalling the previous cases, the Appellate Body pointed out that China's measures restricting trading rights may be in breach of its WTO obligations related to trade in goods<sup>23</sup>. However, even if China contravened any WTO obligation or commitment, it may be justified under relevant exceptions encompassed in the WTO Agreements<sup>24</sup>.

Last but not least, the Appellate Body emphasized that, the measures that China tried to justify must have a clearly discernable and objective link to its regulation of trade in the specific goods<sup>25</sup>. Where such a link is clarified, then China might invoke GATT exceptions as the defence to its regulatory measures at issue. Reviewing the proofs presented by China and the Panel's determination, the Appellate Body was convinced of the extensive nature of China's content review system for the specific goods, and that the challenged measures on trading rights have formed part of China's broader regime regulating the trade in relevant goods. Basing on all the analysis aforementioned, the Appellate Body recognized that China may seek to justify the challenged provisions as necessary to protect public morals in China under Article XX (a) of the GATT1994, provided that China could demonstrate its compliance with certain conditions of Article XX.

In this instance, the Appellate Body's conclusion has clarified that Article XX of the GATT 1994 can be invoked to justify Members' breaches of obligations or commitments outside the GATT 1994. It is therefore rational to mark this decision as a millstone for its contribution to increase the legal certainty and predictability in applying the general exceptions. From the standpoint of China, the Appellate Body's finding has confirmed

<sup>21</sup> *Id.*, para. 225.

<sup>22</sup> *Id.*, para. 226.

<sup>23</sup> *Id.*, para. 227.

<sup>24</sup> *Id.*, para. 223.

<sup>25</sup> *Id.*, para. 230.

China's right to regulate trade in WTO-consistent way, as well as the right to invoke the general exceptions as a defence for obligations specifically undertaken by China<sup>26</sup>. Such an affirmation, to some extent, may constitute a good defence of China in the future cases<sup>27</sup>.

## B. The Necessity Test

The Appellate Body has defined, in the previous cases, a proper approach to assess “necessity” through a process of “weighing and balancing” a number of factors. In the *Brazil – Retreaded Tyres*, the Appellate Body presented that the relevant factors involved the importance of the interest or values at stake, the extent of the contribution made by the measure to the achievement of the relevant objective, and the measure's restrictive effect on trade<sup>28</sup>. Besides, the measure at issue should be compared with possible alternatives in order to confirm the result of the above weighing and balancing process<sup>29</sup>. Last but not least, such an assessment of the “necessity” of a measure is a sequential process. Thus, the “necessity” test should proceed through a number of steps, and then draw a final conclusion<sup>30</sup>. The Panel, in the present case, was also required to assess the “necessity” of certain provisions in the context of Article XX (a) of GATT1994. Though the Panel did not accomplish all the steps analyzing each relevant provision, the Appellate Body confirmed the Panel's approach in the assessment of the “necessity” of provisions at issue, and analyzed the appeal in the following aspects.

<sup>26</sup> On interpreting the specific obligations undertaken by China in its Access Protocol, see generally: Julia YA QIN, “The Challenges of Interpreting “WTO-Plus” Obligations”, (2009) 09-18 *Wayne State University Law School Legal Studies Research Paper*, available online at: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1428976](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1428976)>.

<sup>27</sup> Xiaohui WU, “Case Note: China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (WT/DS363/AB/R)”, (2010) 9-2 *Chinese Journal of International Law* 415, 428.

<sup>28</sup> *Brazil – Measures Affecting Imports of Retreaded Tyres*, Report of the Appellate Body, WT/DS332/AB/R (3 December 2007), para. 178.

<sup>29</sup> *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Report of the Appellate Body, WT/DS285/R (7 April 2005), para. 307 (hereinafter “*US – Gambling*”).

<sup>30</sup> AB Report, *supra*, note 16, para. 242.

## 1. Assessment of the Importance of Objectives

As mentioned above, the “necessity” test starts with an assessment of the relative importance of the interests or values furthered by the measures at issue<sup>31</sup>. China has underscored, before the Panel, the importance of the public morality for China. In the view of China, most of the goods involved in this case would be classified as “cultural goods”, some of which may have a potentially negative impact on the public morals. In order to prevent such kind of goods being dissimulated in the society, China has established a mechanism of content review, which involves both domestic cultural goods and imported products of this kind. Basing on the provisions challenged in this case, China selected certain import entities to implement the content review of imported cultural products. Thus, China asserted, on these considerations, that the provisions were important to realize China’s objective to protect public morals<sup>32</sup>. Before moving on to the next step, the Panel set forth an assumption that the imported cultural products with prohibited content would have detrimental effect on the public morals of China<sup>33</sup>.

According to the Panel, it is out of debate that the protection of public morals is one of the most important values or interests pursued by Member<sup>34</sup>. Yet the “public morals” may be defined differently among Members, since the scope and content of this concept could be impacted by various elements of a society. Thus, as the Appellate Body indicated, it is up to each Member to determine what level of protection is appropriate in certain circumstances<sup>35</sup>. In this case, both the Panel and the Appellate Body have shown respect for the high level of China’s protection on public morals. Moreover, the US did not specifically argue that the challenged measures were not adopted for the purpose of protecting public morals. Consequently, it may be rational to infer that the content review regime was not challenged directly in the present case; on the contrary, the Panel

<sup>31</sup> *US – Gambling*, *supra*, note 29, paras 306-308.

<sup>32</sup> Panel Report, *supra*, note 11, paras 7.751-754.

<sup>33</sup> *Id.*, para. 7.763.

<sup>34</sup> *Id.*, para. 7.816.

<sup>35</sup> *Brazil – Measures Affecting Imports of Retreaded Tyres*, *supra*, note 28, para. 210; *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Appellate Body, WT/DS135/AB/R (12 March 2001), para. 168; *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Report of the Appellate Body, WT/DS161/AB/R (11 December 2000), para. 176.

affirmed China's right to maintain the high standard of public morals and thus implement the content review. In fact, this is, in the view of some Chinese scholars, the very point that China does not want to lose; while from the standpoint of the Appellate Body, it appears to be another instance to declare its respect for the sovereignty of WTO Members.

## 2. The Contribution Made by the Challenged Measures to the Public Morals Protection

With regard to the “necessity” test, the Appellate Body analyzed the claims from both China and the US, and drew conclusions about the contribution of three conditions involving in the regulations at issue.

### a. The State-Ownership Requirement

Article 41 of the *Regulations on the Administration of Publishing* (2001) (hereinafter “*Publications Regulation*”) provides that:

“The business of importing publications shall be operated by the entities engaging in the import of publications as established according to this Regulation; among which the publication import entities that run the business of importing newspapers or periodicals shall be designated by the administrative department for publication under the State Council.”

In addition, as Article 42 of *Publications Regulations* (2001) stipulates, one of the conditions for establishing a publication import entity is that the applicant has to be a wholly State-owned enterprise. The Panel found that, the conditions presented in this provision made no material contribution to the protection of public morals in China, while imposed restrictive effect on the publication import entities at the same time<sup>36</sup>. Thus, the measures encompassed in this provision could not satisfy the “necessity” test under Article XX (a) of GATT1994. Similarly, the ownership requirement on importers involved in Article 27 of the *Regulations on the Administration of Audiovisual Products* (2001) (hereinafter “*Audiovisual Products Regulation*”) and Article 8 of the *Measures on the Administration of Importation of Audiovisual Products* (2002) (hereinafter “*Audiovisual Products Importation Rule*”) has not been reckoned as contributory to protect public morals.

<sup>36</sup> AB Report, *supra*, note 16, para. 234.

#### b. The Exclusion of Foreign-Invested Enterprises

According to some provisions of the relevant regulations, the foreign-invested enterprises are excluded from engaging in the importation of certain products in China. For instance, Article 4 of the *Several Opinions on the Introduction of Foreign Capital into the Cultural Sector* (2005) provides:

“It is prohibitive for a foreign investor to engage in the business operation regarding the publication, general distribution or import of books, newspapers and journals, or regarding the publication, production, general distribution or import of audio and video products or electronic publications”.

Moreover, as stipulated in Article 21 of the *Measures for Administration of Sino-Foreign Distribution Contractual Joint Ventures of Audiovisual Products* (2004): “No Chinese-foreign cooperative audio-video product distribution enterprise may engage in the business of importing audio-video products”. The Panel has not been persuaded that the ownership of enterprises makes a material contribution to the protection of public morals. Hence, the Panel concluded that the requirement relating to the ownership of enterprises is not “necessary” to protect public morals in China.

Considering the two kinds of measures mentioned above, the Panel found that, both the provisions requesting the ownership of import entities and those provisions excluding foreign-invested enterprises from importing certain cultural products reflect the same opinion, that is, China reckoned that the entities designated by the administrative department or State-owned entities will be more efficient and reliable in exercising content review than non-State-owned publication import entities.

On the one hand, China alleged that the cost incurred in the course of the content review is substantial, which makes the review unaffordable for privately owned enterprises. The Chinese Government could not thus require private investors to bear such a high cost of performing the policy function of content review<sup>37</sup>. Compared to the profitability of the business of importing publications, the cost of content review is relatively low, and hence most enterprises could afford it. Besides, it is not sure that the cost associated with content review is so high that it would dissuade all privately owned enterprises from seeking to enter the business of importing

<sup>37</sup> *Id.*, para. 257.

publications<sup>38</sup>. On the other hand, China argued that the import entities must equip with appropriate facilities and professionals in order to perform content review fluently. Besides, foreign-invested enterprises might not be familiar with Chinese values and public morals and would not be capable of efficiently communicating with the authorities<sup>39</sup>. The Panel did not agree with China, since privately-owned enterprises could also perform content review by employing qualified personnel who have the requisite knowledge of public morals in China. Then, the Appellate Body upheld the Panel's finding and concluded that the person conducting content review and communicating with administrative authorities could be the same individuals, with the same qualifications and capabilities, regardless of the investors of the import entities<sup>40</sup>. On balance, the Appellate Body found that China had not established that the State-ownership requirement and provisions excluding foreign-invested enterprises from being approved as importers made contributions to, and therefore was necessary for the protection of public morals in China<sup>41</sup>.

### c. The State Plan Requirement

Article 41 of the *Publication Regulation* (2001) sets forth several requirements for the approval of publication import entities. One of the requirements is that “publication import entities may only be approved if they are in conformity with the State plan for the number, structure, and geographical coverage of publication import entities”. As to the specific content of the “State plan”, China has not presented sufficient proofs. Yet, China did refer to the “State plan” as prescribing development consistent with the selection of a limited number of import entities with extensive geographic coverage<sup>42</sup>. In China's view, a limited number of import entities with branches covering most customs areas will ensure an overall supervision. The Panel has found the contribution of the State plan requirement to the public morals protection on the basis of such an assumption that the State plan requirement imposed a limitation on the number of import entities, while limited importers would make it easier for the administrative authority to interact with those entities and take

<sup>38</sup> Panel Report, *supra*, note 11, para. 7.856.

<sup>39</sup> AB Report, *supra*, note 16, para. 273.

<sup>40</sup> *Id.*, para. 277.

<sup>41</sup> *Id.*, para. 278; Panel Report, *supra*, note 11, paras. 7.849 and 7.868.

<sup>42</sup> China's first written submission to the Panel, para. 214.

more time to conduct annual inspections<sup>43</sup>. However, in the view of the Appellate Body, China presented no information on the limitation of the number of import entities set out in the State plan. Besides, none of the evidence presented by China contained any information about the geographical or product coverage of the State plan<sup>44</sup>. Thus, the State plan requirement makes no material contribution to the protection of public morals.

### 3. The Restrictive Effect: Potential Importers

As one step of the “necessity” test, the Panel should, in abstract, analyze the restrictive effect of the challenged measures on international trade<sup>45</sup>. However, in the present case, the specific point is that, a new element, potential importers, was taken into the Panel’s account in assessing the restrictive effect of relevant provisions. China has alleged before the Appellate Body that the Panel erred in involving “those wishing to engage in importing” into its assessment of the restrictive effect of the challenged measures. The text of Article XX of GATT1994 does not provide explicit directions on the scope of the factors involving in the assessment of necessity. However, the Appellate Body recalled on the finding in previous cases<sup>46</sup>, and suggested that the assessment of the restrictive effect on imported products may be extended in a particular dispute<sup>47</sup>. In the present case, based on the analysis of paragraph 5.1 of China’s Accession Protocol and paragraph 84(b) of China’s Accession Working Party Report, the Panel concluded that China’s obligation under these provisions was closely related to the question of who is entitled to engage in trade, and the Appellate Body upheld the Panel’s decision in this respect. Subsequently, the Appellate Body rejected China’s assertion that such an additional assessment of restrictive effect was logically erred and might impose “unsustainable burden of proof” on China. Last, the Appellate Body ascertained that the restrictive effect of relevant measures on those wishing to

<sup>43</sup> Panel Report, *supra*, note 11, para. 7.832.

<sup>44</sup> AB Report, *supra*, note 16, para. 293.

<sup>45</sup> *Id.*, para. 300.

<sup>46</sup> *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Report of the Appellate Body, WT/DS161/AB/R (11 December 2000), paras 135-136; see also *Japan – Taxes on Alcoholic Beverages*, Report of the Appellate Body, WT/DS10/AB/R (4 October 1996), p. 16.

<sup>47</sup> AB Report, *supra*, note 16, para. 306.

engage in importation could constitute a part of the assessment of the restrictive effect of the measures found to be inconsistent with China's trading rights commitments<sup>48</sup>.

#### 4. Reasonably Available Alternative Measures

After analyzing the contribution of each challenged measures to the protection of public morals, the Appellate Body turned to the other question under the "necessity" test, that is, whether an alternative measure was reasonably available for China to realize its objective of protecting public morals with less restriction on trade.

As the complaining party, the US had submitted three proposals: have the foreign-invested and privately held importers with the necessary expertise conduct content review, have the importer hire domestic entities with appropriate expertise to implement content review, or have the Chinese Government conduct content review of all the imported products. According to the US, none of these three alternative measures may have restricted impact on the trade of relevant goods<sup>49</sup>. China's main argument on the proposed alternative was that the Government would bear an undue financial and administrative burden and engage in tremendous restructuring<sup>50</sup>. Moreover, it might create undue delays to the importation of products with time-sensitive nature, like newspapers and periodicals. Consequently, this proposal may have some adverse effect on the efficiency of content review and the trade flows.

As to the alternative measures proposed by the US, the Panel considered it unnecessary to examine each of these alternatives, provided that at least one of them could be reasonably available to China and guarantee the appropriate level of protection that China pursued. To this end, the Panel mainly analyzed the US proposal that the Chinese Government could conduct the content review of all the relevant imported goods<sup>51</sup>. China's allegation on this proposal had not been accepted by the Panel. On the contrary, the Panel was convinced that, of the three possible alternatives, the Government being solely responsible for conducting content

<sup>48</sup> *Id.*, para. 311.

<sup>49</sup> Panel Report, *supra*, note 11, para. 7.883.

<sup>50</sup> AB Report, *supra*, note 16, para. 322.

<sup>51</sup> Panel Report, *supra*, note 11, paras 7.886-887.

review would be less trade restrictive while providing an equivalent contribution to the protection of public morals<sup>52</sup>. With respect to the burden and delays arising during content review, it was convinced that the Government may resolve such difficulties in various ways. Therefore, the alternative measure proposed by the US was “reasonably available” to China. Then, the Appellate Body upheld the legal finding of the Panel and concluded that, China had not successfully justified under Article XX (a) of the GATT 1994 the provisions and requirements found to be inconsistent with China’s trading rights commitments under its Accession Protocol and Working Party Report<sup>53</sup>. In sum, as the Appellate Body regards it, the content review plays an important role in protecting public morals, yet the entities performing content review need not be confined to the importers of relevant goods. Hence, the effect of review and the level of protection on public morals will not be undermined, even if the review is performed by other kinds of entities, like administrative authorities, provided that the means and criteria of content review stay the same.

#### **IV. WTO and UNESCO: the Special Nature of Cultural Products and the Effect of Cultural Exceptions**

##### **A. The Attitudes of Parties towards Cultural Products**

In the view of China, all the reading materials and finished audiovisual products should be classified as “cultural goods”, i.e. goods with cultural content<sup>54</sup>. According to Article 8 of the UNESCO *Universal Declaration on Cultural Diversity*, cultural goods are “vectors of identity, values and meaning” and that they “must not be treated as mere commodities or consumer goods”. Therefore, the cultural products, depending on their content, could have a major impact on public morals<sup>55</sup>. Correspondingly, the US stated, based on Article 20 of the UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (hereinafter as “Cultural Diversity Convention”), that China’s rights or obligations under WTO agreements or China’s Protocol of Accession cannot be

<sup>52</sup> *Id.*, para. 7.869.

<sup>53</sup> AB Report, *supra*, note 16, para. 335.

<sup>54</sup> Panel Report, *supra*, note 11, para. 7.751.

<sup>55</sup> *Id.*

modified by the Cultural Diversity Convention. Besides, the US emphasized that, “nothing in the text of the WTO Agreement provides an exception from WTO disciplines in terms of ‘cultural goods’, and China’s Accession Protocol likewise contains no such exception”<sup>56</sup>. The relationship between WTO rules and UNESCO Conventions has long been a controversial issue. In this case, the Panel did not explicit its view on this point, instead, it merely indicated in a footnote<sup>57</sup> that:

“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. We have no difficulty accepting this general proposition, but note, as indicated, that we need to focus more specifically on the types of content that is actually prohibited under China’s relevant measures”.

The opinions of other WTO Members deserve special attention as well. Australia, European Community, Japan and Korea were all involved in this case as third parties and presented their arguments separately. Australia alleged that China could not rely upon the provisions of UNESCO Conventions. On the one hand, the status of the *Universal Declaration on Cultural Diversity* is not yet clear. On the other hand, Article 20(2) of the *Cultural Diversity Convention* provided explicitly 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.”<sup>58</sup> Japan and Korea submitted, on the same ground, that the Panel should not take the UNESCO Conventions into consideration when applying Article XX of GATT 1994<sup>59</sup>. The European Community did not directly express their denial on the application of *Cultural Diversity Convention* in this case, instead, it reiterated the proposition of the United States, that is, the crux point of this case was not China’s content review system, but whether the challenged Chinese measures imposed restriction on the importation of certain goods<sup>60</sup>.

<sup>56</sup> *Id.*, para. 4.207.

<sup>57</sup> *Id.*, para. 7.758 and footnote 538.

<sup>58</sup> *Id.*, para. 5.13.

<sup>59</sup> *Id.*, para. 5.49.

<sup>60</sup> *Id.*, para. 5.28.

In conclusion, US, Australia, Japan and Korea all refused that UNESCO Conventions may have influence on Members' commitments under the WTO rules. Yet, it is interesting to note that, the European Community did not negate China's reliance on the UNESCO Conventions to demonstrate the link between the relevant products and the public morals, and thus invoke Article XX of GATT 1994 as a defence. It seems that, EC has evaded the question of the collision between UNESCO Conventions and WTO agreements with respect to the liberalization of trade in cultural goods. Actually, the European Community has refused to make liberalization commitments on audiovisual services in the WTO negotiations<sup>61</sup>, which reflected the EU's opposition to the liberalization of trade in cultural products. Besides, the EU Parliament has affirmed that "each Member State should have the legal flexibility to take all necessary measures in the areas of cultural and audiovisual policy so as to preserve and promote cultural diversity"<sup>62</sup>.

## B. Cultural Exceptions in the Free Trade Agreements

As mentioned above, the US insisted that there is no "cultural exception" encompassed in the WTO agreements, including China's Accession Protocol, that is to say, no special treatment is available for cultural products under the framework of WTO. Yet, some bilateral or multilateral agreements on trade do provide exceptions for the cultural products. For example, the pre-existing Canada-U.S. Free Trade Agreement (CUSFTA) contained a broadly worded culture exception accompanying with a provision permitting retaliation for its use<sup>63</sup>. Article 2005 of CUSFTA provides that "[c]ultural industries are exempt from the provisions of this Agreement," but that either party could nevertheless "take measures of equivalent commercial effect in response to such actions"<sup>64</sup>. It is doubted that the

<sup>61</sup> Christopher M. BRUNER, "Culture, Sovereignty, and Hollywood: UNESCO and the Future of Trade in Cultural Products", (2008) 40 *New York University Journal of International Law and Politics* 351, 373.

<sup>62</sup> EUROPEAN PARLIAMENT, *Resolution on the General Agreement on Trade in Services (GATS) within the WTO, including cultural diversity*, Eur. Parl. Doc. P5\_TA (2003) 0087 (12 March 2003), para. 12.

<sup>63</sup> Krista BORYSKAVICH and Aaron BOWLER, "Hollywood North: Tax Incentives and the Film Industry in Canada", (2002) 2 *Asper Rev. Int'l Bus. & Trade L.* 25, 28-30.

<sup>64</sup> *Canada-U.S. Free Trade Agreement*, Can./U.S., 27 I.L.M. 281 (2 January 1988), art. 2005, available online at: <<http://www.dfait-maeci.gc.ca/tna-nac/documents/>

impact of such a “cultural exception” may be cut down due to the retaliation mechanism. Hence, it is difficult, based on the “cultural exception”, to establish the unique status of cultural industry in the bilateral trade<sup>65</sup>. As to multilateral trade agreements, North American Free Trade Agreement (NAFTA) goes no further than the aforementioned provision in CUSFTA. Article 2106 of NAFTA and the accompanying annex provide generally that cultural industries are to be governed by the applicable provisions of CUSFTA, including the retaliation provision<sup>66</sup>.

So far, China has 14 FTA (Free Trade Agreement) partners comprising of 31 economies, among which 8 Agreements have been signed already<sup>67</sup>. None of these agreements contains the term of “cultural exception”. However, as one item of the general exceptions, the “public moral exception” was embodied in most FTAs concluded by China. In fact, except for the China–Pakistan free trade agreement, Article XX of the GATT 1994 was incorporated into almost all the agreements of free trade in goods, while Article XIV of the GATS was incorporated into free trade agreements on service correspondingly. For instance, Article 200 (1) of the Free Trade Agreement between China and New Zealand provides: “For the purposes of this Agreement, Article XX of GATT 1994 and its interpretative notes and Article XIV of GATS (including its footnotes) are incorporated into and made part of this Agreement, *mutatis mutandis*”. Apart from this kind of exception, some FTA have set forth additional exceptions relating to cultural affairs, such as Article 200 (3) of the China New Zealand FTA, which allows Parties to take necessary measures to “protect national works or specific sites of historical or archaeological value” or to “support creative arts of national value”. Moreover, Article 200 (4) of the China–New Zealand FTA provides:

“Nothing in this Agreement shall prevent the Parties from taking any necessary measures to restrict the illicit import of cultural property from the other Party under the framework of the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, done at Paris on 14 November 1970.”

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cusfta-e.pdf>.

<sup>65</sup> K. BORYSKAVICH and A. BOWLER, *supra*, note 63, 30.

<sup>66</sup> North American Free Trade Agreement, U.S./Can./Mex., annex 2106, 32 I.L.M. 289 (17 December 1992) (hereinafter NAFTA), art. 2106.

<sup>67</sup> See China FTA Network <<http://fta.mofcom.gov.cn/english/index.shtml>>.

It appears that, none of the FTAs concluded by the Chinese Government provides “cultural exceptions”. However, the words of the aforementioned Article 200 (4) may indicate the possibility of China developing more explicit provisions to reflect the specialty of cultural products.

## V. China’s Cultural Industry: the Late-comer with Unique Development Progress

Before accessing to WTO, China had adopted different modes in administrating the domestic and imported cultural products. The imported cultural products will normally receive more supervision and examination, which is likely to be identified as a violation under the rules of WTO agreements. Specifically, the “dual-track administration” expresses itself in the different requirements on the domestic entities and importers of cultural products, regarding the qualification of entities and the means of content review. For instance, Article 16 of the *Audiovisual Products Regulation* (2002) provides that “[a]n audiovisual product publishing entity shall apply a system of editor’s responsibility, which guarantees that the contents of the audiovisual products conform to these Regulations”, that is to say, the publishing entity of domestic audiovisual products could complete the content review on its own. Yet, the imported audiovisual products have to be examined by the administrative authority, according to Article 28 of the *Audiovisual Products Regulation*. Actually, this dual-track mode is formed within a particular historical background.

As a matter of fact, the “dual-track administration” was formed under a unique history background. China is a late-comer of the “cultural industry”. In March 2001, *The 20th Five-Year Plan* was passed by the National People’s Congress of China. It is this Plan that set forth “cultural industry” for the first time in China’s official documents. Meanwhile, most of the regulations and rules on the administration of cultural industry were promulgated by the Government, such as the *Publications Regulation* (2001) and the *Audiovisual Products Regulation* (2002). Soon afterwards, the Chinese Government decided to divide its administration in the field of culture into two parts, namely, the public cultural affairs and the cultural industry. For the cultural industry, the market would be the leading means of administration, whilst the Government would loosen its regulation. Various kinds of capital resources, like privately-owned enterprises, foreign-invested enterprises and so on, would be allowed to engage in the

development of the cultural industry. As for the public cultural affairs, like the nine-year compulsory education and the protection of cultural heritages, the Government would offer more financial support along with more stringent regulations. Subsequently, the system reform was initiated in 2003, in order to carry out the policies aforementioned. In practice, most of the measures and regulations challenged in this case were put into force around the year 2003. It appears that China is not yet skilled enough to maintain its long-standing control on the cultural industry, while at the same time, make the domestic legislations comply with the WTO rules.

As a transition economy, China's laws and regulations relevant to the cultural industry are less systematic with some uncertainty hanging over future legislation. Yet, the development of the cultural industry does speed up since the system reform beginning in 2003. China has turned to be the major exporter and importer of cultural products. Take the audiovisual products for example: in 2008, China was the fifth largest exporter with 1.5% shares of the top 15 exporters, while the export of the US took up 48.8%; as to the importation, China ranked at ten, yet the annual increase pace was 66% , only second to Hong Kong, China<sup>68</sup>. It is clear that the domestic market of China's cultural industry owns huge potential. In addition, as shown in the statistic of WTO, China did not fall within the top 15 export destination of the US's audiovisual products<sup>69</sup>. The reasons are varied though there is no doubt that the residual of the Chinese Government's stringent control on cultural industry plays an important role.

Some media sources of the West tended to portray the *China – Audiovisual Services* case as a “battle between free speech and political oppression” or a “clash between trade and morality,” casting the U.S. or China as the Virtuous Superhero and the other as the Evil Empire<sup>70</sup>. However, this case appears to be, in the view of certain Chinese scholars, an external force for the reform of the cultural industry in China<sup>71</sup>. The Chinese Gov-

<sup>68</sup> WTO, “International Trade Statistics 2010”, Table III.39, p. 156, available online at: <[http://www.wto.org/english/res\\_e/statis\\_e/its2010\\_e/its2010\\_e.pdf](http://www.wto.org/english/res_e/statis_e/its2010_e/its2010_e.pdf)>.

<sup>69</sup> *Id.*, Table III.40, p. 157.

<sup>70</sup> See e.g., INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT, “WTO Rules Against Chinese Restrictions on Foreign Books, Movies, Music”, (2009) 13-30 *Bridges Weekly Trade News Digest 7*, available online at: <<http://ictsd.org/i/trade-and-sustainable-developmentagenda/54208/>>.

<sup>71</sup> Yong LIU, “The Public Morals Exception under WTO. Dispute on the *China – Publications*”, (2010) 5 *Journal of International Trade* 120.

ernment is gradually loosening its control on the cultural industry as well as the trade in cultural products, and allowing various types of ownership to involve in the market competition of cultural industry. Yet, since cultural products may have material influence on the public morals and other issues of critical importance to China, it seems quite difficult for the Chinese Government to comply with the WTO rules and, at the same time, maintain its censorship and control on cultural products<sup>72</sup>.

Recently, China ratified the laws and regulations challenged in this case, in order to live up to the decisions of the Appellate Body. For example, the State Council published two Orders amending the *Publications Regulation* and the *Audiovisual Products Regulation* in March 2011, and then another Order was published in April modifying the *Audiovisual Products Importation Rule*. Thus, the requirements of “wholly State-owned enterprises” and “conform to the State plan” in Article 42 of the *Publications Regulations* were deleted thoroughly. While the requirement that all the entities importing newspapers or periodicals should be designated by a certain authority was deleted from Article 41 of the *Publications Regulations*. Similarly, the word “designated” was substituted by the word “approved” in both Article 27 of the *Audiovisual Products Regulation* and Article 8 of the *Audiovisual Products Importation Rule*, so as to diminish the restrictive effect on the trade in relevant goods. Hence, the case of *China–Audiovisual Services* plays a role of external pulse to some extent, which may speed up the open up of China’s market related to cultural products and services. In short, WTO membership will transform China<sup>73</sup>.

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The prevailing view in many other countries is that the cultural products should be conceptualized not as commodities like any other, but as a special category of products significantly impacting cultural development and national identity. According to Article 8 of the UNESCO’s *Universal Declaration on Cultural Diversity*, cultural products are “vectors of identity, values and meaning” and they “must not be treated as mere commod-

<sup>72</sup> X. WU, *supra*, note 27, 427.

<sup>73</sup> Siyun CAO, “Life Under the WTO Will Require that China Change”, (2000) 26-9 *Asian-week*, available online at: <<http://edition.cnn.com/ASIANOW/asiaweek/magazine/2000/0310/viewpoint.html>>.

ities or consumer goods”. However, the trade of cultural products and services among WTO Members should, as other commodities, be subject to the regulation of GATT, GATS and other WTO agreements. Due to the direct effect of cultural products on the value and ethics of a nation, most countries would lay stress on the relation between the cultural products and public morals. Thus, the public moral exception of WTO rules will be frequently used by Members to legitimate their domestic policies restricting trade of cultural products.

On the one hand, the public morals exception may assist WTO Members to preserve cultural diversity and cultural safety. In the light of cases settled by the DSB, the specific meaning of public morals will be left at the discretion of each Member. On the other hand, WTO agreements have established conditions and requirements for the Member’s application of public morals exception, while the *US – Gambling* and *China – Audiovisual Services* cases both reveal that the burden of proof is relatively high. In summary, the *China – Audiovisual Services* case reflects the weighing and balancing between liberalization of trade in cultural products and domestic measures of trade control. The particular position of cultural products relating to cultural diversity and public morals did not persuade the DSB to leave more room for the domestic administration of Members.

